

JERSEY / JUDGMENT

Carry -v- Liston [2017] JRC 144 (08 September 2017)

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judgment

the commissioner:

Introduction

1. This case involves a dispute between neighbours who have lived next to one another in Trinity for a quarter of a century. It concerns a small area of land in respect of which we adopt the style used in the pleadings and at trial by referring to it as "the strip of land". In order to appreciate fully what is at stake, maps and photographs would ideally be used but, by way of description, this is an area between two banks, the first of which rises steeply from the back of Les Primevères, the house of the Defendants, Michael and Lesley Liston, and the second of which rises further to a field beyond. The strip of land itself is comparatively flat but it slopes downwards from the area of a chemin on the land of the Plaintiff, Joyelle Carry, towards the land to the south of Les Primevères. As the strip of land slopes downwards, it narrows, tapering to just a few feet wide. When the Plaintiff purchased Les Arbres in 1987, the strip of land formed part of her title. When the Defendants moved to Les Primevères in 1992 (as occupiers of the First Defendant's employer's land), which they then purchased in 1996, they cleared the strip of land, which was overgrown, and planted trees and shrubs. They have gardened the strip of land since that time. When the Plaintiff sought to eject the Defendants from the strip of land in 2015, they complained because they wish to continue in possession of it. As with many disputes between neighbours, battle lines have been drawn, with positions deeply entrenched.
2. When faced with the Plaintiff's action pour exhiber titre dated 2 February 2016, the Defendants raised and then abandoned a claim based on possession quadragenaire. Instead, the Defendants now argue that they have acquired ownership of the strip of land through the application of the doctrine of proprietary estoppel, or at least that equity will enable them to some other form of relief permitting them to continue to enjoy the strip of land as part of their garden. It is this claim that makes this neighbour dispute unique and so novel. As a result of previous decisions of this Court that can be regarded as inconsistent, there is uncertainty as to whether the doctrine is even capable of assisting the Defendants, which adds a further layer of complication.
3. The Plaintiff is represented by Advocate Falle and the Defendants by

Advocate Sharp. The Court is grateful to Counsel for the assistance they have provided on what are difficult questions to resolve. The pleadings 4. The Plaintiff's summons dated 2 February 2016 actions the Defendants "to exhibit before the Royal Court the title in virtue of which you enjoy and occupy certain land situate in the parish of Trinity and to which land (inter alia) the said [Plaintiff] has right by purchase by hereditary contract passed before the Royal Court on the 29 day of May 1987 from the limited liability company Riada Limited AND IN DEFAULT OF TITLE to be ordered to cede the enjoyment and possession of the said land to the said [Plaintiff] and to be condemned to pay the costs, recoverable and irrecoverable, of this action." 5. The Defendant's Answer dated 15 March 2016 refers to the strip of land in dispute in this case as being "visually indistinct from the garden which surrounds it save for one visible boundary stone" and "accepted that the owner of Les Arbes [sic] previously owned the strip of land as defined by the aforementioned boundary stones" (paragraphs 6 and 8). The Answer raises a title for the Defendants through possession quadragenaire . Having referred to the position of predecessors in title, paragraph 11 states: "During their period of occupation and ownership of Les Primeveres, [the Defendants] understood (they now accept in error) that the strip of land belonged to them. They enjoyed exclusive and peaceful possession of the strip of land that was used as part of the east facing garden. [The Defendants] looked after and maintained the strip of land as part of the lawn. In 1993, [the Defendants] planted fruit trees in the middle of the strip of land." The Answer continues: "14. [The Plaintiff] has never used the strip of land. [The Plaintiff] has never asserted or otherwise communicated to [the Defendants] that she possesses any legal right of title to the land. No complaint was made by her when the fruit trees were planted in the middle of the strip of land. 15. [The Defendants] understood (in error) that [the Plaintiff] enjoyed a right of way over the strip of land as defined by the boundary stones and believed that this was an inconsequential anomaly that could be traced back to when Les Primeveres and the surrounding area was owned by one farm and there was a need to move machinery around the land. The strip of land tapers off and does not provide a right of access to anywhere. [The Plaintiff] has also enjoyed a right of access to a well that is located on Les Primeveres' land." 6. The Plaintiff's Reply in response to that Answer refers to the boundary between the parties' properties having been defined by six boundary stones established and described by a contract dated 11 July 1986. (We will cover this contract in more detail shortly, but it is common ground that the parties are successors in title to the respective contracting parties who entered into that contract.) The Plaintiff contends that "the successors in title of the contracting parties are estopped from bringing evidence calculated to undermine its purpose and effect" (paragraph 2). When the Defendants purchased Les Primeveres in 1996, by reason of their attorney's oath, they "are estopped by contract from claiming to have enjoyed adverse possession of any part of the Plaintiff's land after the 1986 contract". Accordingly, the claim to have acquired title through possession quadragenaire was resisted. Paragraph 8 of the Reply states: "It is denied as alleged in Paragraph 11 of the Answer that the Defendants have ever enjoyed exclusive possession of the part of the Plaintiff's land now claimed by them. Any occupation by the Defendants of the Plaintiff's land has occurred with the benefit of her indulgent license and

accordingly terminable at will and the Plaintiff has never given up possession alternatively exclusive possession of any part of her garden." In paragraph 11 of the Reply, the Plaintiff refers to admissions made by the First Defendant in March 2015 that the Defendants did not own the strip of land and the offers made to the Plaintiff to purchase it from her. 7. At a directions hearing on 5 July 2016, the Defendants were given permission to file a Rejoinder to the Plaintiff's Reply in order to plead their case in proprietary estoppel. Thereafter, at a further hearing on 22 September 2016, the Defendants were permitted to withdraw their claim for possession quadragenaire as set out in the Answer. Accordingly, the basis on which the Defendants now resist the relief sought by the Plaintiff is set out in their Rejoinder dated 13 July 2016. Although the Defendants have abandoned any reliance on possession quadragenaire, we have referred to the manner in which it was introduced in their Answer and resisted in the Reply in order to place the current pleaded cases into their proper context. 8. The Defendants' Rejoinder is headed "Claim in Proprietary Estoppel" and paragraph 5 simply states that the Defendants "claim proprietary estoppel in respect of the strip of land". Reference is made in it to the recording of a conversation between the Plaintiff and the First Defendant that took place on 9 March 2015. In paragraph 6, certain passages from the transcript of that recording are quoted, particularly the Plaintiff saying "I just thought you use it you keep it you know you maintain it and that was always my understanding really". The comments made by the Plaintiff are said by the Defendants to indicate that the Plaintiff was aware that the Defendants had planted trees on the strip of land, which is said to be significant because that action communicated to the Plaintiff an intention on the part of the Defendants to occupy permanently the strip of land, that she was content for them to keep the strip on condition that they maintained it and that she acknowledged that she had not communicated what was in her mind to the Defendants, staying silent about the matter. The Rejoinder continues: "8. [The Plaintiff's] admissions confirm that she either: I knew that [the Defendants] had made a mistake about the ownership of the land but said nothing about it notwithstanding the fact that [the Defendants] have maintained the strip of land since 1992 at their own expense; or ii. encouraged [the Defendants] to use the strip of land, spend money on its maintenance and integrate it as a part of their garden, on the express or implicit understanding that [the Defendants] would be entitled to remain in occupation of the land. 9. Further and alternatively, whatever the precise circumstances in which [the Plaintiff] permitted [the Defendants] to occupy and maintain the strip of land since 1992 until 2015 without complaint, it is now unconscionable for [the Plaintiff] to seek to exercise any legal rights (none being admitted) in order to (a) require [the Defendants] to vacate the strip of land and/or (b) now use the strip of land, that presently forms an integral part of the garden at Les Primeveres, for some other purpose and/or (c) construct a boundary across the strip of land such as a six foot fence or hedge. 10. [The Defendants] have suffered substantial detriment by (a) maintaining the strip of land since 1992 and (b) making the strip of land part of their garden and therefore their home. The strip of land is now an integral part of Les Primeveres and vital to their enjoyment of it. Substantial building alterations were made to the property Les Primeveres in order that several of the rooms in the house might enjoy views out onto

the garden that includes the strip of land." The relief sought by the Defendants (in paragraph 11) is a declaration that proprietary estoppel forms a part of Jersey law, by following three specified cases with which we will have to deal in detail, and an order that they own the strip of land or an order that they may continue peacefully to occupy the strip of land and maintain it as part of their garden. 9. The final pleading is the Plaintiff's Response to the Rejoinder dated 7 October 2016. The Plaintiff repeats the allegations of fact and law contained in her Reply. She questions the weight that ought properly to be given to the isolated comments taken out of context made during the recorded conversation when she was unaware that the discussion was being recorded. The Plaintiff draws attention to the cases in which this Court has ruled that proprietary estoppel in relation to land is not part of the law of Jersey and suggests that the cases on which the Defendants rely turned on their own peculiar facts, noting that the equitable jurisdiction of this Court can only be invoked exceptionally where the perceived overriding justice of a case so demands. In any event, if the Plaintiff's primary contention relating to proprietary estoppel is rejected, on the facts, the Defendants cannot rely on the doctrine. The Plaintiff expressly highlights the binding nature of the contract that established the boundary and the knowledge of that boundary resulting from the passing of the Defendants' own contract of purchase in 1996. She also invites the Court to give consideration to the full extent of the recorded conversation and how the concerns expressed by the First Defendant should be treated as showing that there was at that time no assertion of owning the strip of land, but rather the reverse. In summary, the Plaintiff contends that the Court has no jurisdiction to override her contractual and customary rights. 10. We consider that the Defendants have pleaded their claim in proprietary estoppel in a very particular, or specific, way. Although the Defendants' Advocate suggests that the Defendants are not seeking to incorporate the English law doctrine into Jersey law, highlighting the flexible nature of the equitable relief available, the express reliance in the declaration sought at paragraph 11(i) of the Rejoinder on cases in which the formulation derived from earlier English jurisprudence was adopted is viewed by us as necessarily advancing the doctrine as applying on that basis. As such, we have a primary choice between the earlier decisions of this Court in which some relief based on what was stated to be, or perhaps should have been recognised as being, proprietary estoppel has been granted and those cases in which the Court has ruled against the existence of the doctrine as a matter of Jersey law. The Defendants' claim to have acquired title to the strip of land is premised on the Plaintiff having remained silent in the face of the Defendants being observed to use the strip of land and the detriment suffered by them through the steps taken in reliance on nothing being said by the Plaintiff. This is a different basis on which to assert that the doctrine assists the Defendants from the factual situations of any of the earlier cases. The secondary issue is whether the law of Jersey should recognise the possibility of title being acquired in such circumstances as are found here. However, in the event that the Court were to find that the Defendants have no title to the strip of land, as an alternative case, the Defendants argue that the Court can and should decline to permit the Plaintiff to enforce the rights that would otherwise be open to her on the basis that to do so would produce an unconscionable outcome. In both cases, the Defendants invoke the

equitable jurisdiction of this Court. Court's equitable jurisdiction 11. It is clear that this Court enjoys an equitable jurisdiction. In *Fogarty v St Martin's Cottage Limited*

- [2016] JCA 180 , at para. 124, the Court of Appeal confirmed that "The Royal Court is a court of original jurisdiction whose powers were not created by statute. It has the power of a court of equity or *équité* as it decided in *Ex parte Viscount Wimborne* ." 12. In our view, the comprehensive analysis of this jurisdiction given in *Ex parte Viscount Wimborne* 1983 JJ 17, commencing on page 19, still holds good today: "That the Royal Court is a Court of equity in the widest sense is clear; see, for example, *Felard Investments -v- Trustees of the Church of Our Lady Queen of the Universe* ,
- (1979) J. J. at pages 18 and 23; the reply of Mr. (as he was then) Jean Hammond, the Bailiff, to the Commissioners of 1861 at Answer 103; and the opinion of the then President of the Jersey Law Society in *Re Windeatt's Wills Trust* (1969) 2 A. E. R. 324. See also *Latter -v- Doyen et Autre*
- (1948) 50H. 305, 311 (N. S.). But that does not mean that the Royal Court has any wider powers than the former Chancellors of the Court of Chancery. Their position is referred to in paragraph 1204 of Volume 16 of *Halsbury's Laws of England* (Fourth Edition) as follows: "1204. Relationship of equity to common law. Early authorities refer to "conscience", "reason" and "good faith" as the principles which guided the Court of Chancery, and the term "equity" implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of men living in a civilised society. Yet there was never a time in the history of the Court when the Chancellor was at liberty to follow generally either his own, or professional or common opinions as to what was right and convenient. Law and administration of law are, in all systems, intended as a means of attaining justice, but the means are imperfect. The special imperfections of mediaeval common law were, as to the law itself, that its rules were too strict, and that it did not cover the whole field of obligations; as to its administration, that it had no effectual means of extracting truth from the parties, that its judgments were not capable of being adapted to meet special circumstances, and that they were often unenforceable through the opposition of the defendant, or were turned into means of oppression. Insofar as it remedied these defects, the Court of Chancery afforded an improved system of attaining justice, but this was the extent of the difference between law and equity. Each had the same object; each attained it only imperfectly - equity somewhat less imperfectly than law. Both, moreover, were developed in the same way, by decisions given in accordance with precedents and subject to professional criticism. From the beginning the Court of Chancery acted on the maxim that equity follows the law, and, in cases where the legal analogy clearly applied, the rule of law was adopted, however harsh it might be". Moreover, the conditions in the English Courts which gave rise to the system of law known as equity were not mirrored in the history of the Royal Court. It may well be that "equity" in Jersey inclines more to the French "*équité*" than its English counterpart. I have not been able to find the word "*équité*" in the *Ancienne Coutume de*

Normandie, or in the Commentators, but I note that in the Dictionnaire de Droit et de Pratique (of France it is true and not only of Normandy) by De Ferrière, published in 1771, there appears the following under the title of Equité:- "EQUITÉ, est un juste tempérament de la Loi, que en adoucit la rigueur, en considération de quelques circonstances particulières du fait. Ainsi cette équité est un juste retour au droit naturel, en retranchant les fausses & rigoureuses conséquences qu'on veut tirer de la disposition de quelque Loi, par une trop regoureuse explication des termes dans lesquels elle est concue, ou par de vaines subtilités que sont évidemment contraires à la Justice, & à l'intention de Législateur. Cette équité, que doit être la règle de la Justice, doit être préférée à la disposition de la Loi même, lorsque la question qui se présente à juger n'est pas expressement décidée par la Loi, ou que le sens & les paroles de la Loi peuvent, à cause de leur ambiguïté, recevoir quelque interprétation. Le Juge peut donc alors pencher du côté le plus équitable, & le plus approchant du droit de nature, que est appelle *fumma ration*, in lege 43. ff. de religiosis & sumpt. funer. Autrement il pourroit, pour s'être attaché trop scrupuleusement à la rigueur de la Loi, devenir injuste. *Summum jus, summa est quandoque injuris; unde mitigatio juris, quam Cicero, in Orat. pro Cleuntio, Legum laxamentum vocat, stricto juri est antepone*nda; maximè si *Lex Scripta clara & aperta non sit*. Mais quand la Loi est claire & certaine, qu'elle ne reçoit, ni par rapport à sa décision, ni par rapport aux termes dans lesquelles elle est concue, aucune interprétation, le Juge est dans l'obligation de la suivre ponctuellement. Comme il ne lui est pas permis de s'en écarter, au cas qu'il trouve trop d'injustice à la suivre, il doit avoir recours au Prince pour savoir quel sens il veut qu'on lui donne. Leg. 1, cod. De Legibus." This passage lends support to my view that, although as I have said, the Royal Court has declared itself a Court of Equity, that does not mean to say that all the principles developed in the English Court of Chancery must necessarily apply. The more so is the case when that Court is interpreting a number of English statutes and cases based on English Trust Law. Nevertheless, the Royal Court gives relief to someone who is threatened with a wrong which is, of course, an equitable remedy. As the Court said in *Sayers -v- Briggs*, J. J. Vol. 1, part 1, 399 at page 401: "The Court also believes that it has inherent power to prevent a wrong from being committed before it is done".¹³ In paragraph 113 of its judgment in *Fogarty*, the Court of Appeal cited part of this passage, as well as a translation of the extract from De Ferrière into English that had been prepared by the respondent's Advocates: "Equité is a just tempering of the law which in particular factual circumstances, mitigates its vigour. Thus equity turns to the natural Law for justice, stripping away false and rigorous consequences that might be inferred from the provision of the same Law by an over rigorous construction of the terms in which it is conceived, or by the empty subtleties which are obviously contrary to justice and the intention of the legislator. This equity which must be the rule of justice is to be preferred to the letter of the Law when the question presented for judgment is not expressly answered by the law or the sense and words of the Law are capable, because of their ambiguity of, giving rise to different meanings. The Judge must then lean to the most equitable side and that most proximate to the law of nature ... Otherwise it could, [in] being closely fixed to the rigour

of the Law, become unjust ... But when the Law is clear and certain, such that it does not admit of any argument as to its interpretation whether by decision or as a result of the terms in which it is framed, the Judge is obliged to follow it to the letter. As it is not permitted to him to depart from it in a case where he finds it too unjust to follow it he must have recourse to the King ..." Although our own translation of this passage might have been couched in slightly different words, the substance is adequately set out for present purposes. It serves as a reminder that the Court's starting point must always be the legal position before deciding whether the outcome that would follow is considered to produce injustice and, if so, whether it is amenable to being tempered in some way. 14. Paragraph 4, which deals with the relationship of equity to common law, in what is now volume 47 of Halsbury's Laws of England (Fifth Edition) is almost word for word as quoted in *Ex parte Viscount Wimbourne* and the minor changes made are, in any event, no more than stylistic as opposed to substantive. Invoking the equitable jurisdiction of this Court raises the question of how many, if any, of the well-known (or sometimes less familiar) maxims of English jurisprudence fall to be borne in mind. One maxim that is, in our judgment, applicable, particularly by reference to the passage just cited from *De Férrière*, is that equity follows the law. Paragraph 106 of Halsbury's, volume 47, states: "Jurisdiction in equity is exercised upon the principle that equity follows the law. This maxim is, of course, not universally true, or there would never have been occasion for the development of a separate code of equitable principles. It simply means that equity treats the common law as laying the foundation of all jurisprudence and does not depart unnecessarily from legal principles. In matters coming before it which depend solely on legal rights, as in legal claims arising in the course of an administration claim, equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. When equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and departs from this analogy only in exceptional circumstances." In respect of the application of this maxim, paragraph 107 continues: "In relation to the limitations and incidents of equitable estates the rules of law were, before 1926, in general followed, and departures from them were exceptional. Such exceptions occurred when equity declined to allow dower out of equitable estates, or to make an equitable contingent remainder depend for its validity on a sufficient preceding vested interest, or to allow an equitable estate to escheat. Although the only legal estates which can now subsist are a fee simple absolute in possession and a term of years absolute, yet there can still be equitable interests, such as an interest for life and an interest in remainder, corresponding to the legal estates which could formerly subsist. Equity also followed the law as regards damages and the limitation of actions, and it applied the statutes of limitation as a bar to equitable estates, either by way of analogy, or, as it was sometimes said, because they were binding on a court of equity." 15. Another maxim that is potentially engaged is that he who comes to equity must come with clean hands. This maxim tends to be of more academic than practical interest and usually arises only if it is shown that there has been an element of dishonesty or sharp practice, by virtue of which the extent of serious misconduct

involved is treated as justifying refusal to grant relief to the party invoking the Court's equitable jurisdiction. 16. In respect of both maxims, it is fair to point out that they appear not to be rigorously followed as a matter of English law, but perhaps can best be regarded as offering guidance of how to assess the doing of justice in any given case. 17. The principles this Court derives from these materials is that it is always necessary to start with consideration of the position in law, in the sense of the parties' legal rights, before turning to consider whether the outcome so dictated is unduly harsh and, if perceived to be so, whether it is permissible to ameliorate that outcome by reference to equitable doctrines. In doing so, it is clear that it is not open to the Court simply to reach a conclusion as to what it regards as being right and convenient. Given the origins of this Court, paying attention first to the principles of *équité* summarised, for example, in *De Férrière* is more appropriate than leaping straight into the standard works on equity as it has operated, and continues to be applied, in English jurisprudence. That is not to say, however, that what has been said to be the application elsewhere of equitable principles necessarily has to be ignored, but sometimes what has been decided elsewhere is a result of the particular way in which law and equity have developed in that jurisdiction and we consider it appropriate to bear that factor in mind. Accordingly, there needs to be a degree of caution exercised before accepting as applicable what may be regarded as the settled approach in, eg, England and Wales, to ensure that such an approach is consistent with the different legal framework existing in Jersey. The ultimate question is whether, as a result of the particular factual circumstances of the case, any unduly unpalatable consequences of strict adherence to the application of principles of law can properly be tempered through preferring instead a different outcome more in keeping with what present day opinions of what is a just outcome would be. *Action pour exhiber titre* 18. In this context, the nature of the proceedings commenced by the Plaintiff has been emphasised by her Advocate. An action for recovery of land may either be possessory or proprietary. This distinction was described in the following terms in *Vardon v Holland* 1964 JJ 375, 377: "Le Gros, in his *Traité du Droit Coutumier de l'Isle de Jersey*

- (1943) at 417, makes the following distinction between the "action possessoire" and the "action pétitoire": "L'action possessoire suppose que l'on est troublé dans la possession d'un immeuble, comme le voisin qui empiète sur la propriété ou qui déplace des bornes. L'action pétitoire a pour but de faire reconnaître un droit de propriété sur un immeuble. En d'autres termes, elle protège le droit de propriété en permettant la revendication de l'immeuble dont on a été injustement dépossédé. L'action possessoire est intentée par Bref de Justice à la Cour du Samedi, et l'action pétitoire est intentée par bille à la Cour d'Héritage." He goes on to summarise the characteristics which distinguish the two types of action as follows- "1 L'action pétitoire soulève une question de propriété. L'action possessoire soulève une question de possession. L'action pétitoire aboutit à une solution définitive. L'action possessoire aboutit à une solution provisoire. Au point de vue de la procédure, l'action pétitoire est conduite moins rapidement que l'action possessoire. L'action possessoire doit être intentée dans le délai d'un an et un jour. L'action pétitoire se

prescript par le laps de quarante ans." The reason for the rule stated in paragraph 40 that an "action possessoire" must be instituted within a year and a day is that, according to Jersey law, a person who has been in possession of real property for that period, provided that such possession is continuous and peaceable, has acquired a right to it and this right cannot be challenged by an "action possessoire." After that time such person's right can only be challenged by an "action pétitoire," which is only barred after the lapse of forty years." 19. Because of the time during which the Defendants have occupied the strip of land, the Plaintiff has been required to proceed by way of an "action pétitoire". This requires the Defendants to show that they have title to the strip of land or, at the very least, a better title than the Plaintiff. When the Defendants abandoned their claim to possession quadragenaire, the Plaintiff's Advocate submits that the Defendants conceded that they have no answer according to the laws and custom of Jersey to the Plaintiff's action. In their Rejoinder, the Defendants have claimed ownership of the strip of land through the effect of proprietary estoppel. In doing so, taken at its highest, their case amounts to an assertion of a better title than that of the Plaintiff. However, the Defendants' Advocate acknowledges that, if the Defendants failed to persuade the Court that they had acquired such a title, the Plaintiff's title as shown from the contract of purchase necessarily prevails. In those circumstances, the Defendants seek to distinguish between the declaration of title and the enforcement by the Plaintiff of the rights normally attaching to that status, arguing that it would be unjust to order against them the recovery of possession of the land, being the relief claimed by the Plaintiff. 20. To the extent that the Plaintiff's Advocate argues that this strays beyond a simple issue of property and so falls outside the jurisdiction of the Héritage Division, the Court notes that rule 3/4(1) of the Royal Court Rules 2004 permits the Héritage Division to award damages and such other relief as may be awarded by the Samedi Division. As a result, we do not accept that there is any procedural impediment to the alternative relief sought by the Defendants being considered in this action. If the Defendants succeed in establishing that they have title, the Plaintiff's action is dismissed and a declaration of ownership in their favour can be made. If they fail in that regard, the Plaintiff has *prima facie* succeeded in her action, subject only to the question of whether the Court should decline to make a positive order for possession of the land in her favour by reason of it being inequitable to do so and, if so, the extent to which the Defendants should be afforded the benefit of some relief stating the basis on which they can continue to enjoy the use of that strip of land. This possibility invokes the equitable jurisdiction of the Court in a similar fashion to the Defendants' primary contention that they have already acquired title relying on proprietary estoppel. We are satisfied that the Defendants' claim for such relief can properly be brought in opposition to the Plaintiff's "action pétitoire". The contracts 21. On behalf of the Defendants, their Advocate concedes that the contractual position clearly shows that the Plaintiff acquired title to the strip of land and that, when they purchased Les Primevères, the Defendants did not acquire title to the strip of land. The relevant contracts (from which we quote faithfully each time without correcting any of their contents) are as follows. 22. In 1986, Les Arbres was purchased by Riada Limited from Mr and Mrs

Desmond Minikin. At the time, Les Primevères was owned by Mr and Mrs Donald Le Flem. The boundary between Les Arbres and Les Primevères was re-established in a contract passed before the Court on 11 July 1986 ("the 1986 contract"). Before then, there had been a boundary described by reference to three boundary markers as established in a contract dated 30 July 1949, but that boundary was superseded. The Le Flem joined in the contract conveying Les Arbres to Riada Limited in the following manner as recorded therein: "ET ETAIT à ce présent William James Bailhache, Ecr., un des Procureurs dûment fondés de Monsr. Donald John Le Flem et de Dlle. Marian Brown, sa femme, comme paraît par Procuration signée à St. Hélier en cette Ile l'an mil neuf cent quatre-vingt-deux le vingt-cinquième jour de Février et insinuée au Registre Public de cette Ile lesdits Sieur Le Flem et uxor propriétaires de ladite propriété appelée "Les Primevères" située au Sud à l'Ouest et au Nord-Ouest de ladite propriété présentement vendue lequel Procureur en vertu des pouvoirs à lui donnés par sadite Procuration déclara pour et aux noms desdits Sieur Le Flem et uxor sesdits constituants pour eux le survivant d'eux at les hoirs de tel survivant comme suit, savoir:- (a) QUE les trois bornes (lesquelles sont les première, deuxième et troisième établies au contrat de prise et acquêt par Monsr. Albert Henry Pike de Messrs. William Syvret Cornish et Alfred Thomas Cornish Junr., en date du trente Juillet mil neuf cent quarante-neuf) et qui délimitaient ladite propriété présentement vendue par les côtés de l'Ouest et du Nord-Ouest d'icelle d'avec celle desdits Sieur Le Flem et uxor sont abolies à perpetuité comme s'ils n'avaient jamais existé. (b) QUE la clôture clause contenu aux contrats antérieurs de ladite propriétés présentement vendue et de celle desdits Sieur Le Flem et uxor est abolie à perpetuité comme si elle n'avait jamais existé. (c) CONSENTIR au bornement de ladite propriété présentement vendue d'avec celle à eux appartenant par lesdites six bornes et ligne de démarcation ci-dessus décrites. (d) CONSENTIR à la clôture clause ci-dessus décrite." 23. The boundary between Les Arbres and Les Primevères set out in the 1986 contract, including the new enclosure clause, was in the following terms: "LADITE propriété présentement vendue étant séparée et délimitée par le côté du Sud ou environ de l'Ouest et du Nord-Ouest ou environ d'avec la propriété desdits Sieur Le Flem et uxor par six bornes plantées comme suit, savoir:- la première desdites bornes est plantée proche la carre Sud-Ouest ou environ de ladite propriété présentement vendue et est à cinquante-huit pieds un pouce au Sud-Ouest ou environ de l'angle Sud-Ouest ou environ de ladite maison présentement vendue, à vingt-neuf pieds deux pouces à l'Ouest ou environ de l'angle Nord-Ouest du garage formant partie de la propriété "Les Primevères" appartenant auxdits Sieur Le Flem et uxor et à cinq pieds sept pouces à l'Est ou environ dudit chemin public, la deuxième desdites bornes est plantée proche la carre Sud-Est ou environ de ladite propriété présentement vendue, à cent trois pieds dix pouces à l'Est ou environ de ladite première borne, à quarante-sept pieds au Nord-Est ou environ de l'angle Nord-Ouest ou environ de ladite maison "Les Primevères" et à quarante-neuf pieds un pouce au Sud-Est de l'angle Sud-Est de la maison formant partie de ladite propriété présentement vendue. la troisième desdites bornes marque la carre Sud-Est de ladite propriété présentement vendue et la carre Nord-Est de ladite propriété desdits Sieur Le Flem et uxor et est plantée à six pieds un pouce au Sud-Est de ladite deuxième et à trente

pieds quatre pouces au Nord-Est de l'angle Nord-Ouest de l'édifice au Nord de partie de ladite maison appartenant auxdits Sieur Le Flem et uxor la quatrième desdites bornes (qui est un pierre non taillée) est plantée à cinquante-deux pieds neuf pouces au Sud ou environ de ladite troisième borne à cinquante-six pieds au Sud-Est de ladite deuxième borne et à trente-quatre pieds trois pouces au Nord-Est de l'angle Sud-Est le plus Est de ladite maison appartenant auxdits Sieur Le Flem et uxor (ladite dernière mesure prise suivant la pente du terrain) la cinquième est plantée à quarante-et-un pieds onze pouces au Sud-Ouest ou environ de ladite quatrième et à vingt-deux pieds dix pouces au Sud-Est de l'angle Sud-Est de ladite maison appartenant auxdits Sieur Le Flem et uxor et la sixième et dernière desdites bornes (qui est une pierre non taillée) est plantée dans l'angle Sud-Est ou environ de ladite propriété appartenant auxdits Sieur Le Flem et uxor au pied d'un chêne à quarante-neuf pieds six pouces au Sud-Ouest de ladite cinquième et à cinquante-quatre pieds un pouce au Sud-Est de l'angle Sud-Ouest de ladite maison desdits Sieur Le Flem et uxor. TOUTES lesdites mesures étant en pieds royaux et lesquelles bornes sont et demeureront mitoyennes (sans relief) pour être maintenues et entretenues comme telles entre lesdites parties et leurs hoirs ou ayant droit respectifs à fins d'héritage. LA LIGNE de démarcation desdits côtés du Sud de l'Ouest, ou environ, et du Nord-Ouest, ou environ, entre ladite propriété présentement vendue et ladite propriété appartenant auxdits Sieur Le Flem et uxor, étant une ligne droite imaginaire tirée reliant les centres desdites six bornes et prolongée vers l'Ouest ou environ à partir de ladite première borne jusqu'à atteindre ledit chemin public et vers le Sud à partir de ladite sixième et dernière borne jusqu'à atteindre la limite Sud de ladite propriété présentement vendue. ETANT RECONNU par ledit Directeur pour et au nom de ladite Société Acquéreuse et pour ses successeurs, comme suit, savoir:- QU'AFIN de plus amplement séparer et délimiter ladite propriété présentement vendue par ledit côté du Sud ou environ de l'Ouest et du Nord-Ouest d'icelle d'avec celle appartenant auxdits Sieur Le Flem et uxor (au droit susdit) il sera loisible tant à l'une qu'à l'autre desdites parties de faire ériger des murs ou autres clôtures ou de planter des haies vives sur ladite ligne de démarcation ci-dessus décrite moitié sur le terrain de l'une et moitié sur le terrain de l'autre desdites parties et ce aux frais de la partie entreprenant le travail et une fois érigés ou plantés tels murs, autre clôtures ou haies vives n'excéderont pas six pieds de roi en hauteur au dessus de la surface normale du sol et seront et demeureront mitoyens pour être maintenus comme tels entre lesdites parties à fin d'héritage." 24. In the contract dated 29 May 1987 by which the Plaintiff purchased Les Arbres from Riada Limited ("the 1987 contract"), this boundary was repeated, with only very minor changes. The description of the location of the first boundary stone refers to it being "à cinquante-huit pieds un pouce au Sud-Ouest ou environ de l'angle Nord-Ouest ou environ de ladite maison présentement vendue" instead of referring to "l'angle Sud-Ouest" as was the case in the 1986 contract. This appears to be an error. Helpfully, however, there are now separate paragraphs referring to the locations of the fourth, fifth and sixth boundary stones. In the enclosure clause, "haie" has somehow lost its "s". Apart from the oddity in respect of the first boundary stone, the wording is the same and it must have been the intention of the parties that the imaginary line would be exactly as it had been

established the previous year. The description of the land being purchased by the Plaintiff included: "... et la mitoyenneté, sans relief, des deux bornes (ci-après décrites) du Sud ou environ vers la propriété connue sous le nom de "Les Primevères" appartenant à Monsr. Donald John Le Flem et Dlle. Marian Brown, sa femme, (ayant droit par acquêt héréditaire par contrat en date du vingt-sept Avril, mil neuf cent quatre-vingt-quatre, de Monsr. Patrick John Murrin) ... et la mitoyenneté des bornes (ci-après mentionnées) de l'Ouest et du Nord-Ouest ou environ vers ladite propriété appartenant auxdits Monsr. Donald John Le Flem et Dlle. Marian Brown, sa femme". 25. On 24 July 1992, The Jersey Electricity Company Limited ("the JEC") purchased Les Primevères from Marian Brown. Dennis Short appeared on behalf of the purchaser in his capacity as "Mandataire". The subject-matter of the contract effecting this purchase ("the 1992 contract") was described in the following terms: "... certaine maison appelée "LES PRIMEVERES", garage et appartenances, avec les jardins et terrains tout autour d'iceux, le tout s'entretenant et joignant ensemble et formant un seul et même corps de bien-fonds, avec la mitoyenneté (sans relief) des six bornes (ci-après mentionnées) du Nord, ou environ, du Nord-Est, ou environ, de l'Est, ou environ, et du Sud-Est, ou environ, vers la propriété appelée "Les Arbres" appartenant à Dlle. Joyelle Ann Carry (ayant droit par acquêt héréditaire par contrat en date du vingt-neuf Mai mil neuf cent quatre-vingt-sept, de la Société à responsabilité limitée dite "Riada Limited") ...". 26. The boundary between Les Primevères and Les Arbres, including the enclosure clause, was set out in the same degree of detail as in the earlier sale contracts in respect of Les Arbres, but reflecting that it was a different parcel of land being sold: "LADITE propriété présentement vendue est séparée et délimitée par le côté du Nord, ou environ, du Nord-Est, ou environ, et du Sud-Est, ou environ, d'icelle d'avec ladite propriété appelée "Les Arbres" appartenant à ladite Dlle. Joyelle Ann Carry, par six bornes plantées comme suit, savoir:- LA PREMIERE desdites bornes est plantée proche la carre Nord-Ouest ou environ de ladite propriété présentement vendue et est à cinquante-huit pieds un pouce au Sud-Ouest ou environ de l'angle Sud-Ouest ou environ de ladite maison formant partie de ladite propriété appelée "Les Arbres" appartenant à ladite Dlle. Joyelle Ann Carry, à vingt-neuf pieds deux pouces à l'Ouest ou environ de l'angle Nord-Ouest dudit garage formant partie de la propriété présentement vendue, et à cinq pieds sept pouces à l'Est ou environ dudit chemin public appelé "La Rue des Cateaux"; LA DEUXIEME desdites bornes est plantée proche la carre Nord-Est ou environ (la plus Nord ou environ) de ladite propriété présentement vendue, à cent trois pieds dix pouces à l'Est ou environ de ladite première, à quarante-sept pieds au Nord-Est ou environ de l'angle Nord-Ouest ou environ de ladite maison formant partie de ladite propriété présentement vendue et à quarante-neuf pieds un pouce au Sud-Est de l'angle Sud-Est de ladite maison formant partie de ladite propriété présentement vendue; LA TROISIEME desdites bornes marque la carre Sud-Est de ladite propriété appelé "Les Arbres" appartenant à ladite Dlle. Joyelle Ann Carry et la carre Nord-Est (la plus Sud) de ladite propriété présentement vendue et est plantée à six pieds un pouce au Sud-Est de ladite deuxième et à trente pieds quatre pouces au Nord-Est de l'angle Nord-Ouest de l'édifice au Nord de partie de ladite maison formant partie de ladite propriété

présentement vendue; LA QUATRIEME desdites bornes (qui est une pierre non taillée) est plantée à cinquante-deux pieds neuf pouces au Sud ou environ de ladite troisième, à cinquante-six pieds au Sud-Est de ladite deuxième et à trente-quatre pieds trois pouces au Nord-Est de l'angle Sud-Est, le plus Est, de ladite maison formant partie de ladite propriété présentement vendue (ladite dernière mesure prise suivant la pente du terrain); LA CINQUIEME desdites bornes est plantée à quarante-et-un pieds onze pouces au Sud-Ouest ou environ de ladite quatrième et à vingt-deux pieds dix pouces au Sud-Est de l'angle Sud-Est de ladite maison formant partie de ladite propriété présentement vendue; ET LA SIXIEME et dernière desdites bornes (qui est une pierre non taillée) est plantée dans l'angle Sud-Est ou environ de ladite propriété présentement vendue au pied d'un chêne à quarante-neuf pieds six pouces au Sud-Ouest de ladite cinquième et à cinquante-quatre pieds un pouce au Sud-Est de l'angle Sud-Ouest (le plus Sud) de ladite maison formant partie de ladite propriété présentement vendue. TOUTES lesdites mesures étant en pieds royaux. LA LIGNE DE DEMARCATION desdits côtés du Nord, ou environ, de l'Est, ou environ, et du Sud-Est, ou environ, entre ladite propriété présentement vendue et ladite propriété appelé "Les Arbres" appartenant à ladite Dlle. Joyelle Ann Carry, étant une ligne droite imaginaire tirée reliant les centres des susdites six bornes et prolongée vers l'Ouest ou environ à partir de ladite première borne jusqu'à atteindre ledit chemin public appelé "La Rue des Cateaux" et vers le Sud à partir de ladite sixième et dernière borne jusqu'à atteindre la limite Sud de ladite propriété présentement vendue. ETANT RECONNU par ledit Mandataire pour et au nom de ladite Société Acquéreuse et pour ses successeurs ou ayant droit, comme suit, savoir:- QU'AFIN DE plus amplement séparer et délimiter ladite propriété présentement vendue par lesdits côtés du Nord, ou environ, du Nord-Est, ou environ, de l'Est, ou environ, et du Sud-Est ou environ d'icelle d'avec celle appelée "Les Arbres" appartenant à ladite Dlle. Joyelle Ann Carry, il sera loisible tant à l'un qu'à l'autre desdits propriétaires de faire ériger des murs ou autres clôtures ou de planter des haies vives sur ladite ligne de démarcation, ci-dessus décrite, moitié sur le terrain de l'autre desdits propriétaires et ce aux frais du propriétaire entreprenant le travail et une fois érigés ou plantés tels murs, autres clôtures ou haie vives n'excéderont pas six pieds de roi en hauteur au dessus de la surface normale du sol et seront et demeureront mitoyens pour être maintenus comme tels entre lesdits propriétaires à fin d'héritage." 27. The 1992 contract also referred to the servitude enjoyed by the Plaintiff and her heirs to draw water from a well located on the land being purchased by the JEC. The contract also recorded that Marian Brown was selling "certains meubles meublants et effets mobiliers extants sur ladite propriété présentement vendue, le tout selon Inventaire" to the Mandataire for and in the name of the company for £2,000. 28. On 2 August 1996, the Defendants purchased Les Primevères from The Jersey Electricity Company. The purchase price equated to the amount that company had paid to Marian Brown, being a combination of the price for the realty and the personalty. The Defendants appeared through their attorney, Elizabeth Anne Ahier, who took the oath on their behalf. This contract ("the 1996 contract") included the same words describing what was being purchased as appear in the 1992 contract. The words used in respect of the boundary with Les Arbres and the enclosure clause were

almost identical, the only differences being in some punctuation and use of hyphens. 29. We have referred to these contracts in this level of detail because the sequence of events shows how much attention was placed on defining the boundary between Les Arbres and Les Primevères down to the last inch. From 1986 to 1996, the boundary was consistently described in the same terms (ignoring, for these purposes, the slip that appears in respect of the first boundary stone in the 1987 contract). The legal position throughout has been that the precise line following the imaginary line to which reference is made could have been drawn on any accurate plan or shown in some physical form on the land. The owners of either property have been permitted to erect something physical of a permitted type along the boundary and bind the owners of the other property to contributing towards the costs of maintaining that boundary feature at any time thereafter. The contractual position as between the parties is clear and unambiguous. 30. Although the point raised in paragraph 15 of the Defendants' Answer referring to their erroneous understanding that there was a right of way over the strip of land that was an inconsequential anomaly traceable to when all the land involved comprised a single farm was not developed by the Defendants' Advocate, there is nothing contained in these contracts from which any such belief could have arisen. It appears that this possible explanation of the historical position was given to the First Defendant by the Plaintiff when they met on 9 March 2015. In any event, the re-establishment of the boundary by the 1986 contract and its repetition in the 1987 contract, the 1992 contract and the 1996 contract clearly demonstrate that a fresh start had been taken to the titles of the two parcels of land since then, which has continued to be the position during the ownership by the parties of their respective properties. Significance of contracts 31. The Plaintiff's Advocate has stressed the importance of the way in which transactions in respect of land are effected in the Island. The requirement to pass an hereditary contract before this Court ensures that it becomes a public document. As explained in MacLeod, "Property Law in Jersey" (2016), the effect of this level of notoriety serves to inform third parties, to promote certainty, to facilitate proof of rights and to reduce the opportunity for fraud, which is why it can be labelled as the "publicity principle", akin to that used in other jurisdictions, notably Scotland and South Africa. 32. We gratefully adopt the summary given in *Fogarty v St Martin's Cottage Limited*

[2015] JRC 068 (at para. 30) relating to the procedure for transferring land or creating rights over land by agreement between the parties concerned, which was cited with approval by the Court of Appeal at para. 77 of its judgment: "For many centuries the structure of the laws affecting land and succession in Jersey was such that contracts of sale were relatively uncommon, but nonetheless it remains true that from time immemorial, transactions in land have been completed by means of a contract sworn by the contracting parties before the Royal Court. Having confirmed with the parties that they are aware of the contents of the deed, the Bailiff (or the Deputy Bailiff or Lieutenant Bailiff) administers the oath to the contracting parties - "Do you swear that you will neither act nor cause anyone to act against this deed of [sale of house outbuildings and appurtenances] in perpetuity upon

pain of perjury?" It is the act of taking that oath which completes the transaction in real estate and the Court then has the original contracts enrolled in the Public Registry where they are available for inspection by everyone. The original deed is then returned to the transacting party, but has no intrinsic value. Accordingly, a person is able to ascertain the ownership of Jersey real estate by a check in the Public Registry of this Island; and because the practice is to ensure that there is included within the contracts passed before the Royal Court a full description of the property which is the subject of the transaction, with its boundaries and servitudes affecting it, the Public Registry search establishes certainty for those who are transacting in other respects with the landowner in question. Wills of real estate are similarly registered on the death of the testator; as are contracts of division of inherited assets. It is true that there is sometimes a potential gap in respect of property inherited by the sole and principal heir on intestacy and in respect of undisturbed occupation of property for 40 years *nec vi clam aut precario* , but these exceptions as it were prove the rule that the general policy is to look to the Public Registry for proof of title. These simple conveyancing procedures form the rationale for the *maxim nul servitude sans titre* ." The Royal Court in *Fogarty* continued (at para. 33): "There is more than just that certainty principle involved. Where parties to a transaction freely come to Court and take an oath to abide by the terms of the contract on pain of perjury, it is unthinkable for a Court to pay only lip service to that act. The principles underlying *la convention fait la loi des parties* are given added impetus by the fact that the contracting party has sworn on oath to abide by the terms of the contract. Such contracts can be set aside on the usual grounds of *dol* , *erreur* or *lésion* , because all those principles go to the fundamental free will or *volonté* of the contracting parties; but, that apart, what is found in the Public Registry can be relied upon." 33. These comments need to be placed in the further context of the additional comments given by the Court of Appeal in *Fogarty* (at para. 78), on which the Defendants' Advocate placed considerable reliance: "As well as the *maxim nul servitude sans titre* there is, as the Appellant contended, another fundamental principle of Jersey property law, *promesse à titre* [sic

- *héritage*] ne vaut , from which it follows that unregistered agreements for the purchase and sale of land cannot be perfected by the Court with an order for specific performance. The Public Registry contains a register of contracts and other documents such as wills of immoveable property which can be relied upon by persons seeking to establish the ownership of any area of land and the rights and servitudes affecting it. However, it is not a complete and exhaustive record of title: it is more in the nature of a register of contracts. As the Respondent's Advocate submitted, a prospective purchaser of land cannot rely and act solely upon what is to be found in the Registry. It is necessary to attend on site in order to see how the property and any structures upon it lie in relation to their neighbours. It is only by viewing the property that a conveyancer acting for the prospective purchaser will be in a position to advise as to any servitudes or other obligations to which it may be subject by operation of law. To that extent, the Appellant's contention that the Register is inviolable must be qualified." 34. We endorse what has previously been said about the public nature of

registering the contracts passed before the Royal Court and how it forms the starting point for anyone interested in ascertaining to whom a particular parcel of land belongs. This Court similarly recognises that the oath taken by the parties to the contract, whether in person or through their attorneys, on pain of perjury is of great significance. It is implicit in that act that the party so bound is aware, or should be aware, and so fixed with constructive notice, of the terms by which he or she is agreeing to abide.

Facts

35. Many of the facts in this case are not in dispute. They derive from the documents we have considered and the evidence given by the witnesses. 36. The Court heard oral evidence from both Defendants and also from the Plaintiff and from Nicholas Cabot, the conveyancer who has acted for the Plaintiff throughout. Each relied upon Affidavits filed in the proceedings as their evidence-in-chief. The First Defendant swore his Second and Third Affidavits on 15 September 2016 and 3 February 2017 respectively. The Second Defendant's First and Second Affidavits were sworn on the same dates. The Plaintiff's Affidavit and her Affidavit in response were sworn on 15 September 2016 and 17 February 2017. Mr Cabot swore his Affidavit on 23 December 2016. 37. The Plaintiff was permitted to adduce transcripts of interviews that had been conducted by the Defendants' Advocate with the previous owner of Les Primevères, Marian Brown (formerly Le Flem), and with Wendy Luce, who had been the conveyancer acting at the time of the 1992 contract for the JEC. The Defendants' Advocate objected to the calling of Dennis Short as a witness for the Plaintiff. Mr Short had been included on the Plaintiff's billet, deposited in accordance with rule 6/32 of the 2004 Rules, but the Plaintiff had not complied with a direction given by the Court on 8 December 2016 requiring service of an affidavit to stand as his evidence-in-chief within the following eight days. The Defendants' objection to Mr Short appearing as a witness was upheld because of non-compliance with the Court order and because the evidence sought to be adduced through calling him was in any event apparently uncontroversial and was capable of being elicited through cross-examination of the First Defendant. The Court listened to the recording that had been made by the First Defendant of his conversation with the Plaintiff on 9 March 2015. Hearing how the words were delivered has been helpful to the Court, both in supplementing how they read on the pages of the transcript and for forming our overall impressions of the two persons involved. The Court also undertook a site visit at the beginning of the hearing, attending at Les Primevères and noting the features of the back garden, the relationship of the strip of land to the buildings owned by the parties, the field beyond it and the field owned by the Plaintiff above her own back garden and, from within the Defendants' house, the views from a number of rooms therein. As a result of that visit, the Court has been aided in visualising the parties' respective positions. 38. The Court has formed the impression that each of the witnesses giving oral evidence is an intelligent person doing his or her best to recall events accurately so as to assist. Some of the events date back many years, where recollections will inevitably be less clear than more recent events, especially where they were not particularly noteworthy at the time. The parties have

never been close friends and their interactions have been less frequent and less effusive than they might be had a genuine friendship developed between them. However, they have not been bad neighbours, largely leaving one another to their own devices, even to the extent that the Defendants seem to have had no discussions with the Plaintiff about any possible impact on her before the various development works were undertaken at Les Primevères and the Defendants had found the Plaintiff on their land without her having requested permission or otherwise informing them. The parties did not present as the sort of people who would be in and out of each other's properties, chatting away about all and sundry, on an almost daily basis. They were cordial with each other when they came into contact. Had they been closer, we consider that the "complete misunderstanding" referred to at the recorded meeting (as quoted below) may have been less likely. 39. During the cross-examination of Mr Cabot, who had been with Jenners for many years until that firm ceased to exist, he was questioned about his new employer, who he acknowledged has been found to have breached the Law Society of Jersey Code of Conduct twice. The implication, although this was not developed by the Defendants' Advocate, was that Mr Cabot's evidence was tainted by his willingness to work for someone with that professional history. This was also in the context of where Mr Cabot's Affidavit explicitly refers to him having spoken to the Second Defendant on 15 June 2005, which he now acknowledges could not have been the case because documents produced confirm that she and the First Defendant had been in Budapest on that date. Taken in combination with the First Affidavit of the Plaintiff, which also referred to Mr Cabot speaking to the Second Defendant on that occasion, repeated in her Second Affidavit sworn on 17 February 2017, it has been submitted that they have invented this incident as a means of fixing the Defendants with knowledge of the boundary issues in 2005 rather than much later, which is when the Defendants say they were first aware of this. As a result, the Defendants' Advocate has urged us to treat the evidence on behalf of the Plaintiff with caution. However, we do not take the view that the evidence of Mr Cabot and the Plaintiff lacks credibility on this basis. It was unwise of them to assume that the person spoken to, being a woman, was the Second Defendant, but we accept that a mistake has been made and that the credibility of their other evidence is not undermined or even demolished in the manner suggested. Further, we do not consider that the length of time the Plaintiff and Mr Cabot have known each other and the fact that Mr Cabot lives nearby, albeit they do not socialise, are factors that lead the Court to view his evidence as having been tailored in any way to support the Plaintiff's case. 40. At the time when the Plaintiff purchased Les Arbres in 1987, she acknowledges that the strip of land was overgrown. Mr Cabot attended on site with the Plaintiff prior to her purchase and walked the boundaries. It is apparent that the Plaintiff has always known the extent of the land she purchased. 41. Although what Ms Brown said, when she was spoken to by the Defendants' Advocate, is not in the form of sworn evidence and has not been tested in cross-examination, the Court is satisfied that her recollection is consistent with the Plaintiff's evidence. Ms Brown agrees that, throughout her occupation of Les Primevères (being 1984 to 1992), the area was overgrown with "brambles and stuff like that", of which there was a lot, and she also refers to wild daffodils. She comments in particular, by reference to more

recent photographs of the back of Les Primevères , that they show more lawn than she recalled when she lived there. She did not treat the overgrown strip of land as part of her garden; indeed she thought it belonged with the field beyond. When she lived at Les Primevères , mowing of the back garden was only carried out on the steep bit of garden immediately behind the house. She recalled the boundary stone (being a reference to the fifth boundary stone described in the contracts) as being at the edge of the brambles. Her recollection is consistent with the contractual position. She knew that the land of Les Primevères did not extend beyond the line of the boundary stones. 42. The Plaintiff chose not to garden the strip of land. She explained that she had started a business in 1986 and so devoted her time to that venture and to getting the house at Les Arbres in order before embarking on tackling any of the land. Up until 1992, when Mrs Le Flem sold Les Primevères and the Defendants moved in, apart from arranging for the overgrown strip of land to be strimmed from time to time, and most recently in November 1991, nothing was done by or on behalf of the Plaintiff to that strip of land. 43. In 1992, the First Defendant was appointed as the General Manager of the JEC. He had previously been that company's Chief Engineer. Because neither of the Defendants possessed residential qualifications in the Island, they were able to benefit from a scheme operated by the company under which they would find a property that they liked, the company would buy it on the basis that the Defendants met the outgoings in respect of it with a view, when the Defendants were able to own the property, that it would be transferred into their legal ownership. The house from which the Defendants moved in 1992 fell within this scheme, as did Les Primevères . 44. The agents acting for Mrs Le Flem wrote to Advocate Maurant at Maurant du Feu & Jeune on 17 June 1992 confirming that a sale of Les Primevères had been negotiated. Maurant du Feu & Jeune acted on behalf of the JEC in relation to the 1992 contract. The Defendants' viewing of the property must, therefore, have been shortly before that, although the exact date has not been stated. When they attended, they spent about 45 minutes at the property. The First Defendant recalls commenting that the back garden appeared to be secluded and very private. Privacy was important to him because of his high public profile. By reference to the grass and the trees, there seemed to be very natural boundaries. Both Defendants agree that the strip of land was very overgrown at this time. There were also areas of the garden that were overgrown and so would need work to be undertaken. The First Defendant stated that the untidiness would have irritated the Defendants. However, they liked the property and so caused an offer to purchase to be made, which was accepted by the vendor. 45. During the period between then and 24 July 1992 when the 1992 contract was passed before the Court, the Second Defendant recalls three occasions on which she met the vendor. Ms Brown recalls the first meeting to which the Defendants refer, when they discussed her selling items in Les Primevères , but does not recall the Second Defendant attending with a cleaner, although accepts that may have happened. The third occasion to which the Second Defendant refers is 24 July 1992 itself. The Second Defendant was concerned that Mrs Le Flem had not yet instructed an Advocate and so arranged to meet her before Court to ensure the transaction went through. Although Mrs Le Flem was a little late, she did appear and so the contract was passed as planned. 46. On one of these occasions, the Second Defendant

says she had a conversation with the vendor about the fifth boundary stone and recalls being told it marked a public right of way. The First Defendant has also referred to being told this. Whether this was on the first or second occasion on which the Second Defendant met the vendor is not considered relevant and we have ruled out the third occasion because the issue was raised in correspondence between the Advocates engaged in the conveyancing transaction. On 23 July 1992, Mourant du Feu & Jeune wrote to Crills, who acted for the vendor: "Our client Company has advised us that Mrs Le Flem believes that there is a public right of way over the North-Eastern part of the property. Neither our searches or enquiries have revealed anything to this effect and we should therefore be obliged if you would liaise with your client on the matter and revert to us." The reply, sent the same day, stated: "Having spoken to my client it is clear that your client company has misunderstood her in that a public right of way does exist but not on my client's property. The right of way is over the property "Les Arbres"." The inference we draw is that the request for clarification arose because of what the Defendants must have told someone at the JEC. No other suggestion for the source of the enquiry has been offered. There is also a handwritten note prepared by Ms Luce and dated 22 July 1992 indicating that she had researched the contracts back to 1838 and could find no rights of way. This late enquiry was resolved just prior to the passing of the contract before the Court, confirming that no such right of way existed over Les Primevères . As the request for clarification arose as a result of what the Defendants must have relayed to the JEC, we consider it more likely than not that the outcome was similarly relayed to the Defendants, or at least to the First Defendant. 47. At the beginning of the conveyancing process, Mourant du Feu & Jeune wrote to Crills, who were acting on behalf of the vendor, on 24 June 1992 requesting inter alia an extract from the Ordnance Survey Map showing the location and extent of the property. The Ordnance Survey Map produced from the conveyancing file has marked on it hatched areas on to which the Plaintiff's name has been written. There are other parcels of land identified with the name "Pallot". The hatched areas include the area that represents the strip of land. The precise boundaries are unclear. However, the map produced corresponds with the boundaries described in the contracts existing at that time. 48. The conveyancing file also contains a letter dated 7 July 1992 from the JEC enclosing another copy of the Ordnance Survey Map for the location of Les Primevères on which had been marked the approximate route of the overhead line service to it. According to the map, the line shown is close to, and in one aspect above, the footprint of the building on the site. 49. On 7 July 1992, Advocate Mourant and Ms Luce attended on site. (Ms Luce has explained that Advocate Mourant was the partner at the firm who had an existing relationship with the JEC and that another colleague, Elizabeth Breen, from within the firm's property team, was also involved with the transaction.) They were able to locate four boundary stones. Their note comments on the inability to locate one partly because the property in that area was so overgrown. By a letter dated 10 July 1992, Mourant du Feu & Jeune asked Crills to attend on site to locate the first and fourth boundary stones. In a handwritten note dated 14 July 1992, Ms Luce explained that when she and Advocate Mourant returned to the site that day, Crills having located the other two boundary stones, the fourth one being behind a small tree, they "were unable to take the measurements

between the third and the fourth and fourth and the fifth because of the mega undergrowth but the one to the house appeared OK". Ms Luce also drew a sketch plan of Les Primevères at around this time showing each of the six boundary stones and their positions relative to the buildings on the site. The sketch refers to the neighbouring property owned by the Plaintiff, including the chemin and, above a wavy line, records "overgrown area belonging to Miss Carry". Ms Brown agreed that Ms Luce's sketch was accurate. By letter dated 20 July 1992, a copy of this sketch and other documents were forwarded to Mr Short at the JEC. The internal Action Status Report of Mourant du Feu & Jeune records that the contract was read and explained on 20 July 1992. We understand that the Defendants did not attend on this occasion. The First Defendant does not recall being shown the sketch plan at that time or, if he did see it, realising that the eastern boundary ran a few feet closer to the house than it appeared when the Defendants viewed the property. A copy of the contract as passed before the Court the previous week was sent to Mr Short under cover of a letter dated 27 July 1992.

50. Because the purchaser of Les Primevères in 1992 was the JEC, the Defendants did not involve themselves as much as they would have needed to had they been the purchasers. However, given the nature of the relationship they had with the purchaser and the fact that they were going into occupation of land owned by the First Defendant's employer, the level of trust that the First Defendant says he had in his staff to sort out matters does not equate to him being completely in the dark. This is borne out by the First Defendant's involvement in respect of the Housing Consent he needed. When Mourant du Feu & Jeune forwarded the Consent received to the First Defendant on 6 July 1992, he replied on 9 July 1992 pointing out that there was an error in his job title, even though the original request for an amended consent had been submitted by the Financial Controller of the company. On 24 July 1992, Ms Luce sent a facsimile to Mr Short requesting him to ask the First Defendant to confirm the inventory, which we treat as a reference to what was being sold to the purchaser of the previous property occupied by the Defendants, and, on the same day, the Second Defendant was in attendance at Court to meet the vendor of Les Primevères, the implication being that she was keen to ensure there were no slip-ups in the transaction. Overall, therefore, the level of interest that the Defendants had in the 1992 contract was reasonably high, albeit not at the same formal level as if they had been purchasing in their own names.

51. The Defendants duly moved into occupation at Les Primevères. Shortly thereafter, they caused the strip of land to be cleared. They did so up to the bank beyond the strip of land, thinking that it was the natural boundary, and tidied the bank as well. To have left the strip of land in its unkempt state would have offended their sense of tidiness, which was both stated and quite apparent from the property as seen by the Court during the site visit. Three fruit trees, being a pear, a plum and an apple tree, were planted on the strip of land before the Defendants became the legal owners of Les Primevères in 1996. The Second Defendant also retrieved from the Defendants' previous garden a hydrangea plant, which had been a gift from her late father, and planted it on the boundary of the cleared strip of land within a short period of the Defendants moving in. The boundary stone, being the fifth one and so visible in the area that was by then lawned, has been left in place throughout the Defendants' occupation, as have the other five boundary stones.

52. The Plaintiff was aware at this time

that the strip of land had been cleared by the Defendants. She was similarly aware that shrubs and fruit trees were planted on the strip. Her assumption was that this had been done to encourage birds and wildlife. She regarded it as a pleasant gesture. The Plaintiff did not take any of the fruit and there has been no suggestion that the Defendants offered her the opportunity to take any; there simply was no discussion between them about the fruit trees. The Plaintiff did not raise any objection, or even discuss with either of them at all, what the Defendants were doing. The Plaintiff queried with Advocate Jenner, who was her Advocate and who she saw regularly in relation to her business, what the legal consequences of the Defendants carrying out work on her land were. She was informed that, unless the occupation continued for 40 years without comment, there was no problem. No mention was made by Advocate Jenner of proprietary estoppel. 53. In 1996, the First Defendant obtained his residential qualifications. This meant that the Defendants could complete the agreement with the JEC to purchase Les Primevères. The 1996 contract was passed before the Court on 2 August 1996. The Defendants appeared through their attorney, Elizabeth Breen. A copy of the contract was sent to the Defendants by Mourant du Feu & Jeune under cover of a letter dated 8 August 1996. Because the Defendants were purchasing a property they had occupied for four years, they regarded this as being a formality to convey to them what they had envisaged they would ultimately own when they found the property in 1992 and caused the First Defendant's employer to purchase it with such an end in mind. 54. In the late 1990s, the Defendants had work undertaken, pursuant to development permission, at Les Primevères. The first development carried out at Les Primevères following the occupation by the Defendants took place in 1994, when the property was still owned by the JEC, and involved the glazing to the dining room. As the years passed, the parties continued to interact in the rather limited neighbourly way that had been established, but nothing was said about who owned the strip of land. 55. The Plaintiff sold her business in 2003. As part of the sale agreement, she continued working for the new owners until 2004, when she retired. Because she had more time available, she found she could turn her attention to carrying out further enhancements to her land. One of the projects involved erecting a fence to keep her cats on her land. On 15 June 2005, she had a meeting with Mr Cabot to review the boundaries with the Defendants' property. A few days earlier, the Plaintiff had hand-delivered an undated note to the Defendants in the following terms: "I am having some more work done by the Men of the Trees that will involve cutting down the tops of the sycamores on the boundary as I have done with the larches. I also wish to continue the fence that would run along the top boundary of your property - the east boundary. My lawyer is coming up at 5.00 on Wednesday 15 June to see where the boundary is and you may wish to join us. Hope the above is in order." Although the First Defendant said in his evidence that he did not recall receiving this note, he accepted that it must have been received by the Defendants and we find that it was delivered in the manner stated by the Plaintiff. Moreover, in his Third Affidavit, the First Defendant explains that the Defendants declined to respond to the Plaintiff's note because it was "entirely innocuous, referring only to her intention to trim trees and extend her fence along our shared, undisputed, boundary". In her Second Affidavit, the Second Defendant confirmed that they had been invited by the Plaintiff in that

way, but that the proposal to extend the fence to contain the Plaintiff's cats seemed entirely reasonable, so they felt there was no need to attend. 56. Neither of the Defendants was present on 15 June 2005. Neither had made any prior contact with the Plaintiff in response to the note. Mr Cabot followed his usual practice of knocking on the door at any premises with which there was a common boundary to explain what he was doing. From the strip of land, he descended to the back door and spoke with a woman. The Plaintiff stayed on the strip of land and, although she overheard a brief conversation, she did not see to whom Mr Cabot had spoken. It is now common ground that the woman could not have been the Second Defendant, despite Mr Cabot's assumption that it was. This is because both of the Defendants were away off-Island on that day. The Second Defendant has produced documentation from which it is quite clear that both Defendants were in Budapest at that time. Although the Defendants are adamant that there was, and could have been, no one in their home on that date, the Court finds that it is more likely than not that Mr Cabot did speak to a woman, who he recalled did not speak with a foreign accent, on 15 June 2005 and who raised no objection to him and the Plaintiff continuing to do what they were doing. 57. In the end, the Plaintiff decided that it would be prohibitively expensive to erect a fence along the boundary indicated from boundary stones four to six. She chose to continue the run of fencing beyond boundary stone four, roughly along the edge of the chemin on her land. By doing so, the Plaintiff was also solving her primary concern of wishing to keep her cats fenced in, which may not have been as readily achievable had the fencing followed the whole of the boundary with Les Primevères. However, the Plaintiff had a gate installed in the fence between boundary stone four and the end of the fence by the bank below the fields beyond. The dimensions of it, shown on an invoice within the batch of invoices we have been shown relating to the work carried out for the Plaintiff, is 2' 6" wide and 3' high. As she put it, this was done to afford her access to her land. There was, however, no discussion between the parties relating to the purpose of there being a gate in the fence. The work undertaken at this time by the Plaintiff included clearing areas where the fence and gate was then installed. The Plaintiff planted an *Elaeagnus* shrub in the vicinity of boundary stone four, the positioning of it being on the strip of land but near the fence. She has pruned the shrub since then. The Defendants made no comment to the Plaintiff about her planting this shrub on the strip of land. 58. In 2011, the Defendants sought planning permission to carry out quite extensive works to their property. One of the reasons for these works was to create living quarters that could be occupied by any staff who might be needed at some future point to care for the Defendants and help around the property. The location plan accompanying that application outlined the site of Les Primevères as being more extensive than the land described in the 1996 contract by which the Defendants purchased it. The application was also accompanied by a design statement prepared by David Syvret of Naish Waddington Architects. Within that document, it is stated that "The site is bounded to the north by and [sic] adjacent private property, to the west by Le Rue des Catieaux [sic] and to the south and east by agricultural fields." The Plaintiff reviewed this planning application later on. She noted that the information in support of it was inaccurate in the way it described the site of Les Primevères. She regarded it as sloppy work on the part of the

architects rather than reflecting any mistake being made by the Defendants about the extent of their land and she chose to say nothing further about those inaccuracies. 59. In 2011, the Plaintiff had various works done around the fence boundary between the parties' properties, and a little further planting was undertaken by her in 2013. The middle one of the three fruit trees on the strip of land was replaced by the Defendants in 2013 or 2014. 60. The owners of the land beyond the bank next to the strip of land at the times with which we are concerned were Paul Cook and his wife. On 29 October 2013, Mr Cook wrote to the Plaintiff indicating that they were thinking of selling their property and enquiring of her whether she was still interested in the field, known by its number 942, because it is adjacent to the field that the Plaintiff owns, referred to as number 941. He identified a purchase price that they had in mind, noted that the field was tenanted and so income-producing and invited her response. However, before the Plaintiff could respond, she was told by Mr Cook that it was no longer on the market. Nothing further happened in relation to this during 2014 but, having checked the boundary with Mr Cabot again, the Plaintiff sent to him an e-mail on 10 February 2015 referring to a further discussion she had with Mr Cook about the possible purchase of that field. In that same e-mail, the Plaintiff indicated to Mr Cabot that she had not by then spoken with the Defendants, adding: "I have thought about the piece of land at the back of [the Defendants's] house and have decided that I want to keep it and take back proper possession of it which was my original intention with having the boundaries checked. I will have a hedge planted there, probably in the autumn as it is a bit late now. I like to plant in October so the plants can get established over the winter. Therefore, could I please ask you to write to them and give them six months notice of my intention to re-take possession of that area of land. If they want to release it earlier, fine." 61. The reference to having checked the boundaries is a reference to a visit that the Plaintiff and Mr Cabot made on 15 December 2014. In respect of this visit, all four witnesses agreed that they were present on that day, but their accounts of what happened differed in some respects. The Defendants spotted the Plaintiff and Mr Cabot entering through the gate on to the strip of land. The Second Defendant came to the kitchen door and spoke with Mr Cabot and was told by him that he and the Plaintiff were checking the boundaries. There was reference to a boundary stone by a mature oak tree. The First Defendant briefly went out of the Defendants' house and pointed out the oak tree where what is the sixth boundary stone is located. (That tree had been cut down by the time of the Court's attendance on site.) Mr Cabot and the Plaintiff walked across the strip of land to the area of the sixth boundary stone, and then returned and passed through the gate. Shortly thereafter, the Second Defendant left Les Primevères by car and stopped to enquire of the Plaintiff and Mr Cabot, who were by that stage standing in the road at the boundary between the parties' properties, if she could assist in their discussions about the placement of the fence at that point, and was told that no help was needed, so she drove off. 62. In the early part of 2015, Mr Cabot telephoned the Second Defendant to advise that he wished to return to the property to take boundary measurements from Les Primevères because the new extension that had been erected was likely to have affected the distances. The Defendants were invited to be present when the measurements were taken but, due to other commitments, were unable to be there at the

time. We infer that this happened prior to 10 February 2015, which was when the Plaintiff e-mailed Mr Cabot about the strip of land. 63. On 3 March 2015, Mr Cabot, on behalf of the Plaintiff, wrote to the Defendants in the following terms: "My firm is acting for Ms Joy Carry, your neighbour, and we recently met on site when I was asked by her to explain to her the boundary line which separates your two properties. I am advised that you have always been aware that the highest portion of your garden beyond the three boundary stones which are in existence belongs to Ms Carry. Following the site visit Ms Carry did telephone you but you were obviously out of the house at that time. Ms Carry has decided that she would like to better incorporate this area of garden into her property and she plans to establish a hedge on the line of the three boundary stones, probably during the autumn of this year. Should you wish to discuss this with me please give me a call or please feel free to contact Ms Carry direct." Upon receipt of this letter, the First Defendant telephoned the Plaintiff to request a meeting to discuss it. He did not discuss matters with the Second Defendant, preferring to wait to tell her until he had discovered what it was all about. The First Defendant was concerned at the Plaintiff's tone and manner during the telephone call. It was not aggressive, but he formed the impression the Plaintiff was annoyed with him and had become agitated, referring to the recent changes to Les Primevères. Given that he would be meeting with her alone, he considered it a prudent precaution to record their conversation, using the facility on his new smartphone. The Court does not accept, as the First Defendant states, that this was a decision taken only when the First Defendant approached the Plaintiff's home, and so finds that his course of action had been decided by him earlier than that. He did not inform the Plaintiff that he was going to be recording their conversation. Rather than covertly recording this meeting, the First Defendant could have chosen to be accompanied by someone else, including by the Second Defendant, but chose not to follow that course, which supports our view that making the recording was pre-planned. 64. That meeting took place on 9 March 2015. The Court finds that the meeting started at around 5.30 pm. This is consistent with the first words heard from the First Defendant explaining that he did not "have to go to a meeting this afternoon until later this evening". The transcript shows that the recording, and so the meeting, lasted close to 75 minutes. (The punctuation, or notably the absence of it, in the transcript is not always helpful to understanding what was being said by them, but has been retained in the manner transcribed in the passages to which we refer.) The particular passage on which the Defendants rely is at approximately 23 minutes into the recording (expanding it slightly from the passage quoted in the Defendant's Rejoinder so as to refer to what the First Defendant used in his Second Affidavit): "Carry I didn't mind you gardening it I mean I always thought you looked after it in return for having the use of it that was always my understanding which I thought was fair enough and I gave Lesley some plants one year to put in that bank because I thought that was mine but it doesn't really matter you know just a few plants so my understanding was always you used it and you gardened it which was a fair deal really so that was always in my mind. Liston That perhaps explains why you didn't come round ranting when we suddenly put fruit trees there Carry No no no I thought if you and I mean I wouldn't want the fruit so if we do divide it up you are welcome to the fruit anyway but I mean I just thought you use it you keep it you

know you maintain it and that was always my understanding really Liston Oh right well Carry Cause I wouldn't expect someone to maintain my garden unless they had some use of it you know Liston Yeah and we wouldn't have been doing anything on anyone's garden if it wasn't ours so Carry So just a complete misunderstanding really". 65. Before that exchange in the conversation took place, the First Defendant and the Plaintiff had initially been looking at and discussing a drawing or plan the Plaintiff had copied for the purpose showing the various areas of land owned by the parties and by the Cooks. The Plaintiff referred to the measurements taken from Les Primevères before the more recent extensions were carried out and pointed out the gate, then commented on the bit across the back of the Defendant's property, referring to the First Defendant's knowledge of what must be a reference to the boundary stone "on the old oak tree there", to which the First Defendant replied "Yes that's right". The First Defendant conceded to the Plaintiff that "I've got no reason to dispute in general that you own this finger of land". He raised the consequences for him, as a Jurat, if the dispute ended up in Court. In doing so, he acknowledged that "the stones are there the boundary has always been that line has always been clear what wasn't clear until Thursday was it was an ownership boundary not a right of way". Shortly thereafter, he repeated the gist of this, adding "we assumed that it was for some land that you either used to have or that you may be expected to have at some time in the future and that it would so we thought ok it's a bit odd but you know actually it doesn't go anywhere". The Plaintiff explained that the reason suggested by Mr Cabot for the strip of land being left associated with Les Arbres was that it may be a link path between properties in the farm formerly existing in that location. The First Defendant pointed out that the Defendants would regard the planting of a hedge along the boundary, even a low one, as having an impact on their enjoyment of their property. Immediately before the passage quoted, the First Defendant said "actually if I was in your shoes and somebody had done what we did inadvertently or not I'd probably say no I want to assert my boundary and I'm going to put that there". 66. After that exchange the Plaintiff suggested to the First Defendant that he should check for himself that the line of the boundary was accurate. The First Defendant acknowledged that lawyers might argue about a couple of inches or a foot, adding that "That's quite immaterial to me the material thing is what do you intend to do with that strip". He also commented on how the Court would have to approach an issue such as erecting something on a boundary as being what a reasonable person would expect, after which the Plaintiff asked him what he wanted. His response was that he and his wife wished to maintain the status quo. He accepted that the Defendants did not go and sit on the strip of land or use it, but that they enjoyed the rather nice view. He raised the possibility of seeking planning permission to develop Les Primevères into a number of dwellings by building as close as possible up to the boundary at the back. The First Defendant proposed that he buy the finger of land, paying a hefty premium, or ransom value, for it. The First Defendant commented about not wanting to remain living in an area where the good relations with the neighbours were adversely affected, referring to the Defendants being relieved that, unlike their early days in the United Kingdom, they no longer lived on estates where neighbours would argue about their "postage stamp bits of land". He raised the reference in the telephone conversation they had recently had relating

to the Plaintiff's concerns about overlooking into her property, commenting that there is only one additional small window from what there had been before, to which the Plaintiff responded "but it's still a window", adding "anyone there could look straight into my back garden you know but that's the way it is". The First Defendant volunteered the possibility of agreeing a restrictive covenant so that nothing could be done "with what is currently your bit of land". He commented that "all I want is for nobody to say that's my land and I want to stick an obstruction along there". The First Defendant also explained that "had I known about this at the time we bought the property it would have been a deciding factor on whether we bought the property", adding that this would either have led to a negotiation with the Plaintiff at the time to find a solution or them not proceeding with the purchase. The conversation also turned to Mr Cook's field beyond the strip and whether the Defendants might think of acquiring it to block off the risk of the strip of land being turned into a thoroughfare. The First Defendant realised that it might not be wide enough for vehicular access but that horses might use it. The Plaintiff explained that she already had access to her field and had a tractor in a shed up there already. They concluded by discussing the need for the First Defendant to check the position by reference to his title deeds. 67. The Plaintiff prepared a short note of this meeting with the First Defendant, which is dated 14 March 2015. It is a high level summary covering what the Plaintiff regarded as the salient points that were discussed and is, in any event, broadly consistent with the transcript of the recording that has since been prepared. We do not find that the Plaintiff's failure to record every aspect of the conversation has any significance. When she prepared her note, she was unaware that a full verbatim transcript would subsequently be produced because she did not know that the First Defendant had covertly recorded their conversation. Accordingly, we have had full regard to the recording and the transcript and draw no adverse inference against the Plaintiff because her note comprises only a summary. 68. The First Defendant wrote to Mr Cabot on 12 March 2015. (By this time he had informed the Second Defendant about what had happened.) In his letter, he described his meeting with the Plaintiff as "cordial" and explained that the Defendants had been unaware they did not own that part of their garden, adding that "The previous owner of our property had asserted that the two boundary stones which are visible denote a narrow right of way attached to Ms Carry's property." The letter continues: "Nothing has arisen in the past two decades to alert us to Ms Carry's ownership and it is a great credit to her neighbourly disposition that she has neither said nor done anything to assert that ownership despite our overt and continuous use of this strip of land without requesting her permission - even to the extent that we planted fruit trees on it and cultivated it as part of our garden in every way as if we owned it. Moreover, she has had the sensitivity never to exercise her right of way over it. For these reasons I have now offered my fullest apology to her." After referring to the devastating impact that the Plaintiff's intention to plant a hedge would have, for no apparent purpose, he reiterated his offer to purchase the strip of land at a ransom value in order to preserve the status quo. Although he would instruct a conveyancer to check the location of the acknowledged boundary, he requested a copy of the drawing that Mr Cabot had prepared. 69. Following a further discussion with the Plaintiff at her house on 2 April 2015, about which little has been

said and in respect of which we understand that there is another covert recording and transcript, although we have not heard or seen either, the First Defendant wrote to her expressing his regret that she was not prepared to sell the strip of land to them at any price and was unwilling to discuss any other way of resolving matters. He indicated that the boundary was not agreed and that he had appointed Le Gallais & Luce to advise him. 70. The Plaintiff wrote to the First Defendant on 7 April 2015, in which she set out her position: "1. The garden to the East of your property clearly marked with boundary stones belongs to Les Arbres and was part of the garden when I purchased the property. 2. I have allowed you use of this part of the garden in return for your maintaining the area. However, I now wish to maintain this area myself and, in Mr Cabot's letter of 3rd March, you were advised of this. 3. Out of courtesy, the date of the 'handover' was mentioned as the autumn of this year. I would now like to be more specific and put a date on this of 1st October 2015. This gives you ample time to remove any plants that belong to you but, after 1st October, I would ask that neither you nor your gardeners enter this area. 4. My property Deeds give me a specific right to erect a wall, fence or plant a hedge on the boundary to be no higher than six feet. I intend to plant a hedge to mark the boundary more clearly and to maintain your privacy and mine when either of us are in the adjoining areas. 5. As advised to you previously, this land is not for sale. I have maintained this position from our first conversation on this matter." At this time, she had not seen his letter to her dated 2 April 2015, as she explained in a further brief letter to him dated 8 April 2015. Subsequent correspondence was exchanged between the parties' legal advisers. 71. On 31 July 2015, the Defendants purchased from Mr Cook and his wife the bank, which is on the other side of the strip of land from Les Primevères, being a portion of the land known as "Le Parquet and le Clos de Quérée", bearing the number 942, and some other land along the southern boundary of Les Primevères, all for £5,000. The accompanying plan shows that the land acquired by this contract forms a continuous line along the boundary with land retained by the Cooks. As a consequence, it means that the Defendants now own the land at the southernmost end, being the narrowest part, of the strip of land in dispute being the parties. This is at the point where the land drops away into the track that the Cooks had created some years ago giving access to other parts of the land owned by them, including the field numbered 942. 72. The First Defendant has also referred to an incident on or about 18 November 2015 when he had cause to object to the Plaintiff's gardeners, as directed by the Plaintiff, cutting the top of the Defendants' hedge along the boundary between the two houses. He stood on the flat garage roof at Les Primevères to deter them from causing further damage until the Plaintiff moved them on. He regards this, especially when taken with an incident in 2011 when the Plaintiff had to be dissuaded from cutting down self-seeding saplings on the Defendants' land, as examples of her preoccupation with her boundaries. 73. The Plaintiff says that she has walked on the strip of land approximately three or four times each year since the Defendants moved in. Apart from the one occasion in 2014 when she was with Mr Cabot, the Defendants say they have never seen the Plaintiff on the strip of land. Proprietary estoppel domestically 74. The declaration sought by the Defendants is that proprietary estoppel forms part of Jersey law following the cases of *Pirouet v Pirouret* [1985-86] JLR 151, *Maçon v Quérée*

[2001] JLR 80 and Cannon v Nicol

[2006] JLR 299 . From these three cases, the fullest exposition of the principle to be applied is found in Maçon v Quérée , where the doctrine, as derived at that time from In re Basham

[1986] 1 WLR 1498, 1503, was put in its broadest form as being (para. 25): "... [W]here one person, A, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right in or over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief." Accordingly, it is on this formulation of the doctrine that we have principally focused, and the way it was further explained by the Court in that case, especially relying on the judgment of Robert Walker LJ in Gillett v Holt

[2001] Ch 210 . 75. The Defendants' Advocate recognises that there have been conflicting decisions on the question of whether the doctrine exists as a matter of Jersey law. The three cases on which he relies are sandwiched between an earlier decision (Felard Investments v Trustees of the Church of Our Lady Queen of the Universe

[1978] JJ 1) and two subsequent decisions (Flynn v Reid

[2012] (1) JLR 370 and Fogarty itself). It is common ground that the Court of Appeal has not ruled definitively on the issue, so our task is to decide which of the lines of authority to prefer and apply to the present case. 76. Although the Court of Appeal has not been called upon to determine this issue, the Defendants advance two decisions from which they suggest that that Court is likely to decide that the doctrine is applicable as a matter of Jersey law. As a result of the indications given in these cases, the Defendants have urged us to depart from the most recent rulings from the Royal Court and to restore the position that prevailed before, as represented most particularly by Maçon v Quérée . 77. Most recently, the Court of Appeal commented in Fogarty on the decision of the Royal Court to align itself to the Felard case (at para. 40): "No issue was taken in this Court as to the Royal Court's decision in relation to any of the above findings. We therefore do not consider them further. We should, however, mention that Felard is not necessarily the last word on estoppel: although the point was not argued before us, there are later decisions in Pirouet v Pirouet [1985-86] JLR 151, Maçon v Quérée

[2001] JLR 80 , Cannon v Nicol

[2006] JLR 299 and Reid v Flynn

[2012] JRC 100 , in which the Court was prepared to countenance estoppel as part of the law of Jersey." The fact that this comment was made without the benefit of any argument on the question inevitably diminishes the force of the Defendants' submission that this shows how the Court of Appeal would approach the question if actually seized with determining it. Further, the fact that it refers to Flynn v Reid as an example of a case in which the doctrine was countenanced, when it is the case relied upon most strenuously by the Plaintiff's Advocate as establishing why the doctrine has now properly been rejected,

might be taken as indicating that this dictum relating to proprietary estoppel has little relevance for this Court in the present case. It is, of course, accurate to "mention that Felard is not necessarily the last word on estoppel" because *Flynn v Reid* contains a fuller and more recent analysis of the position. Naturally, we cannot ignore what the Court of Appeal has chosen to include in its judgment, but the weight we should give this indication is affected by those factors. It is an obiter comment on what were already obiter comments from the Royal Court, recognising that that Court did not resolve the *Fogarty* case on the basis of proprietary estoppel anyway. Further, had the Court found that the doctrine existed, the facts found did not enable the party invoking it to rely upon it. 78. The relevant passage in the Royal Court's judgment in *Fogarty* is as follows: "65. The defendant contends, whether on the grounds of proprietary or equitable estoppel that the plaintiff ought not to be entitled to the remedy which she seeks. As in the case of *Flynn v Reid*

- [2012] (1) JLR 370 this Court considers that the better conclusion is that the doctrine of proprietary estoppel is not part of the law of Jersey, and would align itself with the approach of the Court in *Felard Investments Limited* (*supra*) if a decision were necessary. However, it is not necessary because, again on the facts, one cannot say that there has been any conduct by the plaintiff which encouraged the defendant to the belief that there was a right to maintain the encroachments. First of all, the plaintiff had no relationship with the defendant for this purpose at any material time. The extent of the relationship was a warning, prior to the defendant completing the purchase, given by the plaintiff's lawyer to the defendant's lawyer that he should check the boundaries carefully. One can hardly construe from that that there was any encouragement or representation that all would be well - quite the reverse. One cannot therefore say that the defendant has acted to its detriment on the basis of a belief or representation encouraged or given by the plaintiff. Nor can it be said that Mrs de Carteret could have brought such a defence either. The defendant's contention is that there was a written agreement to abide by the opinion of Advocate Frederick Benest, as arpenteur . That may well have been so but the basis of that agreement was that the parties would abide by the decision of Advocate Benest as to where the boundary was, and Advocate Benest said it was impossible to determine that question. The fact that he made a proposal as to where the boundary should be is beside the point, because neither party agreed to be bound by his opinion as to where the boundary should be. 66. Furthermore, it is clear that Mrs de Carteret's lawyers were well aware of the need to ensure that there was written into the boundary contract a provision that the encroachments could remain as they were, and yet that could not be successfully negotiated with the plaintiff. It is impossible in those circumstances to say that Mrs de Carteret relied upon any representation made by the plaintiff." As is readily apparent, the Royal Court did not analyse the position in any detail. Instead, it simply endorsed the conclusion reached in *Flynn v Reid* and added that, even if the doctrine did exist, it could not, on the facts found, be relied upon by the defendant in that case. Accordingly, this Court can derive little assistance from *Fogarty* , both in the Royal Court and the Court of Appeal, on the issue of whether the doctrine of proprietary estoppel exists. 79. The earlier

Court of Appeal decision to which the Defendants' Advocate has referred is *Ernest Farley & Sons Limited v Takilla Limited* (1989/22, 11 May 1989). This case arose from a dispute between the parties about the interpretation of clauses restricting the development permitted on a parcel of land retained by the vendor when selling off a portion of land originally owned by it. The Court of Appeal does not appear to refer at all to the doctrine of proprietary estoppel. It does, however, comment on what was said about remedies in the *Felard* case (para. 70): "When granting relief for the breach which they found of clause 6 of the contract, the Royal Court said they would, if free to do so, have considered substantial damages a proper remedy, but under the decision in *Felard Investments, Ltd. v. Trustees of the Church of Our Lady Queen of the Universe* (1979), J. J. 19 they had no power to award damages in lieu of an order for removal. Mr. Mourant expressly disclaimed any challenge to the Royal Court's decision on this point. We too should have considered damages, if such an order were legally available, an adequate remedy for breach of clause 3, but in view of Mr. Mourant's attitude we have not pursued the point. We therefore express no view upon it, beyond stating that both the decision in the *Felard Investments* case and the extent of its operation remain open for consideration in this Court." It is unclear from this final sentence whether the Court of Appeal was referring generally to the decision in the *Felard* case or whether it was confining its remarks to the narrower issue of awarding damages in lieu of an order for removal. Within the context of the matters with which the Court of Appeal was seized in the *Takilla* case, we incline to the view that its comment was made on this narrower basis and so it cannot be read, as the Defendants' Advocate suggested, as raising the possibility that the Court of Appeal in 1989 was inviting re-consideration of the substantive decision in the *Felard* case on the question of whether proprietary estoppel existed. Such a conclusion is consistent with the approach taken in *Fogarty* by the Royal Court and the Court of Appeal in respect of the availability of damages as an adequate remedy. 80. As a result, we take the view that there is little, if anything, by way of positive indication from the Court of Appeal that lends support to the submissions made on behalf of the Defendants about the existence of the doctrine in Jersey law. Put simply, there are conflicting decisions of the Royal Court, none of which binds this Court (as confirmed recently by the Court of Appeal in *Fogarty* at para. 137), and our task is to consider which reasoning we find the most persuasive. 81. The earliest of these decisions is the *Felard* case itself. This case also involved covenants created at the time of selling part of a parcel of land whilst retaining the rest. The parties were the successors in title of the original owner of the parcel of land. The plaintiff company brought a representation to the Court seeking a declaration that the restriction on building on a strip of land where part of a building had been constructed had been extinguished or alternatively that the Court should apply the doctrine of proprietary estoppel, thereby estopping the defendant trustees in perpetuity from enforcing the building restriction as regards what had been built. The Court analysed the doctrine in the following terms (at page 7): "That doctrine is discussed under that name in *Snell's Principles of Equity*, 27th ed., at 565-568 (1973). Its essentials are well summarised in *Halsbury's Laws of England*, 4th ed., vol. 16, para. 1511, as follows: "Expenditure on the land of another. If A spends

money on B's land believing that the land belongs to A or that A has or will obtain some interest in the land and B, knowing of A's mistaken belief, stands by while the money is being spent or encourages the expenditure, B will not be heard to assert his title to the land so as to defeat A's expectation at least without compensating A for his expenditure. The principle also applies where A spends money or takes some other action in relation to his own land in the belief that he has, or will be, granted some interest in or right over B's land when B will be compelled to give effect to the belief or expectation. This doctrine is a particular instance of estoppel by acquiescence, and differs from estoppel in that it can give rise to a cause of action rather than being available merely as a defence." It is clear from the English cases that if the equity is established by the application of the above doctrine, then in England effect will be given to it in whatever is the most appropriate way. Reverting to the passage just quoted from Halsbury, in some cases it will suffice merely to restrain B from enforcing his rights against A. In other cases, where positive action is necessary to regularise the position, B may be compelled to grant A the appropriate legal rights, such as a conveyance of his land or of a right of way over it. In either case, A may be ordered to pay B compensation. From the English authorities cited to us, we have no doubt that in a case such as this in England the Court (if it came to the conclusion that the circumstances were such as to justify the application of the doctrine) would be empowered to make an order permanently restraining the Trustees from enforcing against the Company the restriction on building on the strip in respect of the new development." 82. Having identified that what was in issue was the creation or extinction of a servitude, both of which required the passing of a deed before the Royal Court, the judgment continues (at page 9): "Counsel for the Company was unable to cite to us any local authority for the proposition that a servitude may be created or extinguished in Jersey by the application of the doctrine of proprietary estoppel. Nevertheless he reminded us that the Royal Court is a court of equity, and he asked us to find that a servitude may be created or extinguished in Jersey by the application of equitable principles, as it can be in England. The Court is indeed a court of equity, but our consideration of the ancient authorities, such as Poingdestre, Basnage, Pothier and Berault, and of the modern cases, leaves us in no doubt that an interest in land, which of course includes a servitude, can be acquired only by title or in certain cases by prescription or "destination." We have already shown that in Jersey an agreement to create (or extinguish) an interest in land is not enough; it must be implemented by a deed passed before the Royal Court. The English doctrine of proprietary estoppel does not require an agreement; as we mention later, conduct on the part of the person asserting his legal right which falls short of an agreement can be sufficient to establish the equity. But it must follow that if an agreement does not in Jersey law create an interest in land unless a deed is passed, that must be even more the case where the conduct relied upon falls short of an agreement. Counsel for the Company argued that he was not asking us to find that the servitude in this case had been extinguished, but only that the Trustees, by their conduct, should be held to be estopped permanently from enforcing the breach by the Company of the building restriction. That seems to us to be a distinction without a difference. For both

parties the effect of such an estoppel would be precisely the same as if the servitude were to be extinguished. As we see it, the application of the doctrine either has the effect of creating (or extinguishing) an interest in land, or it has no effect at all. In England the former is the case; in Jersey, it does not have that effect and therefore it has no effect at all." Although the Court ruled that the doctrine of proprietary estoppel did not form part of the law of Jersey, it went on to consider whether, if it did, it would have been available on the facts of that case. It concluded that the facts did not support such an outcome because there was insufficient evidence to found the encouragement necessary to satisfy that element of the test. 83. When the Felard case returned to the Court for further consideration of the relief to be granted (1979 JJ 19), what had been set out the previous year was largely repeated, and it was clarified (at page 27) that "the law of Jersey relating to interests in land has developed as it has for valid historical reasons, and is now so well entrenched that it is not open to the Courts to change the fundamental principles". The Court had added (at page 23) this further consequence of the position: "What, however, is clear from the authorities is that, although the Royal Court is a court of equity, it cannot order the creation or extinguishment of an interest in land arising out of an agreement; in other words, an agreement to create or extinguish an interest in land is not specifically enforceable. The authorities on this matter were fully discussed in the judgment in Symes

- v. Couch 1978 J. J. 119, and we do not think it necessary to repeat them. The only course open to the Court in such a case is, where the circumstances so warrant, to order the recalcitrant promisor to pay damages, and this the Court can undoubtedly do even where the agreement does not include a penalty clause. These observations apply to an agreement to create or extinguish a servitude, which is an interest in land." 84. It is the Court's conclusion in the Felard case that it had no power to award damages in substitution for ordering the removal of the part of the building found to have been constructed in breach of the covenant that has attracted subsequent criticism. As already mentioned, this occurred in the Takilla case as well as in Fogarty . In Fogarty in the Royal Court, however, there was also a further departure from the reasoning just cited from the Felard case relating to the effect of the estoppel (para. 80): "In the first judgment in the Felard case, the Court reached the conclusion that the building restriction had not been extinguished and that it would not apply the principles recognised in the courts of England and Wales as forming the doctrine of proprietary estoppel. The Court said that it considered that there was a distinction without a difference in saying that the covenant had not been extinguished but that the defendant was estopped permanently from enforcing it, because the effect of the estoppel would be to extinguish the covenant. We do not subscribe to that view. The effect of preventing a plaintiff permanently from enforcing a building restriction in relation to a particular building does not remove the restriction. If for any reason, the building were to be removed, the restriction would still be in place. We respectfully would depart from the reasoning of the Court in Felard (No 1) to that limited extent." 85. Although it is clear that the decision in Felard is not one where there has subsequently been universal acclaim for its outcome and reasoning, it remains a previous decision of this Court rejecting the existence

of the doctrine of proprietary estoppel. The Court reached that conclusion on the basis that the doctrine does not sit comfortably with the requirement that there be the passing of a contract before the Court for the agreement between the parties creating or extinguishing an interest in land to be implemented, subject only to the exceptions established in the customary law. The criticisms of the decision, though, have been advanced on behalf of the Defendants to support their Advocate's submission that we should not be overly troubled if minded to follow the later cases that have found the doctrine to exist. 86. The first in time of those cases is *Pirouet v Pirouet* (supra). Although the Court's judgment did not categorise this as a case of proprietary estoppel, it has since been analysed in that manner. This case concerned a will. The plaintiff had been given a life interest in the farm owned by his father under the latter's will rather than becoming its owner, as he had expected. The plaintiff had been in occupation for a long period of around 30 years, paying a rent, but had made significant and costly improvements to the property during that time. On each occasion, the plaintiff had sought consent from his father and had been told by his father that the property was to be his so that he could do as he wished with it. However, as a result of the plaintiff and his family becoming Jehovah's Witnesses, one of the actions taken by the plaintiff's father was to change his will, the consequence of which was that only a life interest was given to the plaintiff under it and the ownership of the property vested in the plaintiff's brothers instead. It was this changed will of realty that the plaintiff sought to have set aside, coupled with seeking a declaration that he was the true owner of the farm, and/or that it be conveyed to him and/or damages. (The Order of Justice also sought similar relief in respect of two fields, but the Court distinguished factually between the farm and the fields, which the plaintiff had occupied for a comparatively shorter time and where he had not spent capital to any great extent on them, and it granted no relief in relation to either field.) 87. The judgment of the Court refers to the issue as one of "equitable estoppel". It commented on the *Felard* case by reference to two other decisions (*Symes v Couch* 1978 JJ 119 and *York Street Pharmacy Ltd v Rault*

[1974] JJ 65) in which the equitable jurisdiction of the Court had been confirmed (at page 160):

"The two recent Jersey cases, *York Street Pharmacy v. Rault* and *Symes v. Couch* , make it clear that the Royal Court will apply equitable principles and award equitable remedies in appropriate cases. Although in *Felard Invs. v. Trustees of Church of Our Lady &c* . the Royal Court, in dealing with the extinction of a servitude, declared that the doctrine of proprietary estoppel was not part of the law of Jersey, we cannot avoid coming to the conclusion that the doctrine of equitable estoppel, and in particular the facet of it known as promissory estoppel, or estoppel by representation, is part of the law of Jersey and can be applied in appropriate cases. We consider this an appropriate case. There was a promise. There was part performance." Whether the Court recognised that it was departing from the decision in the *Felard* case, or whether it considered that there were different doctrines engaged, is not entirely clear, although the Court had (at page 159) referred to *Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd*

- [1982] QB 133 and *Amalgamated Investment & Property Co. Ltd. v Texas Commerce International Bank Ltd*
- [1982] QB 84 as indicating that there is flexibility in the doctrine of equitable estoppel before adding: "Although the distinction between proprietary estoppel or estoppel by acquiescence and promissory estoppel or estoppel by representation was noticed, it was accepted that they were facets of the same principle. The necessity of satisfying all the probanda of Fry, J., in *Willmott*
- v. Barber was questioned and the view was approved that the real test was whether it would be unconscionable in any particular case for a person to enforce his legal right." This reference to there being a distinction leads this Court to conclude that the Court in the *Pirouet* case was not consciously departing from what had been stated in the *Felard* case. Instead, it regarded the doctrine it was applying as a different facet of equitable estoppel, albeit that the relief granted and the approach taken has subsequently been treated as if it had been a case on proprietary estoppel. 88. This view is reinforced by the first two of the English cases to which reference was made (at page 157): "In *Dillwyn v. Llewellyn* the plaintiff's father had given him a farm. A memorandum to this effect was signed by father and son. The plaintiff obtained vacant possession, built a residence there and laid out and planted the grounds at a cost of £14,000, all with the father's knowledge and approbation. The farm was never formally conveyed to the plaintiff and on his father's death it passed with his estate. Lord Westbury, L. C. ruled (4 De G. F. & J. at 523): "I propose, therefore, ... to declare, by virtue of the original gift made by the testator and of the subsequent expenditure by the Plaintiff with the approbation of the testator, and of the right and obligation resulting therefrom, the Plaintiff is entitled to have a conveyance from the trustees of the testator's will ..." In *Ramsden v. Dyson* Lord Kingsdown said (L. R. 1 H. L. at 170): "The rule of law applicable to the case appears to me to be this: if a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*
- (1811) 18. Ves. 328, and, as I conceive, is open to no doubt."" There is sufficient similarity on the facts and to the outcome in *Dillwyn v Llewellyn*
- (1862) 4 De GF & J 517 to suggest that, in the context of the promise and part performance to which reference was made immediately before the Royal Court concluded that considerable money had been spent in the expectation of inheriting the farm, where it did not wish to see that expectation defeated, that the Court was aligning itself to the fairness achieved by these decisions. Indeed, the similarities are such that the Court was achieving a comparable outcome involving the testamentary disposition to reflect the previously-expressed expectations. 89. The Court also appears to have been influenced by the

decision reached just one week earlier in *Lane v Lane* [1985-86] JLR 48. This case concerned a property that had been jointly owned by a married couple. The wife obtained a divorce in England, following which, as part of the agreement relating to their finances and property, incorporated into an order of the court, she agreed to transfer her interest in the property to her ex-husband. She executed a power of attorney in a Jersey solicitor but her ex-husband died before the transfer of the property to him was made. The wife then revoked the power of attorney. Some years later, proceedings were instituted in the Family Division of the High Court of Justice to ascertain whether the order, insofar as it remained unperformed, was still valid. Sheldon J declared that the original order remained valid. As a result, the ex-husband's heir, the plaintiff, sought relief by way of an order to perfect the transfer of the property or, in the alternative, for damages against the ex-wife, who was the defendant. 90. The Royal Court accepted that it should seek to give the relief sought under the principles of comity and similarly cited the lengthy passage from *Ex parte Viscount Wimbourne* (supra) on the application of *équité* before considering if there were any impediments to it doing so. It rejected all of the arguments advanced on behalf of the defendant, two of which merit further comment. The first is that strong arguments would be needed to remove the right of the person with legal title, in respect of which reference was made to *Ritson v Slous*

[1973] JJ 2341 , 2346: "... we know of no rule of law which prevents this Court from divesting a person of his property when the justice of a case dictates that that be done", and to *Basden Hotels Ltd v Dormy Hotels Ltd*

[1968] JJ 911 , 919: "... but what it amounts to is that courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is good reason in law, which includes the grounds of public policy, for them to be set aside." The second is whether the *Felard* case prevented the awarding of damages in lieu of ordering specific performance. The Royal Court did not feel constrained in that fashion because (at page 62): "Here we have a number of precedents as to what the court is prepared to do, which show the court striving to do justice, not by ignoring the established common law, which would be objectionable, but by interpreting it afresh. Can we take a step further than the court was prepared to do in *Symes v. Couch*? We think it would be right to treat the defendant as if she were a faithless promisor under an agreement of sale." The order made in that case was for the property to be valued, either by agreement or by the Court fixing the value, and thereafter the defendant was ordered to convey the property to the plaintiff within six weeks or pay the value of the property. If the defendant failed to do either, the Viscount was authorised to pass the contract on behalf of the defendant and thereafter put the plaintiff into possession of the property. 91. Reverting briefly to the order made in the *Pirouet* case, the Royal Court declined to go as far as the relief granted in *Lane v Lane* and so did not provide any authority for the Viscount to act in passing the contract. It ordered a transfer of the *nue propriété* to the plaintiff within three months, in default of which the plaintiff was awarded damages reflecting the difference in value between his life interest in the property and the value of the full ownership which he had been led to believe he

would inherit. If that situation arose, further argument on quantum would have been required. We have not been informed as to what subsequently happened. 92. The second decision on which the Defendants rely, which is arguably the strongest authority that proprietary estoppel is recognised in Jersey law, is *Maçon v Quérée* (supra). The defendant began renting rooms on the lower floor of her house to the plaintiffs in 1980. As the plaintiffs' family grew through the birth of four children, they occupied a greater proportion of the defendant's house. There was no formal agreement, but the rent paid by the plaintiffs was increased periodically by agreement. The second plaintiff also began to carry out more management of the garden. The parties reached an agreement that the defendant would change her will so as to leave the property to the plaintiffs in return for which the plaintiffs would look after the defendant in her old age. The defendant's will was duly changed in 1985. As a result, the plaintiffs did more for the defendant. The defendant was seriously ill in 1994-5 and felt that the plaintiffs, who both worked full-time, had failed to look after her properly. The property they all occupied had a borehole, which had become contaminated. The plaintiffs successfully made an insurance claim in respect of this contamination and held the proceeds of the claim. They also arranged and paid for a new borehole to be dug. In 1996, relations between the parties broke down. The plaintiffs were informed by the defendant that they were being removed from her will because they did not look after her properly any more. She asked the plaintiffs to leave the property. The plaintiffs stopped doing anything for the plaintiff, save her laundry, and ceased the various works that were in hand in respect of the property. Although formal notice to quit was served, it was challenged by the plaintiffs and the situation remained as it then was for 4½ years. The plaintiffs claimed damages from the defendant for breach of contract, alternatively in equity on the basis of estoppel. The amount claimed was either the current value of the property, discounted to take into account the life expectancy of the defendant, or an amount representing what had been spent on the property by them since 1985. 93. Before considering the legal basis of that claim, the Court drew attention to two matters. The first was that the second plaintiff was a direct descendant of the parties in the *Pirouet* case, the significance of which was that judgment had been handed down in that case just months after the arrangement agreed between the plaintiffs and the defendant in this case in 1985. Despite that, there had been no attempt to record the arrangement in any written form so as to provide some form of comfort to them all. The second was that the plaintiffs had also benefited from the financial support, including inheriting a different property from another person, the proceeds of sale from which had been received by them before their proceedings against the defendant concluded, but without them amending their claim that they could not afford to find alternative accommodation. The Court found that the plaintiffs were well aware long before the trial started that their financial circumstances had improved and deliberately withheld disclosure of the information and related documents. This was regarded by the Court as serious. 94. When considering the legal basis of the claim in equity, having first rejected the existence of any contract, the Court had in mind the most recent case from England and Wales providing consideration of proprietary estoppel in similar circumstances, which was *Gillett v Holt* (supra). The

plaintiff in that case had worked for the defendant farmer for nearly 40 years from the age of 16. During that time he moved into a property owned by the defendant's company. The defendant repeatedly assured the plaintiff that he would inherit the farm business and executed a will leaving his residuary estate to him. The relationship deteriorated. The defendant dismissed the plaintiff from his employment and made a new will, from which the plaintiff was completely excluded. The Court of Appeal reversed the trial judge's decision to dismiss the claim and substituted relief satisfying the equity that had been established. This entailed conveying the freehold of the property in which the plaintiff and his family had lived to the plaintiff and payment of an amount of compensation for being excluded from the rest of the farming business. In *Pirouet*, the Royal Court highlighted (at para. 25 of its judgment) a number of observations in the judgment of Robert Walker LJ in *Gillett v Holt*: "(a) Although it is customary and convenient to marshal the circumstances of any particular case under the classic headings of assurance, reliance and detriment, the doctrine cannot be treated as being subdivided into three or four watertight compartments: 'Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood' ([2000] 2 All E. R. at 301). (b) '... [T]he fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court may look at the matter in the round' (ibid., at 301). (c) Even an equivocal representation can give rise to a proprietary estoppel (ibid., at 302). As Slade, L. J. put it in *Jones*

- v. *Watkins*: "The equivocal nature of the promises found by the judge is clearly one relevant factor when considering whether or not it would be unconscionable to permit the administrators to rely on their strict legal title, having regard to any detriment suffered by the plaintiff in reliance on them." (d) Detriment is not a narrow or technical concept. It need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is substantial. "The requirements must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances" ([2000] 2 All E. R. at 308, per Robert Walker, L. J.). (e) "There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded - that is, again, the essential test of unconscionability" (ibid., at 308)." 95. The Royal Court then noted that there had only been two previous cases in Jersey considering the application of the doctrine of proprietary estoppel and it proceeded to review the *Felard* and *Pirouet* cases. Its conclusion is set out in para. 29: "Dr. Kelleher submitted that the plaintiffs' claim, although pleaded as a promissory estoppel, was in truth one of proprietary estoppel and, on the authority of *Felard*, must fail. He acknowledged, however, that there was arguably a conflict

between Felard and Pirouet and did not seem to press the argument very strongly. Apart from some infelicity of expression on the part of the court in Pirouet in its reference to different categories of estoppel (Pirouet is a case that would ordinarily be referred to as "proprietary" estoppel in English law; though it is dangerous to attach too much importance to these various labels), it seems to this court that the reasoning in that case is sound and to be preferred to that in Felard, at least in a case such as the present. As others have emphasized, and Robert Walker, L. J. reiterated in *Gillett v. Holt* ([2000] 2 All E. R. at 306), the doctrine of estoppel is a very flexible one. It is likely, therefore, that more often than not a court giving effect to it will be able to tailor the relief given so as to avoid any direct conflict with matters of the kind that concerned the court in Felard. It would be a poor and much attenuated form of equity that was unable, as a matter of principle, to meet the needs of justice because of such considerations. This is not to say that there may not be situations of a kind very different from the circumstances of the present case, where the tension between the demands of equity on the one hand and deeply entrenched principles of Jersey land law on the other will pose difficulties for a court of a more intractable kind than anything that arises in the present case; but that will be for others to explore on another occasion." 96. Applying the principles to the facts, the Royal Court found that there had been a material assurance and that to some extent there was reliance and detriment (para. 58). However, because of the inadequacy of the way in which the plaintiffs had looked after the defendant, the plaintiffs not performing their part of the bargain, the defendant's decision to remove them from her will was "wholly understandable and cannot in itself be described as unconscionable" (para. 62). That said, it also found that equity and justice required some account to be taken of the expenditure on the property incurred by the plaintiffs (para. 63). Adopting a broad enquiry and factoring in "that those who invoke the principles of equity in their favour are expected not to have behaved in an unconscionable way themselves - or, as it is sometimes more colourfully put, those who seek equity must come with "clean hands"" (para. 65), the Court invited the parties to discuss how to achieve the outcome indicated in principle of awarding damages of £25,000 conditional upon the plaintiffs vacating the property and staying the execution of that award until the defendant sold the property or died. 97. This case was not one in which any transfer of ownership of realty was sought. It was a claim for damages and damages were awarded, although in an amount lower than the plaintiffs had sought. The promise, or assurance, relied on by the plaintiffs was one from which the defendant was entitled to resile because it was found not to be unconscionable for her to do so in the particular circumstances of the case. The damages awarded really represented a return on some of the monies expended on the property by the plaintiffs. The case could be categorised as one founded on the doctrine of unjust enrichment. The case is, though, clearly an instance in which the Court chose to recognise that the doctrine of proprietary estoppel existed in Jersey law, preferring the reasoning of the Pirouet case to that of Felard. It is supportive of the Defendants' case that the doctrine can be applied to the facts of the present case on the basis of assurance, reliance and detriment, whilst always being concerned to prevent unconscionable conduct. 98. The third of the cases on which the Defendants rely is *Cannon v Nicol* (supra). This case arose from

the termination of an alleged partnership agreement relating to a recycling business. Initially, the defendant agreed to provide some funds to assist the plaintiff, whose business was in financial difficulties, and she agreed to manage the administrative side of the business whilst the plaintiff concentrated on the operational side. There was nothing recorded in writing. The defendant and her son subsequently purchased a plot of land and built a commercial property on it. The business was intended to occupy the ground floor of that building, which had been designed to accommodate it. The plaintiff alleged that the defendant had told him the business could enjoy indefinite rent-free occupation. The plaintiff had made no direct financial contribution to the property but had been heavily involved in its construction, effectively acting as site manager. When the defendant wished to accept an offer from a third party to rent the ground and first floors of the property, the defendant ended any relationship with the plaintiff and evicted the business. The plaintiff contended that there had been a partnership, which had been terminated by the defendant in bad faith and he claimed to have an interest in the commercial property arising from estoppel. The defendant denied that there had been any partnership and also argued that the plaintiff could claim no interest in the property because she only assured him that the business could have rent-free accommodation for a limited period. 99. The Royal Court found that a partnership had come into existence and had not been terminated in good faith. On the particular facts of the case, the defendant's claim to be repaid monies loaned resulted in such monies being netted off against the damages otherwise payable by her to the plaintiff, with the result that no sum was payable in either direction. However, the Court also found that the commercial property was not an asset of the partnership. It found that the defendant had said that the business would be able to use the ground floor of the building "rent-free for ever" and that other assurances were given by her about the parties having security for their lives (para. 102). It found that, in reliance on those assurances, the plaintiff involved himself to a considerable extent in the construction of the building (para. 103). The judgment confirms (at para. 116) that there had been no contest as to whether the doctrine of proprietary estoppel could be relied upon: "It was clearly established in *Maçon v. Quérée (née Colligny)* that the doctrine of proprietary estoppel forms part of the law of Jersey. Neither counsel sought to argue otherwise and in our judgment *Maçon* was correctly decided." The summary of the doctrine taken from *In re Basham* (supra) and the principles extracted from *Gillett v Holt* (supra) to which reference has already been made were all reiterated. The defendant's Advocate had conceded that if the Court found that the assurances had been given he would accept that the plaintiff had acted to his detriment in reliance thereon and the Court had no hesitation in finding the requirements for proprietary estoppel met (para. 118). In respect of the remedy to be awarded to satisfy the equity that had been established, the Court referred to the analysis undertaken in *Jennings v Rice*

[2003] 1 FCR 501, in which reference was made to the requirement for there to be "proportionality between the expectation and the detriment" and to what Robert Walker LJ had indicated in *Gillett v Holt*, namely "that the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result and a

disproportionate remedy cannot be the right way of going about that." Recognising that the assurances given were uncertain and could not realistically give rise to any expectation of an interest in the free hold of the property, the Court concluded that "the expectation aroused by the assurances was for rent-free occupation for a reasonably lengthy but unspecified period" (para. 124). The Court assessed damages based on a notional occupation for three years and awarded the plaintiff £60,135. 100. This decision confirms the correctness of the previous rulings that proprietary estoppel exists as a matter of Jersey law, but without any further detailed analysis, save in respect of the appropriate remedy. Because the relief granted did not extend to affecting the building's legal owners' title to the property, it was not the type of case in which the difficulties alluded to at the end of para. 29 in *Maçon v Quérée* needed to be explored. The primary question for determination was whether the assurances alleged by the plaintiff to have been given by the defendant had in fact been given. Once it was decided that they had been, the remaining question was the most appropriate relief to satisfy the equity that had been established. 101. The case on which the Plaintiff's Advocate relies, and which is the most recent in which there has been full consideration of the doctrine, is *Flynn v Reid* (supra). The facts are succinctly summarised in para. 1 of the judgment: "The plaintiff and the defendant formed a relationship in 1995 and commenced living together shortly thereafter, the plaintiff moving into the defendant's flat. The first child of the union between them was born in February 1997. It is agreed that about two years later the defendant sold his flat and the couple moved into rented accommodation until March 2001, when the defendant purchased the property 6, Le Petit Pres, Rue des Pres ("the property") for a consideration of £199,000. The parties regarded the property as being their home. It was bought in the sole name of the defendant because he was residentially qualified and the plaintiff did not have housing qualifications. The purchase was funded by a deposit of £54,000, which was provided by the Defendant, the balance being borrowed from the Royal Bank of Scotland International by way of a loan taken out jointly by the plaintiff and the defendant. The loan was secured against the property by way of a hypothec. In 2003, the parties had a second child. In July 2005, the plaintiff and the defendant separated and the plaintiff moved out of the property with the children. The defendant remained there until the property was sold for a consideration of £420,000 on April 27th, 2011. The defendant had carried out a loft extension which was completed at about the time the plaintiff left the property and was financed entirely by him, either with his own funds or by his repayment of a joint equity release loan in the sum of £15,000 which the parties took out. In addition, the defendant made all the loan repayments after the plaintiff left." There was also a written document, which had been prepared by the lawyers acting on the conveyance, although without express instructions to do so, which the parties signed without significant discussion, in which their joint responsibility to discharge in equal shares the outgoings, including the bank loan, was set out. Provision was made for the transfer of the property into joint names when that became permissible. Provision was also made for the plaintiff to receive 50% of the equity in the property after repayment both of the loan and of the defendant's deposit (with interest thereon) in the

event that the plaintiff was asked to vacate the property, decided to live elsewhere or if the defendant wished to sell the property. It was common ground that the parties' obligations to pay in equal shares had been disregarded. The plaintiff sought an award of damages based on any of the grounds she raised, namely breach of contract, proprietary estoppel, constructive trust and unjust enrichment. 102. The Royal Court rejected the plaintiff's claim in contract, and her claims based on proprietary estoppel and there being a constructive trust. It found for the plaintiff on the basis of unjust enrichment, taking as its starting point the legal interest in the property and then considering whether there had been enrichment benefiting the defendant legal owner at the expense of the plaintiff in a way that was unjustifiable. In doing so, the Court noted that the parties had regarded themselves as a couple sharing the roles and responsibilities within their family and that the document they signed, although not enforceable as a contract, showed their common intention to share any net proceeds of sale equally. When considering the remedy to be granted, the Court stated (at para. 112): "... the potential remedies for the plaintiff's claim in unjust enrichment could theoretically have been either a claim for a conveyance of the property, whether outright to her or into joint names, or for damages. We do not need to decide in this case whether the court would have had jurisdiction to grant the relief of a mandatory conveyance of the property. It may well be that the court would have had such a power, because this would be the granting of a remedy for an injustice which had been established, and the nature of the remedy might depend upon the nature of the injustice

- particularly if, for example, there were a number of minor children of the union who regarded the property in question as their home. It may well be that such a case does not fall within the maxim that *promesse à heritage ne vaut* ; but, as we have said, we do not need to decide that in this case and we leave that point over for adjudication in the future, should the need arise. In this case, the remedy is clearly a financial remedy in personam against the defendant and the question which then arises is as to how that is best calculated." The formula then set out to calculate the amount payable by the defendant to the plaintiff took into account the deduction made from the net sale proceeds representing repayment to the defendant of his deposit with interest and adjusted the division of that equity so that the plaintiff would have 40% and the defendant 60%. 103. The comments made by the Court when dismissing the plaintiff's claim based on proprietary estoppel can, therefore, be viewed strictly as being obiter. Having first noted that "the approach of the Royal Court to claims which are really based on proprietary estoppel has been inconsistent" (para. 23), the Court summarised the position in English law in the following terms: "25 The typical basis of a claim in proprietary estoppel is where persons have been induced to invest in or improve property owned by others either as a consequence of their own mistake (acquiesced in by the owner) or by direct encouragement or informal agreement. ... It is an essential component of proprietary estoppel under English law that the party asserting the benefit of that estoppel must have acted in the belief that he or she already owned or would obtain a sufficient interest in the defendant's property to justify the expenditure that had been incurred. It is also clear that, as far as the requirement is concerned that the plaintiff must

have acted to his or her detriment, the question of detriment is "... not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial" (see *Gillett v. Holt* ([2001] Ch. at 232)). There is a requirement that the detriment must be causally related to the promise or assurance." The judgment proceeds to review the cases in which the doctrine has been raised in Jersey in broadly similar terms to the preceding paragraphs in this judgment, albeit that the emphasis placed on different aspects that can be drawn from those cases is not precisely the same. The conclusions of the Court were as follows: "48 The central difficulty with applying the English doctrine of proprietary estoppel - assuming one can adequately define it - in Jersey is that it requires us to accept the principle that there is a theoretical division between the legal ownership of immovable estate in Jersey and its beneficial ownership. This is dealt with in more detail below under the heading of constructive trust and is no doubt what Page, Commr. had in mind when he referred to possible situations where the tensions between the demands of equity and the deeply entrenched principles of Jersey land law might pose difficulties for the court which were intractable. It might be argued that these principles of land law are not set aside but instead the court is merely providing a remedy for someone who has suffered unconscionable conduct at the hands of another. Leaving aside the abstract nature of the premise, it appears to us that the difficulty with this argument is that, in order to provide the remedy, principles of law would in fact have to be overridden in the case in question. Now there is no doubt that in cases of equitable estoppel the remedy is provided because the law forbids the party from exercising his legal rights by resiling from a representation he has made to the defendant on which the defendant relied to his detriment. Equity in the classical sense there mitigates the rigours of the law; but, although the boundaries are not always as clear as one might wish, it is possible to say the law has not been changed. The legal rights remain the same, but in equity they cannot be enforced. By contrast, changing the legal rights so as to found an action seems to us to have been the problem which this court faced in *Felard Invs.*; to hold that the doctrine of proprietary estoppel existed in Jersey law was a step too far for that court because the remedy provided would in fact have put at naught the principle of Jersey law embodied in the maxim *nul servitude sans titre*. Once that principle was put aside, there would be uncertainty in the law of Jersey real property because a check of the Public Registry would not indicate what servitudes burdened or benefited a property; neither would it be possible to ascertain this from any other registry nor from an examination of the abstract of title. This would be a great prejudice for potential purchasers and creditors and thus for landowners generally. For these reasons, we do not think that the doctrine of proprietary estoppel forms part of Jersey law if its effect is to create an equitable interest in land that exists in parallel with the legal interest which, as we understood it, was the bedrock of the plaintiff's claim. Accordingly, we reject the plaintiff's claim under this heading." 104. Having declined on this basis to recognise that proprietary estoppel exists in Jersey law, thereby departing from the previous decisions of *Pirouet*, *Maçon* and *Cannon*, the Court also considered on the facts whether the plaintiff could have succeeded if the doctrine had been capable of being prayed in aid. It concluded that she could not. It struggled to identify a

promise or assurance on which she might have relied. The parties were a couple before purchasing the property in question and they continued to live together in the property afterwards and the arrangements were all part of their everyday dealings as a couple. It also failed to identify any causal link between reliance on any assurances, whatever they were, for the plaintiff's actions. In relation to unconscionable conduct, it concluded that it would be undesirable to analyse fault for the breakdown of an unmarried couple's relationship, so any unconscionability must be related to the breaking of promises or assurances, and commented that this was probably the reason underpinning the way that the English courts have resolved issues by way of constructive trust rather than estoppel when dealing with this type of claim. Applicability of doctrine 105. This line of cases is not entirely consistent. The occasions on which proprietary estoppel has been raised before the Court are not so regular that a clear position has emerged. We are conscious that the two most recent cases in which the Court has concluded that the doctrine does not exist are both cases in which it was not necessary for the Court to give such a ruling. Before that, the existence of the doctrine in *Cannon v Nicol* was accepted without any argument. In any event, the relief sought was confined to damages. *Maçon v Quérée* was also a case confined to a claim for damages and so did not involve any exploration of the difficulties referred to at the end of paragraph 29 of that

judgment.

In *Pirouet v Pirouet*, the Court appears not to have considered that it was departing from a previous decision of the Court. The acknowledgement that a new line of authority was being established only came in *Maçon v Quérée*. As soon as the position is summarised in this fashion, it becomes apparent that, in the absence of any decision from the Court of Appeal, the state of Jersey law is currently uncertain. 106. We have noted the conclusion of the Court in *State of Qatar v Al Thani*

[1999] JLR 118, 126 on the operation of precedent in this jurisdiction: "In our judgment the doctrine of stare decisis as expounded by the English courts does not exist in Jersey. But that conclusion is not as heretical nor revolutionary as it might at first blush appear. We have already stated that nearly all legal systems acknowledge the persuasive force of judicial precedent. The importance of judicial precedent has increased not only with the availability of law reports but also with the creation of the Jersey Court of Appeal in 1961. An hierarchical structure of courts requires that deference be accorded by lower courts to higher courts ... This court is generally bound by decisions of the Court of Appeal and of course, as it always has been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish Court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling change in circumstances ... The Court is not bound by decisions of the Judicial Committee of the Privy Council sitting on appeal from some other jurisdiction." After quoting that passage, in "The Origin and Development of Jersey Law,

An Outline Guide", 5th ed . (2009), Stéphanie Nicolle QC explains (at para. 20.3): "The Inferior Number is not bound by its own decision on points of law, but it will not depart from an earlier decision unless persuaded that the earlier decision was wrongly decided, see *Att Gen v Pennington* (1970 JJ 1349); *Att Gen v Weston* (1979 JJ 141); *Att Gen v Hall* (1995 JLR 102)." 107. The question of precedent, particularly as it affects decisions of the UK Supreme Court (and those of the House of Lords in previous years) and of the Judicial Committee of the Privy Council, has recently been addressed in *Willers v Joyce* (No. 2)

[2017] 2 All ER 383. During the course of the judgment of the Supreme Court, Lord Neuberger PSC explained that "The position is rather more nuanced when it comes to courts of co-ordinate jurisdiction " (para. 6), and then set out (at para. 9): "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Dept*

[2012] EWCA Civ 741 ,

[2012] 4 All ER 94 ,

[2013] 1 WLR 63 (at [59]). I would have thought that circuit judges should adopt much the same approach to decisions of other circuit judges." 108. In our view, the approach described can, to the extent that it articulates the degree of deference that should be accorded to previous judicial decisions that would be likely to be found to operate in Jersey were the question to reach the Judicial Committee, inform the decision we are called upon to reach in the light of the inconsistencies between the previous decisions of the Royal Court on the doctrine of proprietary estoppel. On one analysis, to which we are minded to incline, the decision in the *Pirouet* case did not amount to a departure from an existing decision (*Felard*), but was regarded as involving a form of estoppel of a different character. The point of departure from that previous decision was recognised in *Maçon v Quérée* , where the reasoning in the later case was regarded as sound and to be preferred. Moreover, insofar as there were two previous inconsistent decisions, the Royal Court followed the second in time, thereby adopting the approach now endorsed by Lord Neuberger. *Cannon v Nicol* applied *Maçon v Quérée* without argument and so is an example of what was by then the established line of authority being applied. The possibility of reverting to the position set out in the *Felard* case did not arise. *Flynn v Reid* changed all that, albeit that what is said about proprietary estoppel can be regarded as obiter . To that extent, the established line of authority can be regarded as being that for which the Defendant's Advocate contends. Any departure from it should only be countenanced if we are satisfied that the earlier decision (effectively *Maçon v Quérée*) was wrongly decided. The fact that *Flynn v Reid* has already undertaken this exercise does not of itself mean that this is a subsequent decision which should be followed in the absence of cogent reasons to the

contrary. However the situation is looked at, though, there are previous decisions of the Royal Court that support and reject the existence of proprietary estoppel in Jersey and this case could be viewed as requiring a positive answer one way or the other. 109. Although the primary relief sought by the Defendants refers to proprietary estoppel following the three specified cases, their Advocate has necessarily had to broaden the scope of the applicability of the doctrine by reference to other principles of English law associated with the doctrine. In particular, the fact that the basis of the Defendants' claim is the Plaintiff's inactivity or silence requires a slightly different formulation of the doctrine from that previously set out deriving from *In re Basham* (supra). 110. The Defendants' Advocate offers *Lester and Hardy v Woodgate and Woodgate*

[2010] EWCA Civ 199 as a comprehensive analysis of the previous cases, and the various ways in which the principles had been formulated, culminating in what was said in para. 40: "If the claimant's conduct at the time takes the form of encouraging the defendant to believe that his otherwise tortious interference with the claimant's property will be waived and not objected to and, in reliance on that, the defendant subsequently acts in a way which can be characterised as detrimental then the position is, I think, different from the facts considered in *Ramsden v Dyson* and the court does then have to decide whether the causative effect of that conduct is sufficient to bar the enforcement of the legal right. In this connection it is important to bear in mind what Robert Walker LJ said about detriment in *Gillett v Holt*

[2001] 1 Ch 210 at page 232: - "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances. There are some helpful observations about the requirement for detriment in the judgment of Slade LJ in *Jones v Watkins* 26 November 1987. There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded - that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved." 111. This case was a dispute between neighbours about a pedestrian access to land that the claimants had purchased and on which they constructed a house. An easement affording a right of way on foot and with wheelbarrows had been created over the neighbouring property by way of a deed in 1980. This replaced a right of way granted by conveyance in 1963. However, the route over which the easement ran was a ramp which had either collapsed or been removed by the time that the claimants' predecessor in title acquired the parcel of land in 1999. Either way, it was no longer useable by then. The predecessor in title of the defendants then carried out further work to a parking space that had been created without complaint from the owner and

controller of the company that owned the land subsequently purchased by the claimants, even though the works constituted a substantial interference with the 1980 right of way. The claimants sought a mandatory injunction for the re-instatement of the ramp and an injunction to prevent parking so as to restore the right of way that had previously been granted. The defendants' response was that the claimants' predecessor in title had acquiesced in the works that had been carried out, relying on laches and equitable estoppel. 112. The review of the authorities set out in the judgment of Patten LJ begins from para. 26. Although it is very long, we believe that this passage merits quoting in full on the basis that it covers many of the issues raised on behalf of the Defendants in their Advocate's submissions and refers to many of the various other authorities to which he has drawn the Court's attention, with which we do not then need to deal separately: "26 Proprietary estoppel is conventionally based on a representation by words or conduct which amounts objectively to a statement about the future enforcement of legal rights or an intention to confer on the representee an interest in property. The Court has to determine whether the words used or the acts done would reasonably convey to the other party an assurance which it was reasonable for that party to rely upon. In such cases it is not necessary to prove that the representor intended that his words or conduct would have that effect or was even subjectively aware that they did so: see *Thorner v Major*

[2009] UKHL 18 . But clearly when such evidence does exist the reasonableness of the reliance is likely to be indisputable. Many of the earliest cases arose out of circumstances in which no express encouragement in the form of words was given by the landowner but where the other party built on or made improvements to the former's land in the mistaken belief that he owned or had rights over it. In such cases the landowner's passive and uncomplaining acquiescence in what is done may amount to an assurance that the other party will continue to enjoy rights over his land on which it would be reasonable for that party to rely. A much quoted example is *Dann v Spurrier*

(1802) 7 Ves 231 where a tenant carried out improvements to leasehold property in the belief that he had an option to extend the lease exercisable without the concurrence of the landlord. Although the case was decided by construing the lease in the tenant's favour, Lord Eldon LC expressed the view that:- "this Court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement." Where the conduct relied on to found the estoppel is acquiescence by the landowner a number of different factual situations may exist. The work may well have commenced before the landowner was aware of it and therefore without his being given any opportunity to object. In some cases this state of affairs may continue until the work is complete. In other cases the landowner will become aware that the work is being carried out and will then have an opportunity to object to its continuation. There is no doubt that if the landowner becomes aware of the work and knows that the other party is carrying it out in the belief that he owns the land in question or has rights over it but fails to object, his silence will be treated as a species of equitable fraud sufficient to found an estoppel.

The same will apply a fortiori if he positively encourages that belief. It is this factual scenario which supports the statement of principle in *Dann v Spurrier* and the well-known passage from Lord Kingsdown's speech in *Ramsden v Dyson*

(1866) LR 1 HL 129 at page 170 that:- "If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation." But what of cases where the work is carried out without any actual or justifiable belief as to title and is properly regarded by the landowner as a trespass? The view of the House of Lords in *Ramsden v Dyson* was that silence would not be sufficient in such circumstances to raise the equity at least in relation to the expenditure at that time. Lord Cranworth LC (at page 141) said that:- "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights." This brings me to the decision of Fry J in *Willmott v Barber*

(1880) 15 ChD 96 . The plaintiff was an unlawful sub-tenant who spent money on the land demised to him in reliance on an option granted by the tenant under which he would be able to acquire the remainder of the property comprised in the headlease. Both the sub-tenancy and the option had been granted without the landlord's consent and in breach of covenant. The sub-tenant sought specific performance of the option coupled with a declaration that the landlord has unreasonably refused consent to the sub-tenancy. The issue as between him and the head landlord was whether the landlord was barred by acquiescence from relying on the breach of covenant and, as Lord Walker has pointed out in *Cobbe v Yeoman's Row Management Ltd*

[2008] UKHL 55 at paragraphs 56-58, Fry J's five probanda were formulated in that context rather than as a statement of law which was intended to be of general application in cases of equitable estoppel. The relevant passage in Fry J's judgment is at page 105:- "It requires

very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do." One can see the influence of *Ramsden v Dyson* in much of this. Strictly applied, these conditions would exclude cases in which the claimant's work and expenditure is not attributable to a mistaken belief that he was entitled to act as he did (e.g. a case of deliberate trespass or nuisance) or in which the defendant is unaware that the claimant's actions are carried out under such a mistaken belief. But, in subsequent cases, the courts have held that it is not necessary for all five probanda to be satisfied in every case or (therefore) for the acts of the party seeking to rely on the estoppel to have been motivated by a mistaken belief as to his rights. Those conditions are a useful test of what might amount to unconscionable behaviour in such a case but they are not intended to apply indiscriminately regardless of the particular circumstances in question. So in *Shaw v Applegate*

- [1977] 1 WLR 970 the defendant installed amusement machines in his premises in breach of a restrictive covenant. The adjoining owners who were entitled to the benefit of the covenant took no action for about two years despite being aware of the existence of the machines. The Court of Appeal rejected a defence based on estoppel by acquiescence on the ground that the plaintiffs were confused as to whether the defendant's activities constituted a breach of covenant. But, having referred to the five probanda, Buckley LJ said this:- "As I understand that passage, what the learned judge is there saying is that where a man has got a legal right, as the plaintiffs have in the present case, being legal assignees of the benefit of the covenant binding the defendant, acquiescence on their part will not deprive them of that legal right unless it is of such a nature and in such circumstances that it would really be dishonest or unconscionable of the plaintiffs to set

up that right after what has occurred. Whether in order to reach that stage of affairs it is really necessary to comply strictly with all five tests there set out by Fry J may, I think, still be open to doubt, although no doubt if all those five tests were satisfied there would be shown to be a state of affairs in which it would be dishonest or unconscionable for the owner of the right to insist on it. In *Electrolux Ltd v Elextrix Ltd*

(1954) 71 RPC 23 Sir Raymond Evershed MR said, at p. 33: 'I confess that I have found some difficulty - or should find some difficulty if it were necessary to make up my mind and express a view whether all five requisites which Fry, J., stated in the case of *Wilmott v. Barber*, 15 Ch. D 96 must be present in every case in which it is said that the plaintiff will be deprived of his right to succeed in an action on the ground of acquiescence. All cases (and this is a trite but useful observation to repeat) must be read in the light of the facts of the particular cases.' So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J literally applicable and satisfied in any particular case. The real test, as I say, I think must be whether on the facts of the particular case the situation has become such that it would be dishonest, or unconscionable, for the plaintiff, or for the person having the right sought to be enforced, to continue to seek to enforce it." A similar approach was taken by Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*

[1982] 1 QB 133; and by the same judge in the Court of Appeal in *Habib Bank Ltd v Habib Bank A.G. Zurich*

[1981] 1 WLR 1265 at page 1285:- "For myself, I believe that the law as it has developed over the past 20 years has now evolved in a far broader approach to the problem than that suggested by Mr. Aldous and one which is in no way dependent upon the historical accident of whether any particular right was first recognised by the common law or was invented by the Court of Chancery. It is an approach exemplified in such cases as *Inwards v Baker*

[1965] 2 QB 29 and *Crabb*

v. *Arun District Council*

[1976] Ch 179. We have been referred at length to a recent judgment of my own in *Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1981] 2 WLR 567 in which I ventured to collect and review the authorities. I there said, at

- p. 593: "Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* LR 1 HL 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial
- requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within

the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour." Whilst, having heard the judgment read by counsel, I could wish it had been more succinct, that statement at least is one to which I adhere." In *Jones v Stones*

[1999] 1 WLR 1739, a dispute between the owner [sic] of neighbouring houses, the defendant placed a number of flower pots on a dividing wall. The plaintiffs sought an injunction for their removal. This was met with a denial of trespass on the ground that the wall was a party wall and, in the alternative, with a defence of estoppel based on acquiescence by the plaintiffs over a period of three years. The judge held that the wall belonged to the plaintiffs but that, by not objecting to the flower pots for that period of time, they had encouraged the defendant to assume that he was entitled to keep them there and were therefore estopped from seeking their removal. The Court of Appeal reversed the judge on the issue of estoppel. Aldous LJ treated the law on estoppel by acquiescence as laid down by Oliver J in *Taylor's Fashions*. He went on:- "At the heart of estoppel or acquiescence lies an encouragement or allowance of a party to believe something to his detriment. Thus the first question to determine is whether any action or inaction by Mr. and Mrs. Jones has encouraged Mr. Stones to believe that he was entitled to place the oil tank on the wall in the position that he did and to keep the flower pots there. Second, if there was such encouragement, then it is necessary to consider whether that caused detriment to Mr. Stones. Third, the court should decide whether in all the circumstances of the case it was unconscionable for Mr. and Mrs. Jones to assert their legal rights." On the judge's findings the defendants had placed the flower pots on the wall in the belief that it was jointly owned by them. That belief had not, on the evidence, been induced or affected by the claimants' inactivity nor therefore had any detriment been suffered by them in reliance on the plaintiff's conduct. These authorities, I think, indicate the need to take a flexible and very fact-specific approach to each case in which an estoppel by acquiescence is relied upon. *Shaw v Applegate* confirms that there may be cases where the principle can apply even though the initial interference with the property or legal rights was clearly and perhaps knowingly tortious. In such cases the absence of a mistaken belief or right on the part of the defendant will be one of the factors to be considered in determining whether the claimant's enforcement of his legal rights would now be unconscionable. As explained in *Stones v Jones*, a deliberate act of trespass or nuisance is unlikely to have been influenced by the position taken up by the claimant to the invasion of his legal rights or therefore to have given rise to any detriment on the part of the defendant in terms of the work or expenditure which he carried out. This, I think, is the point made by Lord Cranworth in *Ramsden v Dyson*, although his views are, I believe, closely linked to the relatively conservative approach of the common law as to the circumstances in which a party in the position of the landowner was under a duty to speak. So far as relevant, it is now clear that an obligation to make one's position known is not limited to cases where silence would amount to some form of deception. The commonly accepted test is that set out by Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings*

- [1977] AC 890 at page 903 which is whether:- "Having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner", acting honestly and responsibly, if he claimed any title to the property, to take steps to make that claim known ..." 113. We take no issue in relation to how the Defendant's claim has been labelled in their Rejoinder. We are prepared to treat the reference to proprietary estoppel as encompassing what could have been labelled as estoppel by acquiescence. The Defendants are, however, principally seeking an order that they have acquired the proprietary interest in the strip of land and do so on the basis that the Plaintiff did not raise with them the fact that she had purchased the strip of land as part of Les Arbres, thereby entitling her to raise with them that they were trespassing on her property, and on which they planted fruit trees and shrubs and which they continued to garden over many years. To that extent, because the ownership of the strip of land is the first question to resolve, the general label used cannot be said to be wrong. 114. Another way of approaching the issue is to concentrate on equity (or *équité*) in the manner suggested by the following passage from the judgment of Lord Denning MR in *Crabb v Arun District Council*
- [1979] 1 Ch 179, 187: "When Mr. Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not in itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in *Moorgate Mercantile Co. Ltd. v. Twitchings*
- [1976] Q. B. 225 where I said, at p. 242, that the effect of estoppel on the true owner may be that "... his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct - what he has led the other to believe - even though he never intended it." The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action. This was pointed out in *Spencer Bower and Turner, Estoppel by Representation*, 2nd ed. (1966), pp. 279-282. The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity." If I may expand what Lord Cairns L. C. said in *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439, 448: "it is the first principle upon which all courts of equity proceed," that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights - then even though that promise may be unenforceable in

point of law for want of consideration or want of writing - then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise: see *Central London Property Trust Ltd. v. High Trees House Ltd.*

[1947] K. B. 130 and *Charles Rickards Ltd. v. Oppenheim*

[1950] 1 K. B. 616, 623. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In *Ramsden v. Dyson*

(1866) LR 1 HL 129, 170 Lord Kingsdown spoke of a verbal agreement "or what amounts to the same thing, an expectation, created or encouraged." In *Birmingham and District Land Co.*

v. *London and North Western Railway Co.*

(1888) 40 ChD 268, 277, Cotton L. J. said that "... what passed did not make a new agreement, but ... what took place ... raised an equity against him." And it was the Privy Council in *Plimmer*

v. *Wellington Corporation*

(1884) 9 AppCas 699, 713-714 who said that "... the court must look at the circumstances in each case to decide in what way the equity can be satisfied" giving instances. Recent cases afford illustrations of the principle. In *Inwards v. Baker*

[1965] 2 QB 29 it was held that, despite the legal title being in the plaintiffs, the son had an equity to remain in the bungalow "as long as he desired to use it as his home." Danckwerts L. J. said, at p. 38: "equity protects him so that an injustice may not be perpetrated." In *E. R. Ives Investment Ltd. v. High*

[1967] 2 QB 379, it was held that Mr. High and his successors had an equity which could only be satisfied by allowing him to have a right of access over the yard, "so long as the block of flats has its foundations on his land." In *Siew Soon Wah v. Yong Tong Hong*

[1973] AC 836 the Privy Council held that there was an "equity or equitable estoppel protecting the defendant in his occupation for 30 years." In *Bank Negara Indonesia v. Hoalim*

[1973] 2 M. L. J. the Privy Council held that, despite the fact that the defendant had no protection under the Rents Acts, he had an equity to remain "so long as he continued to practise his profession." 115. These cases demonstrate that, if the factual situation with which this Court is faced had arisen in England and Wales (or in some other Commonwealth country in which the doctrine of proprietary estoppel, as a facet of equity, has been recognised to assist), the possibility of granting relief to the Defendants would be available. Whether

they would succeed would depend on how the facts were considered. We note how frequently reference is made to the fact-specific nature of the doctrine. In other words, the Court would be considering whether the Defendants had established that an equity existed in their favour arising out of the conduct and relationship of the parties and, if so, the extent of the equity so established and then what was the appropriate way to satisfy that equity. There would be no argument on the fundamental prior question of whether the doctrine even operates. However, the primary opposition to any of the relief being sought by the Defendants advanced on behalf of the Plaintiff's Advocate is that the intractable difficulties identified in *Flynn v Reid* should be recognised and adopted so as to reach the conclusion that the doctrine does not form part of Jersey law. 116. We have already referred to the significance we attach to the passing of the contracts before this Court. We further consider that proper regard necessarily needs to be had to the well-established principles underpinning claims for possession quadragenaire . As it was put in *Le Gros*, "Traité du Droit Coutumier de l'Ile de Jersey" (1943), at page 230: "La prescription ... a sa base dans la possession de celui qui acquiert et dans une présomption de renunciation de la part de celui qui n'exerce pas ses droits. ... De prime abord, on tire cette conséquence de la prescription acquisitive qu'elle constitue un acte de spoliation en dépouillant le propriétaire d'un bien qui rentre dans sa titre de propriété. Mais la prescription sert à consolider la propriété, et la victime de la prescription s'attire elle-même le blâme par sa négligence, tellement que le possesseur ne peut être inquiété ni au possessoire ni au pétitoire. Il importe donc au propriétaire de l'immeuble, qui désire conserver ses droits, d'intenter son action en revendication contre le tiers détenteur tant la prescription acquisitive ne s'est pas accomplie au profit de ce dernier." By way of further explanation of the rationale of the principle, *Le Gros* then quotes from *Basnage*: "En effet un temps si considérable efface tout soupçon d'injustice, d'usurpation et de mauvaise foy, et purge tous les défauts réels et personnels, et l'on ne présume point q'un propriétaire soit assez négligent pour abandonner ses droits." At page 233 , *Le Gros* continues: "Il y a interruption de la prescription lorsqu'un acte judiciaire intervient dans le cours de la prescription. Par exemple, une personne qui a joui d'un héritage pendant trente ans est actionnée pour exhiber titres. Le premier acte de la procédure a l'effet d'interrompre la prescription. Si l'acteur succombe dans son procès, la prescription reprend son cours sans qu'on puisse lui opposer le temps qu'a duré l'instance." 117. The position was confirmed in the Code of 1771: "Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, quarante ans, ou au-delà, ne pourront être inquiétés, ni molesté à l'égard de la propriété dans la chose possédée, la possession quadragenaire donnant un droit parfait, et incontrovertible, selon l'ancienne Coûtume de l'Isle, excepté en matière de servitude, laquelle ne peut s'acquérir par la prescription, fût-elle Centenaire: mais dont on peut se libérer, ou acquérir la liberté par la prescription, c'est-à-dire, lorsque la servitude n'a point été exercée par quarante ans continuels." 118. Reliance on silence inevitably introduces a tension with the established principles of possession quadragenaire . As touched on in the *Fogarty* case, this is one of the accepted exceptions to usual practice of the Public Registry being where one looks for proof of title that some property rights may exist. Rights are acquired as a

result of undisturbed occupation of property for 40 years. Accordingly, it is possible to defeat any acquisition through possession quadragenaire by speaking out as late as the fortieth year of occupation. However, on the Defendants' case, the failure to speak out many years earlier would produce the same legal effect through the doctrine of proprietary estoppel. It strikes us that this is a recipe for confusion and uncertainty. The position is, in our view, different from the cases where one party orally promises some future state of affairs to another. In a conduct case such as this, relying on silence or inactivity, at what point would the owner of the land become estopped from asserting that ownership? For example, would the owner, being aware of the encroachment on to his or her land be required to draw attention to this state of affairs at once or only after a period of time when it becomes apparent that the encroacher is acting to his or her detriment? What level of acquiescence or encouragement is necessary in these circumstances? As soon as this type of question is posed, the difficulties surrounding the application of the doctrine in the light of the maxim *nul servitude sans titre* and how it operates with possession quadragenaire becomes very apparent. Whilst the suggestion offered by the Defendants' Advocate that there is little difference in reality because what will be required is an Act of Court declaring the acquisition of property rights through proprietary estoppel has some attraction, the question arises as to when, and on what basis, it is appropriate to make the declaration in the first place. 119. This Court, in our view, is required to take fully into account the established customary law of possession quadragenaire. In circumstances where a claimant advances a title alleging it to be better than that of the owner of land identified by reference to the contract in the Public Registry, relying on occupation without complaint for a period shorter than 40 years, that claim requires very careful scrutiny. Were this Court to acknowledge that the doctrine of proprietary estoppel applies to such a case, we would be undermining the customary law by removing from a landowner the ability to avoid the consequences of inaction by taking appropriate action within that 40-year period. The example offered by Le Gros of commencing an action *pour exhiber titre* implies that this was regarded as the most obvious way in which to attempt to defeat any future claim based on acquisitive prescription. If this Court were to accept the submissions of the Defendants' Advocate that the doctrine of proprietary estoppel is available to the Defendants to defeat the Plaintiff's action *pour exhiber titre* and so enable the Court to make an order that the strip of land is now legally owned by the Defendants, which he has termed "full force" proprietary estoppel, we would be removing the Plaintiff's customary law right to choose when, within the 40-year period, to take steps to stop the prescriptive period running against her. In our view, whilst the focus is often on the way the acquiring party obtains title through prescription, we should not overlook that this is treated as being based on the presumption that the owner able to exercise rights associated with ownership has been sufficiently negligent in not doing so for such a considerable period of time that such an owner cannot properly complain when, by operation of law, ownership is lost in favour of the new possessor. The principle is premised on an owner not being so negligent as to fail to act within the requisite period. In effect, this means that the owner of land has certain rights protected by the customary

law and we take the view that this Court is unable to abrogate those rights through recognising that "full force" proprietary estoppel exists in a case such as this. 120. If the period of 40 years required to enable title to land to be claimed by an adverse possessor is regarded as unduly long in modern times, that is an issue for the legislature rather than the Court to resolve. We are conscious that, in other jurisdictions, the period is shorter because legislation has so prescribed. However, because it is such a fundamental principle of Jersey land law, settled from time immemorial in the customary law and endorsed in the Code of 1771, we consider that "full force" proprietary estoppel, in a case based on acquiescence, does not exist as part of Jersey law because of its effect on possession quadragenaire, which is established customary law that must be respected unless and until it is changed through legislation. 121. That conclusion suffices to resolve paragraph para. 11(ii) of the Defendants' Rejoinder; we therefore dismiss their claim for an order that they own the strip of land. Declaration relating to proprietary estoppel 122. Paragraph 11(i) of that Rejoinder seeks declaratory relief. Because any such relief can only be declaratory of the position as between the parties to these proceedings, we are not minded to grant the declaration sought. The relief sought is couched in general terms because of its reference to proprietary estoppel forming a part of Jersey law following the *Pirouet* case, *Maçon v Quérée* and *Cannon v Nicol*. It is not the function of this Court to offer general advisory opinions on the state of Jersey law; its function is to resolve disputes between the parties. Accordingly, this Court does not have to determine whether those cases were correctly or wrongly decided in order to determine the Defendants' claims to ownership of the strip of land. Unlike in those cases, there had been no discussion between the parties about the Defendants acquiring any property interest in the strip of land. Instead, this is a case that could be categorised as one of estoppel through acquiescence, which raises different, although related, issues. However, in part because the alternative relief sought by the Defendants in opposition to the Plaintiff's action *pour exhiber titre* also relies generally on whether the doctrine exists, as well as more broadly on this Court's equitable jurisdiction, we offer the following thoughts on how the cases have developed. 123. We find the reasoning in the *Felard* case and *Flynn v Reid* more persuasive than the approaches in the other three cases. The primary reason for doing so is that in both of those cases there was a principled analysis of how the doctrine of proprietary estoppel in respect of land ownership presents problems because of the system of passing contracts before the Court and requiring the parties to take the oath that they do when this happens. The validity of such a contract is susceptible to challenge on any of the usual established bases and the customary law of possession quadragenaire presumes abandonment of the title acquired by contract. To that extent, the law is clear and unambiguous, and it is certain. There is no need for the outcome dictated by law to be tempered in any way by the interposition of *équité*. 124. As we have already noted, *Lane v Lane* (supra) was firmly in the mind of the Court when *Pirouet* was decided. We do not think that *Lane v Lane* should be regarded as a foundation on which to build a Jersey doctrine of proprietary estoppel. Had the ancillary relief proceedings taken place here, the order made could eventually have resulted in the Viscount being ordered to execute the contract in place of the recalcitrant party (Article 36

of the Matrimonial Causes (Jersey) Law 1949). The primary issue, therefore, was whether this Court would give effect domestically to what had been ordered elsewhere under the principle of comity. The underlying issue was the means by which it could do so, and that was where reliance on the equitable jurisdiction was needed. The Court (at page 62 of the report) treated the wife as a faithless promisor under an agreement of sale who should not be permitted to shelter behind a procedural defence. That position might not have been found were this not an arrangement that resulted from an order of a competent court. In other words, had the parties agreed a sale of land and then not pursued it to the passing of contracts before the Court, attempting to perfect it through *équité* would, we suspect, have come to naught. As the Court stated in the Felard case (1978 JJ 1, 8): "an agreement to create (or extinguish) an interest in land is not enough; it must be implemented by a deed passed before the Royal Court." As such, *Lane v Lane* should perhaps be regarded as a specific example of how *équité* has been found to assist in the special circumstances that arose in that case rather than as establishing any general principle. 125. The *Pirouet* case itself did not, in our view, adequately address the *Felard* case. In particular, it did not acknowledge that the Court was departing from a previous decision and explain the reasons for doing so. It is quite possible that the Court did not consider that it was actually departing from what had been said in *Felard* , although that is now how the two cases are viewed. We also consider that the Court was also heavily influenced by the old English case of *Dillwyn v Llewellyn* (supra), in which the facts were comparable. However, although the Court ordered the transfer of the *nue propriété* , it accepted that it could not compel that to happen, so, in default of a voluntary transfer, damages to be assessed were made payable. We regard this outcome as amounting to recognition that, save in a situation where the legislature permits the Court to authorise another person to act, the Court should respect the free will of a party to a land transaction not to participate, albeit at risk of having to compensate the other party for the consequences of such a decision. It is also the only one of the three cases in which a transfer of ownership was ordered because both *Maçon v Quérée* and *Cannon v Nicol* were damages claims where the potential problems associated with ordering an unwilling person to transfer title did not arise. The same outcomes could potentially be achieved in both of those cases without needing to rely on the doctrine of proprietary estoppel. 126. *Maçon v Quérée* has always been the best case for the Defendants to advance and the hardest case for the Plaintiff's Advocate to explain away. It was, of course, followed and accepted as correct without further argument in *Cannon v Nicol* . We do not accept any suggestion that this case is to be treated as an anomaly and, in particular, we do not consider that a non-Jersey Commissioner will simply have incorporated English equitable principles without considering the consequences. Indeed, the passage at the end of para. 29 of that judgment, to which reference has already been made, demonstrates the recognition of different situations in which "the tension between the demands of equity on the one hand and deeply entrenched principles of Jersey land law will pose difficulties". The present case, as we have explained, is precisely one of the cases that the Court may have had in mind; no one could suggest that possession *quadrénaire* is not deeply

entrenched. *Maçon v Quérée* was, though, what might be regarded as more of a "classic" case of proprietary estoppel than the present case. There was positive action on the part of the landowner. She changed her will to give effect to the expectation that had been discussed. In that sense, there was a level of agreement found that constituted the assurance on which there was also a finding of the limited reliance and detriment mentioned. Monies of a reasonably significant level were expended on the property. The combination of those traditional elements were regarded as raising an equity in favour of the plaintiffs, following which the Court turned its attention to whether it would be unconscionable to allow the defendant to have changed her will so as to defeat the previously held common expectation as a result of subsequent events. The way of satisfying the equity in favour of the plaintiffs was to award a lesser amount of damages than had been claimed, broadly consistent with the benefit obtained by the defendant as a result of the monies that had been expended by the plaintiffs on the property, subject to some adjustment to reflect the poor way the plaintiffs had conducted themselves. We regard this as a very different type of outcome from that claimed by the Defendants in the present case, which involves conferring upon them some continuing interest in the strip of land, thereby adversely affecting the Plaintiff's legal rights as the landowner. 127. If a claim based on similar facts to those in *Maçon v Quérée* (or *Cannon v Nicol* for that matter, about which we make no further comment) were to arise in the future, the Court then seized with the case will have to decide whether to follow the corresponding decision or whether to prefer the reasoning of *Flynn v Reid*, repeated in the *Fogarty* case. It is beyond the scope of the present case for this Court to opine definitively on whether the doctrine can be prayed in aid in a case where the only relief sought is an award of damages. We have, though, explained, because it was fully argued before us, the direction in which we would have been most likely to travel, had we needed to do so. Our view also explains why we are not minded to make the declaration sought at paragraph 11(i) of the Defendants' Rejoinder. 128. A further consequence of that conclusion is that we have decided that we cannot grant the Defendants the relief they seek in the alternative in paragraph 11(iii) and (iv) of their Rejoinder because either form of relief is dependent on there being an estoppel, through acquiescence, on the basis of which the Court then tailors the relief to fit the circumstances. 129. Any ongoing peaceable occupation of the strip of land so as to maintain it as part of the Defendants' garden would have the effect of denying the Plaintiff the right she has by virtue of the contracts to enclose her land. This would, in our view, undermine the significance we have placed on the contractual position. It further raises the issue as to whether the inclusion of the word "peacefully" in the relief sought equates to affording the Defendants exclusive occupation of the strip of land or whether there could be shared occupation, but such that neither side could oust the other if then using, or occupying, the land. Through the course of the evidence, it became apparent to us that any relief other than a transfer of title is designed to maintain the status quo by virtue of which the parties treat the strip of land as part of the Defendants' garden and not as an area in which the Plaintiff can undertake any of the planting to which she referred. One of the difficulties is that any estoppel so raised against the Plaintiff would necessarily bind

her privies, including any successor in title (see, for example, the way it was put by the trial judge in *Lester and Hardy v Woodgate and Woodgate* (supra), quoted at para. 13). If it did not, it would be comparatively simple for her to sidestep the effect of any order binding her alone and not running with her land. In reality, any relief maintaining the status quo would have much the same effect on the Plaintiff as the primary relief we have already rejected as being incapable of being granted in a case such as this. As such an order would be predicated on the Defendants having established an estoppel, through acquiescence, preventing the Plaintiff enforcing those rights associated with the ownership she has and which she seeks by her action *pour exhiber titre*, forcing the Defendants to cede the enjoyment and the possession of the strip of land to her, our rejection of the doctrine for the reasons we have already given extends equally to our rejection that there is an estoppel where the appropriate relief would be to make either of the alternative orders sought. 130. Paragraph 11(iv) of the Rejoinder seeks any order the Court sees fit to prevent the unconscionable outcome. We do not understand the sole consideration in a case such as this if it were being heard elsewhere to be whether or not the outcome is unconscionable. If it were the sole consideration, it would come perilously close to the Court being invited to order what it regards as right and convenient. In our judgment, the entire premise of the Court's equitable jurisdiction is founded on more than that and as the lengthy passages we have quoted from the English cases show, the route to granting relief leads to the consideration in all the circumstances of the case whether the outcome otherwise dictated is unconscionable. We will move to our conclusions on that question shortly, but it would, in our view, only become a relevant factor to consider if we were satisfied that the Plaintiff's silence amounted to encouragement to the Defendants to act as they did and proceed on the basis that they would be able to continue to enjoy an interest in the strip of land and that, as a result of such tacit, or passive, encouragement by the Plaintiff, it caused them detriment in reliance on it (see, eg, the guidance quoted in para. 37 of *Lester and Hardy v Woodgate and Woodgate*). Unless and until those elements are satisfied, there is no question of an estoppel arising to prevent the Plaintiff from asserting what are otherwise her legal rights and it is only if to permit her to do so would produce an unconscionable outcome that *équité* could be prayed in aid by the Defendants. Consequently, once the conclusion is reached, as it has been, that an estoppel, through acquiescence, cannot arise because of the impact it would have on possession *quadragnaire*, that conclusion applies to any alternative means advanced in which the equity raised can be satisfied. The effect of possession *quadragnaire* is that acquiescence for a period less than 40 years results in no equity being capable of being raised in these circumstances. 131. For these reasons, the Defendants' opposition to the Plaintiff's action for *exhiber titre* is all dismissed and none of the relief sought granted. The Plaintiff's action *pour exhiber titre* is granted, although the precise terms on which the Defendants are to cede the enjoyment and possession of the strip of land is something on which the Court invites further comment from Counsel. Position if doctrine applicable 132. Even if our conclusion that the doctrine of proprietary estoppel as it has been advanced on behalf of the Defendants does not apply to afford them the relief sought is wrong, we are satisfied

that applying the doctrine in the manner we have described it to the facts would still result in the same outcome and the Court would not grant the Defendants an order that they own the strip of land. 133. Unlike in the majority of cases in which such an estoppel has been found, both here and in other jurisdictions, it is common ground that the Plaintiff has not said anything to the Defendants to lead them to think that they own, or will be given any right over, the strip of land. There is no express clear and unequivocal promise or assurance. Instead, the Defendants found their claim on the conduct of the Plaintiff in remaining silent. In other words, they argue that the Plaintiff's decision not to raise with them their obvious misunderstanding of who is the owner of the strip of land perpetuated their belief that they were the lawful owners of it and for the Plaintiff to resile from that position after so many years, during which the Defendants have altered their position to their detriment, would produce an unconscionable outcome. 134. We have already identified concerns about the point in time at which an estoppel could crystallise. The situation in the present case is arguably even more complicated as a result of the position of the Defendants in the mid-1990s. When the strip of land was cleared by, or on behalf of, the Defendants, they did not own Les Primevères . The owner was the JEC and the Defendants occupied with that company's permission, the precise nature of the arrangement having not been explained to us. It was at this time that the fruit trees and other shrubs were first planted on the strip of land. At that time, the ownership of the strip of land was incapable in law of passing to the Defendants, although it would have been capable of being acquired by the JEC. In those circumstances, it is debatable as to whether the Plaintiff should have said or done anything differently and, if so, to whom she should have addressed any comment. She did seek advice from Advocate Jenner and was told that it would only be if any occupation continued for 40 years without comment from her that there would be a problem. We consider that the Plaintiff was able to take comfort from that advice and act in accordance with it. Thereafter, the state of the strip of land does not appear to have changed much, although the Defendants continued to have the grass mown. Perhaps more significantly, the Defendants have proceeded to develop Les Primevères . However, there is no suggestion that the Plaintiff knew they were doing so because they had misunderstood who owned the strip of land. In particular, there has been no evidence of any encouragement by the Plaintiff of the Defendants' development of Les Primevères . Consequently, we do not consider that there was any justifiable belief that the development undertaken arose from any misunderstanding of the Defendants as to the ownership of the strip of land. Any such connection can only have been in the minds of the Defendants and was not shared by the Plaintiff because they said nothing to her about why they were making the changes to their property either. Further, on the basis that the Plaintiff knew the boundary from the contract as explained to her when she purchased Les Arbres , she was entitled to assume that the Defendants had been similarly informed about the position when they purchased Les Primevères in 1996. 135. It is undeniable that the Plaintiff has had plenty of time and many opportunities since the 1990s to explain to the Defendants that she owns the strip of land. Quite why she waited until 2015 to spell out the position and request them to give her possession of it is unclear. In addition to the cases to

which we have referred, we understand that the position in English law relating to conduct through silence amounting to a representation on which the person asserting the estoppel relies can often turn on there being some obligation on the part of the person maintaining the silence to speak out or at least to act in some way. Because of the relationship with possession quadragenaire, we do not consider that such an obligation to speak out could have arisen before 2015. As a consequence, we do not find that there has been conduct through silence or inactivity of a type that amounts to a representation on which the Defendants can rely. There has been no waiver of the Plaintiff's right to highlight the Defendants' interference with her land that can be equated to encouragement of their misunderstanding about the question of ownership. We note that the three decisions of this Court on which the Defendants rely are all examples of where there had been very clear representations made that amounted to a clear and unequivocal promise or assurance being given. The position in the present case is far removed from any of those cases. 136. We have concluded that the Defendants did not pay sufficient attention to the extent of the land purchased by the JEC in 1992. Their explanation that they were not the client purchasing is, of course, an accurate one, but their approach thereafter did not arise as a result of anything positive that the Plaintiff did to lead them to think they owned the strip of land. However, as a result of not informing themselves, or not being informed adequately by the new owner of Les Primevères, the JEC, they did not understand in 1992 that the strip of land was in the Plaintiff's ownership. To that extent, we find that the Defendants did not in the 1990s blatantly encroach on land they knew was not their land to occupy. 137. The explanations of the Defendants about their belief in a right of way do not, though, stand up to scrutiny. A right of way associated with the overhead power cable has been shown by the plan produced identifying approximately where it ran not to be applicable. The power line ran for the whole length, or at the very least the vast majority of its length, nearer to the house at Les Primevères than the strip of land. In any event, we consider that the First Defendant would have been sufficiently familiar with any such rights to have realised that any reference to a right of way associated with a power cable could not have existed. He would have checked the position had he genuinely been concerned about such a possibility. Reference has also been made to it being a public right of way over land belonging to Les Primevères. When the initial enquiry was made on behalf of the JEC just before the 1992 contract was passed before the Court that was the term used. It was mentioned several times by the Defendants; indeed, they say they discussed many years later taking steps to have any such public right of way extinguished. However, if it were a public right of way, we think that the Defendants would have questioned why the previous owner had allowed the area to become so overgrown, arguably rendering use of any public right of way impossible. Further, a public right of way would potentially have had more of an adverse impact on their privacy and enjoyment of their property than any other explanation of the rights affecting the strip of land or any other part of Les Primevères. Because the Defendants must have caused that enquiry to be made during the conveyancing process, we consider that the outcome of that enquiry would have been made known to them, or at least to the First Defendant, meaning that

they were aware when the JEC purchased Les Primevères that there was no public right of way over the land. Had they persisted in believing that a public right of way existed, it would be very strange to plant trees and shrubs, especially a shrub the Second Defendant treasured, on land where members of the public were permitted to pass. The references of the Defendants to two incidents where they saw strangers on the strip of land supporting their assertion that they thought a public right of way existed are, in our view, no more than coincidental. As the Defendants explain at paragraph 15 of their Answer, the strip of land tapers off anyway and provides no right of access to anywhere. We do not find it credible that they had any belief in the existence of a public right of way. 138. To the extent that the Defendants subsequently thought the Plaintiff, as the owner of Les Arbres, had a right of way over the strip of land, the events of 2005 raise questions about the sustainability of that belief. The note that the Plaintiff delivered in June 2005 expressly refers to "the east boundary". On the Defendants' case, they did not have any boundary to the east of their property with the Plaintiff's land, because they said they thought that boundary was with the Cooks' land. Rather than this note being as innocuous as they now claim it was and so not meriting any attendance by them pursuant to the Plaintiff's invitation or even any response, we consider that it must have led to them querying what it was all about. Such a reference to "the east boundary" cannot, in our view, have meant simply the continuation of the boundary at the north of Les Primevères. It would be too obvious a mistake on compass points for them to have reached that conclusion and so we do not find their explanation about the note credible. In any event, the continuation of the fencing across the end of the strip of land would, we think, have resulted in them wanting to know that it had been placed where the Plaintiff was entitled to position that fence, if, as they say they believed, it was on, or near to, the boundary between their respective properties. The inclusion of a gate must also, in our view, have led them to thinking more about what rights, if any, existed so as to warrant this. As we have stated, holding the belief that the installation of the gate was associated with maintaining a public right of way lacks credibility and is rejected by us and so does not assist the Defendants' version of what they thought the gate represented. Similarly, the planting by the Plaintiff of the *Elaeagnus* shrub on what the Defendants must have regarded as the "wrong" side of the boundary fence did not draw any comment, which might have been expected had the Defendants believed that they owned that area already. In short, the events of 2005 must have put the Defendants, or at least the First Defendant, on enquiry as to what the true position was. 139. The Court has formed the impression that the principal decision-maker among the Defendants when it comes to business-type decisions is the First Defendant. That conclusion is not intended to minimise the role played by the Second Defendant, but rather to emphasise that the primary decision-maker in relation to events associated with the strip of land has been the First Defendant. The role of taking an interest in the garden did clearly fall to the Second Defendant. As the First Defendant stated, his wife directed the gardeners what to do and his role was to appreciate it. We draw a distinction, therefore, between decisions about how the garden should appear and decisions relating to quasi-commercial matters. The First Defendant described in detail the way he analyses

issues depending on the consequences. He acts with care. We think it is more likely that he was aware of the issues relating to the strip of land and the boundary before the Second Defendant was apprised of them by him. There is an understandable element of him wishing to shield his wife from what would otherwise be upsetting news. As evidenced by the First Defendant meeting with the Plaintiff on 9 March 2015 without having first told the Second Defendant he was doing so, he sought to identify and organise solutions to problems before sharing those problems with his wife. If he could, he wished to present her with a positive outcome. We consider that his readiness at that meeting to acknowledge that the strip of land was owned by the Plaintiff supports the conclusion that he was aware of the true position some time before that, and we find that it must have been prior to December 2014 when he pointed out the location of the sixth boundary stone to Mr Cabot, although exactly when is not apparent. Even if the First Defendant had been unaware of the significance of boundary stones in 1992 and 1996, by 2014 we consider his experience as a Jurat must have led to him having some appreciation of their significance. We expressly reject the First Defendant's assertions that he was ignorant about these matters until much later. Further, because we find that the First Defendant was aware of the boundary demarcation with Les Arbres earlier than he acknowledges, we also reject the Defendants' assertions that any issue about the boundary came as a surprise to them when it was raised on behalf of the Plaintiff in March 2015. 140. The misunderstanding about ownership of the strip of land under which the Defendants were labouring in 1992 must, we feel, also be placed in the context of the transfer in 1996 of Les Primevères to their legal ownership. We accept that this purchasing process did not take place in the same way as it would have had the Defendants been coming to Les Primevères entirely anew as the purchasers. They were purchasing a property from the First Defendant's employer in which they had been living for four years. We suspect that, throughout that time, they treated Les Primevères as if it was their own property anyway. The development work carried out in 1994 supports that view. However, the Defendants did cause their attorney to take the oath on their behalf confirming that they understood what they were purchasing. As a lawyer who had played a part in the 1992 contract, Elizabeth Breen must have known the extent of the land being conveyed to the Defendants and so was capable of clarifying the position for their benefit. Even if the Defendants did not actually familiarise themselves with the boundary in the 1996 contract, they are to be fixed with constructive notice of it. This has a bearing on any reliance they can place thereafter on any conduct amounting to an assurance by the Plaintiff. Their continued occupation of the strip of land rests from 1996 on their own mistake in not checking carefully enough the title of the land they had purchased. We think that this Court should be slow to give assistance to any person as a result of such a self-induced error. Such a self-induced mistake necessarily affects their reliance on an equitable remedy. It also has a significant impact on whether the outcome through applying the contractual, and so legal, position is regarded as unduly harsh. 141. On the facts, there can be no suggestion that the parties shared any misunderstanding. The Plaintiff has known from 1987 that she owned the strip of land and has never been mistaken about that fact. There is simply no mutual mistake in this case.

The Defendants did not realise in 1992 that the Plaintiff owned the strip of land. They thought it formed part of the land of Les Primevères purchased by the JEC. They submit that the silence of the Plaintiff should be treated as her acquiescence in their continuing occupation of the strip of land and further that this is demonstrated by the passage quoted from the meeting between the Plaintiff and the First Defendant on 9 March 2015 and, in particular, use of the phrase "you keep it". This is the primary basis on which the Defendants submit that the Plaintiff knew of the Defendants' mistake. The Plaintiff has explained what she said by reference to the surrounding words used as meaning that the Defendants were maintaining that strip of her land and so she was content for them to enjoy using it. We prefer the Plaintiff's explanation rather than accepting the construction advanced by the Defendants' Advocate. 142. The suggestion that the Plaintiff was acknowledging during this conversation that she had always proceeded on the basis that the Defendants had established a property interest in the strip of land to the extent that they were able to retain it as theirs for ever is fanciful. To interpret "you use it you keep it" as evidence of the Plaintiff's previous state of mind throughout the Defendants' occupation of the strip of land is straining the English language beyond breaking point. We do not even regard it as a slip of the tongue. The Plaintiff had only just explained "I didn't mind you gardening it I mean I always thought you looked after it in return for having use of it ... my understanding was always you used it and you gardened it which was a fair deal really". Having explained what she understood to be the position and how she was content with an arrangement that the Defendants could make some use of the area they had cleared and continued to maintain, she repeats herself but uses a synonym for "maintain" by referring to "keep". Even the quoted passage read as a whole clearly demonstrates the meaning to be attributed to the Plaintiff's words but, when this short exchange is placed into the entirety of the discussion at that meeting, it is quite clear that the Plaintiff was not conceding that she had ever in her mind abandoned the strip of land to the Defendants for them to own thereafter. 143. We also consider it significant in the context of this meeting that the First Defendant readily conceded that the Plaintiff owns the strip of land. As an astute and experienced businessman, had he not been prepared to recognise that position, he would not have made an offer to purchase it, especially at an inflated price, which he subsequently repeated in correspondence. The implication is that he appreciated that he would need to negotiate a satisfactory outcome. We understand that the arguments advanced on behalf of the Defendants, relating first to possession quadragenaire until it was abandoned and since to proprietary estoppel, are technical matters that may well not have been thought about at the time, but we view the First Defendant's immediate response to be a fair reflection of his position prior to that time. It had not crossed his mind that the Plaintiff's inaction could have resulted in the strip of land having at some time prior to that date resulted in him and his wife becoming the legal owners of it. His belief had been that the Defendants purchased from the JEC what the JEC had purchased from Ms Brown and that the strip of land was included in those purchases. In other words, he had not contemplated at all that the Defendants had acquired, or could, otherwise than by purchase, acquire the strip of land from the Plaintiff. 144. For these various reasons, we

would not have been persuaded, if called upon to determine the issue, that the conduct of the parties, and particularly that of the Plaintiff, has been such that the Defendants have demonstrated that there has been anything amounting to a promise or assurance on which they can rely as the first stage of establishing ownership of the strip of land, or that should now preclude the Plaintiff from denying that the Defendants assumed that the strip of land was their land. The Defendants have not explicitly identified when it is that they say that the Plaintiff's conduct in remaining silent about her ownership of the strip of land resulted in there being a promise or assurance on which they could rely. There is no evidence, save for the strained interpretation advanced in respect of what was said by the Plaintiff on 9 March 2015, which in any event we reject, that the Defendants regarded the Plaintiff's position as encouragement to them over the mistake under which they had been labouring. In particular, there is no link between what the Defendants were doing at the time and any belief in their minds that this meant that they had acquired, or were to acquire, through continuing to maintain the strip of land, the ownership of it. In the context of the relationship over the years between the parties, we also do not consider that the Defendants could have regarded the Plaintiff's silence as any encouragement arising from the Plaintiff's knowledge of their mistaken belief. Apart from the meeting on 9 March 2015 about which we have commented, there is no evidence of how that alleged knowledge arises and impacts on the position. In these circumstances, we are not minded to draw any inference against the Plaintiff on this issue. 145. The Court would also struggle to find that the Defendants had acted upon any such tacit promise or assurance and that this has resulted in detriment to them. As we have just noted, the initial incursion on to the strip of land occurred at a time when Les Primevères was owned by the JEC. Accordingly, any costs associated with clearing the overgrown area and of planting what was then found on the strip of land arguably pre-date the time at which the Defendants could assert any ownership through proprietary estoppel. We consider that the doctrine must be treated as not applying at a time when the persons claiming the estoppel could not take the benefit of ownership for which they are contending. Thereafter, although they have not been quantified for us, the maintenance expenses incurred in respect of the strip of land each year must be small. We further consider that the expenditure should be viewed in the context of what was gained by the Defendants from it. The view from the house and garden at Les Primevères was kept clear and tidy. This was something that the Defendants regarded as important. We take the view that this can be regarded as a benefit to the Defendants rather than a detriment and the costs element was a small, rather than a significant, expense associated with it. The position is markedly different from a case in which a neighbour has inadvertently constructed a building, or part of a building, on another's land. Because the Plaintiff did not take any of the fruit from the trees, any crop produced was available for the Defendants to enjoy. In effect, as the Plaintiff has rationalised it, the benefit of the Defendants' gardening on the strip of land was that they could enjoy any use they then had of that area, including the views from their property, which we believe means that there was no detriment to them in the small amounts of expenditure that will have been incurred. We have noted the way in which the fields were

dealt with in the Pirouet case, which supports our conclusion on this issue. 146. We have considered whether the much more significant amounts of money that the Defendants have spent on extending and improving their house can properly be regarded as them acting to their detriment on the basis that they owned the strip of land. Unlike some of the well-known cases on proprietary estoppel, the building being developed by them is undoubtedly owned by them. The expenditure involved has been to develop property that they own rather than any property they are now claiming on the basis of raising an estoppel in respect of it. We incline to the view that it would stretch any necessary causal link too far to treat this expenditure as within the type of detriment required. Further, the most significant development work undertaken by the Defendants arose from the permission obtained by them in 2011. As we have already commented, receipt by the Defendants of the Plaintiff's note in 2005 referring to "the east boundary" should have put them on notice that there was something to consider and, given the First Defendant's stated approach to decision-making, we feel he must have analysed the position sufficiently carefully before committing the Defendants to such a large amount of expenditure. Consequently, the Court is not persuaded that this type of indirect detriment, even if capable of being taken into consideration, would operate so as to complete the final factors that the traditional approach to proprietary estoppel requires the Defendants to establish. 147. In these circumstances, even if the Court should have made the declaration that proprietary estoppel forms part of Jersey law sought by para. 11(i) of the Rejoinder, it would have concluded on the facts that the Defendants are not entitled to an order that they own the strip of land. Alternative relief and unconscionability 148. As an alternative to ownership, the Defendants seek an order that they may continue peacefully to occupy the strip of land and maintain it as part of their garden, ie, maintain the status quo, or any other order the Court sees fit to prevent an unconscionable result. We have, therefore, similarly formed a view on what, if anything, can be ordered in favour of the Defendants on the basis that there is some equitable relief to which they are entitled. 149. As with our reasoning in respect of the claim of ownership of the strip of land, the difficulty the Defendants face is that we cannot find that they are entitled to rely on any conduct of the Plaintiff to underpin any tacit assurance, or any encouragement of the mistaken position they held about ownership, that the arrangements that have operated for years would be allowed to continue unchanged. We have broadened our consideration of these issues so that they cover all the bases summarised by Patten LJ in *Lester and Hardy v Woodgate and Woodgate* (supra), looking particularly for encouragement, detriment and unconscionability as set out in the Defendants' pleaded case so that this produces a causal link constituting a bar to the Plaintiff enforcing her legal rights. The Defendants' Advocate submits that, as a court of equity (or *équité*), this Court should not countenance an outcome that it regards as unjust or unconscionable. However, we are clear that it is not open to the Court simply to reach a conclusion as to what it regards as being right and convenient. To an objective observer, the stance adopted by the Plaintiff in declining even to discuss selling the strip of land to the Defendants at a vastly inflated price may appear to be unduly inflexible. Similarly, an objective observer might not regard

the levels of devastation expressed by the Defendants at the prospects of a boundary feature being erected, particularly the hedge to which the Plaintiff has consistently referred, as entirely realistic. As a result of our attendance on site, assisted by the photographs that have been produced, we have attempted to visualise the effects of a hedge if one were to be planted and what changes to the views of the Defendants there would be. We have also attempted to consider what level of intrusion there might be on the Defendants' enjoyment of their house and garden from anyone on the strip of land looking over a hedge. Because of the sloping nature of the strip of land, it is obvious that some of the garden, and possibly the corner of the house, at Les Primevères could be seen over a hedge, even one permitted to grow to six feet tall. However, the views into the upper floor of the house might not be direct if the hedge were of that height. Further, we recognise that even if the strip of land were to be continued to be used by the Defendants, there is nothing at present preventing the Plaintiff or any of her invitees from looking into the garden at Les Primevères, and even into the house, from the gate area or further up the chemin looking over the fence that was erected in 2005. We have taken these factors into account in assessing whether, if nothing else mattered, we would view dismissing the Defendants' claims as producing an unconscionable outcome. 150. Our conclusion is that such an outcome is not unconscionable. We have noted that the term unconscionable has been used interchangeably with dishonesty in some of the English cases. Other cases equate the position to the perpetuation of a fraud. In our view, it cannot be said that the Plaintiff's silence can be regarded in such a manner and it would be inappropriate to categorise it in that way. The significance of the passing of the 1996 contract before the Court cannot be overlooked. In a jurisdiction that is physically quite small, land ownership is inevitably precious. There is not always any underlying purpose associated with ownership of "odd" parcels of land, but the mere fact of ownership of such a scarce commodity is sufficient in itself to support the general policy of affording adequate protection to land owners. The customary law has always stressed the importance of preserving land in the hands of those who own it, whether through purchase or inheritance. Property rights are not easily lost and this means that others do not easily acquire them. Although we think it was unwise of the Plaintiff to keep her silence for as long as she did, there is a difference in remaining silent and making some explicit assurance. Although the Defendants are aggrieved that the Plaintiff did not tell them the position earlier than she did, the Plaintiff is entitled to feel aggrieved that the Defendants apparently did not familiarise themselves with the 1996 contract when they purchased (and arguably the 1992 contract under the terms of which they were permitted to enter into occupation by the JEC). It is an unusual set of circumstances, but in assessing whether the position now taken by the Plaintiff is unconscionable, the Court considers that it is necessary to weigh in the balance the shortcomings of the Defendants in this regard. The contract, and in particular the significance of the oath taken by, or on behalf of a purchaser, should not, in our view, be minimised to the extent of effectively being disregarded. 151. We have also considered how to view the Defendants' contention that there is an unconscionable outcome in the light of their actions. The meeting that the First

Defendant had with the Plaintiff on 9 March 2015 is significant in this respect. There was a ready acknowledgement by the First Defendant that the Plaintiff owned the strip of land and we find that his primary objective at that meeting was to persuade the Plaintiff to sell the strip of land to the Defendants. Whilst we accept that he may not have been aware then of the arguments that have since been deployed on behalf of the Defendants, having had several days to prepare for this meeting, we consider that he had a clear objective in mind and the content and shape of their conversation that day supports this conclusion, as does his letter to Mr Cabot a few days later. Putting it bluntly, he was prepared to carve out a deal that suited him and his wife and he prepared himself accordingly. He took a conscious decision to record their conversation without forewarning the Plaintiff. We infer that his motivation for doing so was so that he would have proof, if the Plaintiff's agreement were forthcoming, that she would sell to them, even if the precise terms were not fully agreed at that time. He used a mixture of persuasion and veiled threats to try to achieve his desired outcome, but was unsuccessful. We think that this purpose needs to be factored into any conclusion on whether the outcome dictated by the legal position is unconscionable. 152. We recognise that it is open to the Court to refuse to provide to the Plaintiff the relief she seeks if to do so would produce an unjust or inequitable result. This is necessarily a very fact-specific consideration. The first consideration has to be whether the outcome is unduly harsh. The order sought by the Plaintiff is that the Defendants be ordered to cede the enjoyment and possession of the strip of land to her. The legal position is that the Defendants have failed to establish that they have title to the strip of land and, once their claim in proprietary estoppel is dismissed, they accept that the legal title to that strip remains vested in the Plaintiff. The Plaintiff's right to possession follows in law, unless there is some lesser right to occupy the land that can be ordered in favour of the Defendants which would ameliorate such an unduly harsh outcome. However, we do not think that granting the legal owner possession of her strip of land is unduly harsh in the circumstances of this case. The Plaintiff has that right and, providing she asserts it proportionately and with good neighbourly intentions, we do not think that the Defendants can properly complain. 153. Even if we should regard this outcome as unduly harsh, we are not convinced that there is a solution that could be ordered that would provide the level of comfort that the Defendants are seeking in wishing to maintain the status quo. Although it is easier to envisage an arrangement under which the Defendants, whilst they own Les Primevères, are permitted to enter on and maintain the strip of land, with no permission for the Plaintiff to enter on the strip of land, all of this being a right personal to them and not running with the land, any such personal right would be capable of being defeated by the Plaintiff selling Les Arbres, or at least the strip of land, to a third party. What the Defendants want to achieve is only achievable if there were to be some right running with the strip of land, at least whilst they own Les Primevères. That position is not far removed from an order that ownership be transferred to them on payment of compensation, possibly to be assessed at a higher than market value level. It is a type of distinction without a difference comparable to the comment made in the Felard case, in that what is really being sought by the Defendants has the same effect as if the Plaintiff

were required to transfer ownership. It would tie the Plaintiff's hands from being freely able to manage the land she owns that would not, in our opinion, reflect the justice of the case. As Robert Walker LJ explained in *Gillett v Holt* (supra), granting a disproportionate remedy is not the right way to prevent an unconscionable result. Similarly, we have considered whether, instead of exclusive occupation, the Court could order some form of shared enjoyment of the strip of land, imposing some restrictions on what can and cannot be done thereon by the Plaintiff and the Defendants. Again, we do not feel that a practicable working solution could be imposed in such a manner that it respects the Plaintiff's ownership rights. Any solution founded in *équité* must, we think, pay appropriate regard to the legal position and we have failed to identify any outcome that could be imposed on the parties balancing their respective equities. We are not persuaded that there is sufficient flexibility in these equities to be able to tailor any mutually satisfactory relief. We have even considered whether an award of damages could be made either in respect of the expenditure incurred or by reference to the value of *Les Primevères* without ownership of the strip of land. As we have explained, because any expenditure relating to gardening is small and has provided benefit to the Defendants, even if left to consider whether any damages should be awarded to the Defendants flowing from this, we would not have been minded to make any such award. Further, were we left considering whether to award damages because of the decisions taken by the Defendants to develop *Les Primevères*, as we have also explained above, we would regard any loss to them as being too remote to qualify for any compensatory payment from the Plaintiff. For all these reasons, we do not consider that the alternative relief sought by the Defendants is capable of being granted. 154. That is not to say that a mutually satisfactory solution cannot be agreed between the parties. What is apparent to us is that the Plaintiff and the Defendants have managed to live for over 20 years in a respectful neighbourly fashion and, so far as it is possible for them to revert to that position now that the dispute about the legal ownership of the strip of land is resolved, we encourage them to do so. The enclosure clause in their contracts enables either of them to act unilaterally to the extent permitted, but our concern is that unilateral action is only likely to entrench their positions still deeper and create yet more antagonism between them. The strip of land is physically removed from the rest of the Plaintiff's land. We would be surprised if she, or any successor in title, were to make any extensive use of the strip of land, thereby intruding on the peaceful enjoyment of *Les Primevères* by the Defendants. Her stated intention, although we acknowledge that she is not bound to adhere to it, is to use that small area as a location for further planting and, although the Plaintiff, or someone on her behalf, would need to be on the strip of land to tend anything planted and generally to maintain it, this does not appear to be anything that would impact on the Defendants significantly more than their own gardeners working in that area. Following a period of reflection, the parties should be able to discuss and agree the type and location of any hedge along the boundary, if such a hedge is still what the Plaintiff wants to plant. The other option is for the Plaintiff to realise that the Defendants now own little parcels of land on the two sides of the strip of land that were previously in the ownership of the Cooks, possibly making the strip of land

she owns less attractive to her and so she might be prepared to sell it to the Defendants at a price they are prepared to pay. However, all these matters are for the parties to discuss rather than for this Court to dictate, and will depend on how much the parties are able to put these proceedings behind them.

Conclusion

155. For the reasons we have set out, our primary conclusion is that proprietary estoppel is unavailable to assist the Defendants in this case. Accordingly, the relief sought by them in their Rejoinder cannot be granted. We reach that conclusion principally as a matter of law but, even if we were to accept that the doctrine could be invoked by the Defendants as forming part of Jersey law, on the facts we would not be prepared to grant them an order that they own the strip of land or any order enabling them to remain in possession of the strip in the ownership of the Plaintiff. As a result, we grant the relief sought by the Plaintiff in her action *pour exhiber titre*. 156. We invite Counsel to consider the terms on which the Defendants must now cede the strip of land to the Plaintiff. At the very least, we believe that the Defendants should be entitled to remove from the strip of land the trees and shrubs they have planted, so as to preserve them for their own use. Apart from having cleared the land and mown it for years, this planting, especially the shrub to which the Second Defendant has understandable sentimental attachment, are the only improvements made and we do not think that they should be regarded now as the Plaintiff's, in the sense of running with the land, unless the Defendants indicate that they do not wish to take any of them. Appropriate terms of access for that purpose need to be included in any order. Further, in the absence of agreement between the parties as to an appropriate order, the Court will also entertain submissions on the question of costs. *Authorities Fogarty v St Martin's Cottage Limited*

[2016] JCA 180 . *Ex parte Viscount Wimborne* 1983 JJ 17. Halsbury's Laws of England (Fifth Edition). *Vardon v Holland* 1964 JJ 375 . Royal Court Rules 2004. MacLeod, "Property Law in Jersey" (2016). *Fogarty v St Martin's Cottage Limited*

[2015] JRC 068 *Pirouet v Pirouret* [1985-86] JLR 151. *Maçon v Quérée*

[2001] JLR 80 . *Cannon v Nicol*

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