THE JERSEY LAW COMMISSION

CONSULTATION PAPER

THE JERSEY LAW OF REAL PROPERTY
including the use of English in conveyancing

JERSEY LAW COMMISSION
CONSULTATION PAPER No 6 **September 2002**

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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Review of the Jersey Law of Real Property including the use of English in conveyancing

INTRODUCTION

In July 1999 a working group comprising D O Moon, J Le C Bisson and C R De J Renouf was established, together with I Le Marquand to conduct preliminary research into the conveyancing systems in operation in Guernsey England and Scotland. As a result of this research, the following short-term recommendations were made:-

(a) A mandatory requirement for all conveyancing documents to be in the English language;

(b) The removal of the requirement for contracts to be passed in open court and provision for them to be executed before a prescribed witness and registered in the Public Registry;

(c) Registration to occur on one specific day each week;

(d) Only one form of hypothecation by consent to be available secured on specific property/ies. This also to be executed before a prescribed witness and registered in the Judicial Greffe in the Public Registry and cancelled by a similar process. Judgments obtained in contested actions or by default could still continue to be registered as the present judicial hypothec, but "reconnaissance" would no longer be permissible. Transfers of the benefit of the hypothecs to be effected by registration of the transfer with the Judicial Greffe in the Public Registry;

(e) Title to property, devolved by intestate succession to be registered by the heir claiming title filing an Affidavit within a year and a day of the death of the deceased owner;

(f) Prescription periods both as to actions in respect of title to property and enforcement of adverse covenants/servitudes to be reduced. Remedies for such actions to be discretionary to the court and after a specified period the award of damages to be the only available remedy for such actions;

(g) The introduction of the remedy of specific performance in transactions relating to real property where the terms of the transaction are recorded in a written memorandum executed by or on behalf of each party;

(h) The creation of equitable interest in real property to be permissible where there is evidence in writing in a prescribed form, registered in the Public Registry.

This consultation paper is the result of further research carried out by Advocates H.M. Boléat and W.A.M. Bridgeford into the desirability and practicality of implementing each of the above recommendations in addition to the consideration also put forward at (H) as a recommendation for the abolition of rentes.

A. A MANDATORY REQUIREMENT FOR CONVEYANCING DOCUMENTS TO BE IN THE ENGLISH LANGUAGE

Background

Many years ago, as far back as medieval times, the passing of contracts of real property in Jersey was a parochial event. Each Sunday, following the service at the parish church, a parochial assembly was held (often in the church graveyard) and was attended by all the residents of the parish. All property transactions took place by means of an "*ouïe de paroisse*". Effectively parties to the transaction made a solemn declaration in front of the parish assembly and it was this declaration which bound the parties.

Although initially committed to memory, the transactions were, at times, recorded in manuscript which served as an aide memoire. In the 14th century however, the practice evolved of drafting a formal contract, the contents of which the parties swore on oath before the Bailiff and certain of the Jurats of the Royal Court. At times this contract merely witnessed what had already taken place at an "*ouïe de paroisse*". On other occasions, the contract was first sworn before the Bailiff and Jurats and later read publicly in the parish cemetery. By the 16th century, formal contracts had become commonplace for all types of transactions, and the "*ouïe de paroisse*" subsequently fell into disuse. In 1562 and 1591, attempts were made to introduce a central system of registration for land contracts. However, it was only in 1602, when Sir Walter Raleigh was Governor of Jersey, that the Public Registry was finally established. The passing of the Act of States creating the Registry on 24th July 1602 coincided with one of Sir Walter Raleigh's official visits to the Island: the reason for which he is often (albeit erroneously) credited with founding the Registry.

The provisions of the Act of States were reinacted, with modifications, in the Code of 1771, under the heading of Regîstres, and it is this version in the Code, as amended, which now has force of law.

The following summarises (in translation) those provisions of the Code of Laws 1771 which remain in force:-

(1) all land contracts passed before Court shall be registered according to the Orders of the Commissioners;

(2) the office of Registrar shall be filled by a competent person who shall take oath before Court and who, if required, shall provide a guarantee;

(3) all contracts passed before the Bailiff (or his Lieutenant) and two or three Jurats, will be transcribed formally (not in shorthand). Having been signed by the above named, they shall be delivered (within two or three days) to the Registrar, who will record legibly the date in words: the name of the judge and the Jurats, before whom the contract was passed; the name and surname of the contracting parties; the nature and extent of the land sold, leased or exchanged; the situs of the land and the sum of money or rente involved; the formal clauses and conditions if relevant, and the guarantee of the parties. Once registration is completed, an officer shall take the letters/contracts back to court to be approved. The registrar shall deliver the contracts to the parties within two weeks of having received them;

(4) charges and hypotheques must also be registered if they are to take priority over subsequent charges and/or hypotheques;

(5) Powers of Attorney and Acts of Court appointing tuteurs must be entered into the Register;

(6) the Registry shall remain open to the Public;

In relation to (1) above, such rights are now registered in accordance with the Rules of the Royal Court. In relation to (2) the office of Registrar is *ipso facto* filled by a person of competence and no guarantee is ever required. The office holder for the time being does and should continue to take the customary oath. If the recommendations of this consultation paper are adopted, much if not all of (3) would fall away whilst (4) - (6) would be retained.
In accordance with the Code, all contracts relating to land (including leases for more than nine years) were and continue to be, recorded in the Public Registry, as well as all charges and hypothecs on immovables.

Over the centuries, and even in recent years, the essential form of land contracts has undergone very little change. In essence the contract is a record evidencing the appearance of the parties, or their attorneys, before the Bailiff and Jurats to agree and be bound by the terms of the contract. Registration in itself is not a guarantee of title, but purely a public record of the transaction. (A Purchaser is reliant on his lawyers carrying out a title check on the Pride II

system, to satisfy themselves that the Vendor has good title).

The warranty of title to the property conveyed is dependent on the terms of the conveyance. If it is silent then a warranty is implied but the introduction of various provisions and currently the clause known as the "*vices cachées*" clause is intended to negate any such warranty. The question is sufficiently discussed in the article by Dr John D. Kelleher entitled "The effect of the Fourniture et Garantie clause in a hereditary contract" (see Schedule 4). The conclusion is that the position is confused.

Jersey Legal French

Since the 16th Century when formal contracts first became commonplace, Jersey legal French evolved as the language in which contracts were drafted. The language is essentially French with several words or turns of phrases which modern French speakers would regard as somewhat archaic, for example, the use of the word "*nonante*" instead of "*quatre-vingt-dix*". Although it is true that land contracts have become increasingly complex in recent years, particularly in relation to the larger scale commercial transactions, the language, as indeed the form of contract, has varied little over the centuries.

Registered Contracts are habitually passed in the French language, leases being the only exception. Interestingly, there is no legal requirement compelling the use of the French language. In an article contained in "Parlers et Traditions Populaires de Normandie" (now Le Viquet) written by Peter Bisson (Easter 1984 Vol. 16 Issue 63), Mr Bisson commented that there had recently been an attempt by the Royal Court to allow contracts to be drafted in the English language, and this at the option of the parties. There had also been an attempt to change the method of passing contract. The Jersey Law Society, however, was vehemently against any such change, but as Mr Bisson points out, those in support of changing to the English language were using the argument that there was already a need to translate into English in brackets, after the French equivalents, any unfamiliar French words. Although this practice continues to this day, it is nothing new. During the reign of Queen Victoria, when a number of new houses were being constructed on the outskirts of St Helier, contracts spoke of:-

Salons (anglicé "drawing rooms")
Bosquets d'Arbustes (anglicé "shrubberies")
Couronnement de Murs (anglicé "copings")

Those in support of a change today cite the ever decreasing number of the population who speak or read French and the increasing demand from purchasers for translations of their Deed of Purchase. Not all law firms are able to offer translations to their clients and when they do so translations are invariably handed out post completion. Purchasers are entitled to know with clarity the obligations they are entering into well before completion, and they should have at hand a copy of the contract they are about to enter into in a language they understand. Modern contracts, particularly estate contracts, invariably contain numerous and complex clauses where the rights of neighbours of necessity are very precisely defined. Hardly surprising, therefore, that modern day Declarations relating to Flying Freeholds are drafted (save for the preamble) entirely in the English language as indeed are the majority of contract leases.

It is clear that Jersey legal French has evolved as, and remains to a large degree, the dominant language for the drafting of land contracts in Jersey. This is the result of custom and usage, not of any legal requirement. In a society where French, especially legal French, is now the preserve of the few the situation is far from satisfactory. There should be a mandatory requirement for all conveyancing documents to be in the English language. This would require the adoption of a standard form of deed of conveyance and an addition to the Royal Court Rules of a glossary of terms in English equivalent to the technical French terms in current use (see Schedules 1 and 2). Words not included in the glossary would have their usual meaning appropriate to the context. In the case of dispute, the Court would adjudicate.

B. REMOVAL OF REQUIREMENT FOR CONTRACTS TO BE PASSED IN OPEN COURT AND PROVISION FOR THEM TO BE EXECUTED BEFORE A PRESCRIBED WITNESS AND REGISTERED IN THE PUBLIC REGISTRY

In a recent report dated the 15 February 2001, the Royal Court Consultation Group presented their conclusions as to the workings of the Friday afternoon Court. The question as to whether the passing of contracts before the Court could be carried out in an alternative manner was considered and two proposals put forward:-

(a) The formation of a separate Court, probably sitting elsewhere in the Royal Court buildings on a Friday afternoon, to be presided over by, for example, a Lieutenant Bailiff and two Jurats. Contracts would be passed before this Court. This would release the Bailiff and the Deputy Bailiff to deal with other matters/cases on a Friday afternoon in the main Court. Consideration could also be given as to whether the Judicial Greffier could be given the power to pass contracts in the presence of one or two Jurats, so that the Lieutenant Bailiffs would not have to be present. A change in substantive law would have to be made in order to effect such a change.

(b) Passing of contracts could be carried out throughout the Friday afternoon by members of the public attending at Morier House to appear before the Judicial Greffier and one or two Jurats. Contracts could then be passed by some form of exchange or registration system, which would be completed on the Friday afternoon. Such a change would not involve the passing of contracts before open court and would therefore represent a fairly fundamental change.

A third and alternative proposal to that put forward by the Royal Court Consultation Group would be a simple amendment to the Code of Laws for the Island of Jersey 1771 to provide for the prescribed witness to be either a locally qualified Advocate or Solicitor who should administer the oath in the same way as does the Bailiff or Deputy Bailiff. The Advocate or Solicitor acting for the one party would administer the oath and then witness the contract on behalf of his client and forward the partially executed document to the lawyer acting on the other side for counter execution. Finally, the contract would be forwarded to the Greffier for registration.

A fourth proposal, and that recommended by the Commission is the enactment of legislation to provide for all parties to the contract to execute the contract before a prescribed witness either a locally qualified Advocate or Solicitor, who would attest the signatures/the affixing of a company seal, as the case may be, of the parties and once executed by all parties, the prescribed witness would be responsible for filing the contract with the Judicial Greffier for registration.

C. REGISTRATION TO OCCUR ON ANY DAY

There would appear to be no good reason for restricting registration of contract to Fridays. Provided the contract was delivered to the Greffier for registration before, say, 2.30 p.m. (as per the current practice) on any given day, such contract would be deemed to have been registered on that day and the transaction effective on that day. The consideration would exchange hands on that day.

Recommendation

The introduction of a mandatory requirement for all conveyancing to be conducted in the English language, adopting a glossary of terms and a standard form of deed of conveyance to be executed under hand by the parties before a prescribed witness and filed with the Judicial Greffier on any weekday before 2.30pm for registration the same day. The legislative changes required to achieve this are set out in Schedule 3. These changes should be regarded as an interim measure leading to the substantive change from a system of a registry of deeds to a registry of title and electronic conveyancing on which the Commission intend to issue a report and recommendations once current recommendations have been implemented.

D. FORMALITIES AND ENFORCEMENT OF TRANSACTIONS IN IMMOVABLE PROPERTY

1.1 Promesse à héritage ne vaut

The present law regarding the formalities required for contracts to transact in immovables is marked by an unfortunate degree of uncertainty. From the old case of *Guiton v. Gruchy* (1870) it appeared that the agreement between the parties had to be in writing and, moreover, that such agreement needed to specify the "*penalité*" (that is, a sum of agreed liquidated damages) to be incurred by the refusing party before the court could award damages (though of course it would never order specific performance). This second requirement always sat oddly with the court's general jurisdiction to award damages for breach of contract. In *Basden Hotels Limited v. Dormy Hotels Limited* (1968) the court confirmed that what was required was an agreement in writing; damages could be claimed even though no penalty was stipulated. Nevertheless the practice continues of stipulating agreed liquidated damages in preliminary contracts of sale of immoveable property, even though such damages are often excessive and the court will reduce them in appropriate cases.

In *Romeril v. Davis* (1977) the court refused to treat the plaintiff's published advertisement for sale combined with the defendant's written tender as an enforceable "*accord hérédital*". There was, in the court's view, no intention on the part of the defendant to create legal relations; but the case also appears to be authority that the agreement between the parties must be a single written agreement signed by both of them. By way of contrast, in *Symes v. Couch and JJ Couch Engineers Limited* (1978) the court took the view that the requirement for writing was no more than a rule of evidence, and that the harshness of the customary law, as it had developed in Jersey, could be mitigated by introducing the English equitable doctrine of part performance. In that case an oral agreement which was evidenced in writing and supported by part performance was held to be enforceable and damages were awarded. At the time of the decision in *Symes*, the English doctrine of part performance (though since abolished) could rescue a purely oral agreement which failed to satisfy the then existing requirement of evidence in writing as set out in s. 40 of the Law of Property Act 1925 (which reprised the similar requirements of s. 4 of the Statute of Frauds 1677).

1.2 Defects in the present law

The present law in Jersey suffers from the following defects:

- The case law has left the position uncertain as to whether what is required is a single written agreement, signed by both parties, or written evidence of an agreement; what that agreement should state or include; and whether a purely oral agreement could be rescued by the doctrine of "part performance".

- Although heralded as "one of the great judicial creations of English law", and often valuable in preventing fraud and mitigating the harshness of formal requirements, the doctrine of "part performance" was regarded by the 1987 English Law Commission as suffering from too many vagaries and uncertainties. It was abolished in England by the Law of Property (Miscellaneous Provisions) Act 1989. This doctrine is still considered part of Jersey law.

- There are, again, anomalies, or at least differences that require justification in terms of public policy. A contract to sell immovables owned by a property holding company, to sell a "flying freehold" flat, to create a simple conventional hypothec or to grant a "contract" lease would in principle need to be in writing or at least to be evidenced in writing. But a contract to sell a property holding company, a "share transfer flat", to create a judicial hypothec or to grant a "paper" lease is not required to comply with any applicable formalities of writing.

1.3 The several options and the reformed scheme in England

In 1987 the English Law Commission published its report on *Formalities for Contracts for Sale etc. of Land*. As a result of the report fundamental changes were made to this area of law in England. The position had been governed by s. 40(1) of the Law of Property Act 1925, which was itself was based on the Statute of Frauds Act 1677. Under the law as it then existed, a contract for the disposition of an interest in land which was not (a) evidenced in writing and (b) signed by the party sought to be made liable was unenforceable (though not void). The English Law Commission subjected the wording of s. 40(1) of the 1925 Act to detailed criticism and found it to be illogical and uncertain in its application. Since it is not proposed that the old s. 40(1) should provide any basis for the new law in Jersey such criticism is irrelevant in the present context. Having surveyed several alternative options, each comprising a differing level of formality, the Commission proposed that a high level of formality should continue to apply for contracts for the disposition of interests in land. It is appropriate to set out the various options reviewed by the English Law Commission both in their working paper and in their subsequent report, and to place those options in a Jersey context.

1.3.1 *To make only minor amendments to existing law*

This option was described as tenable but was ultimately rejected. The defects identified by the Commission in the existing English law suggested that a root and branch reform was needed;

1.3.2 *To remove any special formality for contracts to transact in immovables*

If this approach were adopted, a purely oral contract to carry out a disposition in land would be valid and enforceable, though in practice such contracts would in the vast majority of cases no doubt continue to be made in writing. If anything, such formal requirements only aided the dishonest to escape the terms of bargains which had in truth been concluded. In 1983 in the Canadian province of Manitoba, legislature, acting more boldly than its 1980 Law Commission had recommended, abolished any requirement for writing for contracts to transact in land. The "onslaught of litigation" which the Manitoban Commission had feared might result from such a reform does not appear to have occurred. The abolition of any formality for contracts to transact in land is therefore an option that should be given full consideration in Jersey.

The 1987 English Law Commission, in considering this option, surveyed the law in seventeen other jurisdictions. It was found that that there was "an overwhelming trend towards formalities for such contracts". Though there are of course many items of movable property that might be of greater value than a small piece of land, in practice the single most valuable legal transaction that most people make in their lives will be the purchase or sale of land. There is thus a widespread tendency to treat land with greater formality than other types of property. In common law jurisdictions, the requirement for written evidence generally derives from the Statute of Frauds Act 1677; in most of these jurisdictions the formal requirements have been tempered by the doctrine of part performance. In the USA, where the Statute of Frauds provided the basis of the law, written formality likewise applies. The Restatement of the Law of Contract, however, contains a doctrine of equitable relief having similar effect to part performance. In the hybrid jurisdictions of Scotland and South Africa, non-compliance with the relevant requirement of writing makes the contract void, as in Jersey, and not merely unenforceable, as under the Statute of Frauds. Jersey has received the doctrine of part performance, but the strict requirements of form applying in these other hybrid jurisdictions have been tempered by doctrines of *rei interventus*, homologation and unjust enrichment. In civil law jurisdictions, preliminary contracts for the sale of land generally have to comply with specific formalities, on pain of nullity. In theory, the modern French legal system stands out as an exception from the rest of the civil law countries on account of its lack of formality. Contracts pertaining to land are not governed by any special rules, but under the general principles of contract law set out in Part 6 of the Civil Code, and may thus be entered into purely orally. In practice, written evidence has important probative value and some form of writing is necessary if the contract is to be registered so as to be enforceable against third parties.

The conclusion adopted by the English Law Commission was that contracts to transact in land should continue to be

treated with greater formality than generally applies to other types of contract. In Jersey, where land transactions have to date been dealt with under a regime of rather extreme formality, there is an additional argument which tends to the same conclusion.

1.3.3 *Prescribed forms*

Another option considered in the English Law Commission's consultative paper was the introduction of prescribed forms for contracts to transact in land. This option had the advantage that it would be completely clear whether a contract had been entered into; a warning advising that legal advice be taken and certain standard conditions of sale could also be incorporated. In the subsequent feedback, there was some support for this proposal, at least as regards domestic conveyancing. But difficulties were envisaged in devising a form suitable for all types of transaction. It was also considered that, despite warnings, an "official" form may in fact lull the unwary into a false sense of security and so discourage the seeking of legal advice. In view of these difficulties, and the general lack of consensus, the introduction of prescribed forms was not in the event recommended by the English Law Commission.

1.3.4 *Cooling off periods*

By analogy with UK consumer protection legislation, the English Law Commission also canvassed the idea that there should be a statutory cooling off period after a contract for a transaction in land had been entered into, during which parties would be free to withdraw. In the final report the view was taken that "cooling off" periods would only add delay and complication to the conveyancing process. It had also not been established that there was truly a need for "consumer protection" in this area. The proposal for "cooling off" periods was therefore rejected.

1.3.5 *Written contract signed by both parties, on pain of nullity*

This was the preferred option of the English Law Commission and its proposals were duly enacted as s. 2 of the Law of Property Act (Miscellaneous Provisions) Law 1989. The main features of the new law are summarised in the following paragraph.

The agreement itself now had to be in writing, not merely evidenced in writing, as was the case under s. 40 of the Law of Property Act 1925. Under the 1989 Act the absence of a written agreement makes the agreement void, not merely unenforceable as it had been; the effect of this was that the doctrine of part performance was by necessary implication abolished. In accordance with the Commission's views, but subject to the exceptions mentioned below, the new formalities applied to all contracts for the disposition of interests in land, including contracts for leases, mortgages and options to purchase. Whilst in the working paper the Commission had expressed a preference for restricting the requirement of writing to the "main" terms of the agreement, it was decided in the final report that simplicity and certainty required that all the terms of the contract should be in writing. Thus the resulting legislation required that all the express terms of the contract to be in writing. If Jersey were to adopt the former approach, the "main" terms required to be in writing would need to be defined (compare Article 3 of the Security Interests (Jersey) Law 1983).

Pursuant to the recommendations of the English Law Commission, certain exceptions were made to the requirement for a written agreement which would be appropriate to Jersey, namely:

Short Term Leases. Such leases could be granted orally and the Commission had considered that it would be illogical to require a contract to grant such a lease to be in writing. A parallel line of reasoning would exclude contracts for the grant of "paper" leases in Jersey (leases for nine years or less) since such leases may also be granted purely orally.

Sales of land made in public auctions. It was convenient for such contracts to be concluded orally under the fall of the hammer. This will presumably also be the case in Jersey, in those rare instances where immovable property is sold at auction.

1.4 The present position in England if formalities are not observed

The English Law Commission recognised that, despite the advantage of certainty that written formality brings, there will be cases where justice will be denied if the strict requirements of the law are applied without exception. The doctrine of part performance had fulfilled this function, but the Commission recommended its abolition. Instead there are various alternative techniques that can be used by the courts in England.

- *Constructive trusts*. Section 2(5) of the 1989 Act contains an express reservation concerning the creation and operation of resulting, implied and constructive trusts. Constructive trusts are recognised in Jersey law by Article 29 of the trusts (Jersey) Law 1984 and judgments of the Royal Court (see section J where these are discussed).
- *Estoppel*. The Law Commission considered proprietary estoppel to be a particularly useful technique for avoiding injustice in difficult cases. For a brief description of proprietary estoppel, see p. 27 below. As traditionally understood, it appears that proprietary estoppel would be of assistance to a disappointed purchaser, not a vendor. What was considered particularly advantageous by the Commission was the fact that proprietary estoppel allows the court to apply a flexible remedy, depending on the circumstances. Although the Commission clearly thought proprietary estoppel a useful technique for avoiding injustice, the 1989 Act contained no express saving provision for proprietary estoppel. In *Yaxley v. Gotts* (2000) the opportunity came for the English Court of Appeal to consider whether proprietary estoppel could indeed still be used to provide a remedy notwithstanding non-compliance with the statutory formalities laid down in the 1989 Act. It was held that the doctrine of proprietary estoppel had indeed survived the 1989 Act, and that in many cases the same set of facts could equally give rise to claim of proprietary estoppel as for a constructive trust. It has, however, been pointed out that there are nevertheless important differences between proprietary estoppel and constructive trusts, which will potentially affect the nature of the remedy given and the intervening rights of any third party. In Jersey, recent judgments of the Royal Court indicate that a claim for proprietary estoppel will be available: *Maçon v Quérée* (2001) as also will a constructive trust be recognised (*Murphey v Thomas* (2001) and *In the matter of the Esteem Settlement and the Number 52 Trust* (2002). Even so, the availability of proprietary estoppel alone will be of considerable importance to the Jersey courts in seeking to achieve an equitable result (assuming written formality will continue in principle to be required); and its usefulness will certainly be increased if the further express powers outlined on p.25 below are also made available.

- *Rectification*. The English Law Commission, having proposed that *all* the terms of the agreement should be in writing, noted that, in appropriate circumstances, the equitable doctrine of rectification could also operate to save a contract where not all of the pertinent terms had been rendered in writing or where one or more of them had been wrongly recorded. In order for the doctrine of rectification to apply there does not need to be a prior enforceable contract; it is sufficient that there is a prior agreement or a continuing common intention to contract, together with convincing proof that the written document does not adequately represent the terms of the agreement. In Jersey the courts have most often applied the doctrine of rectification in relation to trusts, but it is no doubt available in other contexts. An order of rectification is of retrospective effect.

- *Collateral Contracts.* The English Law Commission also took the view that where some term had not been incorporated into the written contract the contract could be saved by construing the omitted term as part of a collateral contract which, not itself being a contract for the disposal of an interest in land, would be enforceable separately. Unfortunately there are two conflicting decisions of the Court of Appeal on this concept which leads us to believe that it should be avoided.

1.5 Conclusion.

It is proposed that two very different options stand out above the rest and in particular option 1.3.5 which the Law

Commission would recommend.

- *Option 1.3.5: written agreement*. The first would be to adopt a similar approach to that adopted in s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989, that is, to require an agreement in writing between the parties, except in certain specified exceptional circumstances. This would not be radically different from existing Jersey law since the law at present also requires some written formality in order for an agreement to transact in immovables to be valid. In view of the abolition of the uncertain doctrine of part performance in England, and the availability of alternative equitable remedies it seems right also to abolish part performance in Jersey. It is recommended that to avoid the uncertainties of litigation which have arisen in England pursuant to the 1989 legislation that the Jersey legislation should prescribe that an agreement relating to a transaction in immovable property to be enforceable should contain prescribed essential terms in writing such as those required by the Security Interests (Jersey) Law, 1983 and be signed by both parties in the presence of independent witnesses. The term "transaction in immovable property" could be extended to include shares in companies owning immovable property putting share transfer flats on the same footing.

- *Option 1.3.2: no formality*. The option has the considerable advantage of avoiding the technical drafting difficulties and also the vagaries of equitable doctrines which undermine the supposed certainty of statutory formality. It also has the advantage of automatically bringing immovable property into line with the quasi-immovables such as share transfer flats: none would require written formality. The question would simply be whether the evidence established, on the balance of probability, that a valid contract had been concluded under the laws of Jersey, whether written or oral. In practice, agreements would no doubt continue to be put in writing. The doctrine of part performance would fall away.

1.6 On a practical level it is also for consideration as to whether the Island should adopt a suggestion made from a recent study in the United Kingdom, whereby a Vendor would be required to provide a pack of copy documents of title, local authority searches, planning /housing/agricultural consents, draft contracts and other relevant documents when the property is put up for sale to potential buyers.

Recommendation

The Commission recommends that legislation be enacted to require a written agreement for transactions in immovables as discussed in paragraph 1.5 ie. option 1.3.5, a written contract signed by both parties, on pain of nullity.

THE FORMALITIES AND ENFORCEMENT OF TRANSACTIONS OF IMMOVABLE PROPERTY

2. *The non-availability of specific performance – "promesse à héritage ne vaut"*

2.1 The present law

It is well established that the remedy of specific performance is not available in cases of breach of an agreement to sell Jersey immovable property or indeed to carry out any other transaction in immovable property which requires for its completion the passing of a contract before court. This is a consequence of the application of the maxim "*promesse à héritage ne vaut"* discussed above. An agreement for a transaction in immovable property is regarded as enforceable if it is in writing and includes a promise for the payment of a specified sum by way of liquidated damages for non-performance by a defaulting party. In such a case, the court is able to award damages in favour of the innocent party. But it cannot order specific performance other than as an alternative to the payment of liquidated damages. In other types of case involving movables as opposed to immovables, the court has an undoubted discretionary jurisdiction to grant specific performance wherever damages would be an inadequate remedy.

The reason most often stated for non-availability of specific performance in relation to immovables is that the court will not order an unwilling party to take the oath in court which is, at present, a necessary part of the process of conveyancing.

The "oath explanation" was, notably, relied upon by the Court of Appeal in *Taylor v. Fitzpatrick* (1979) and it appears to be generally accepted as the explanation of the maxim. However, alternative explanations have from time to time been proposed. Thus it has been suggested that the maxim is a consequence of the principle of "*la conservation du bien foncier dans la famille*" or that a person cannot be compelled to pass contract because the obligation is one "*quae non est dando sed in faciendo*".

The principle already has a number of established exceptions. By statute, pursuant to Article 35 of the Matrimonial Causes (Jersey) Law, 1949 the court may authorise any person (such as the Viscount) to inter alia pass contract on behalf of a recalcitrant party, in cases where the court has made an order for the transfer of property under that Law. But it is not the only statute that has made inroads. In *Ritson v. Slous* (1973) it was held that the right of a co-owner of Jersey immovable property to enforce the sale of the property by auction to terminate the co-ownership was incontestable. In default of a contract being passed, the court ordered that the Deputy Viscount could carry out the oath-containing conveyance on behalf of the recalcitrant party. In *Lane v. Lane* (1985) it was held that, as a matter of comity between courts, the court could make a similar order so as to give effect to an order of the English High Court. Thus the jurisprudence of the Island appears to regard it as acceptable in some cases for an official of the court to be appointed in order to take the oath on behalf of a recalcitrant party. That being so, it may justly be asked why such a device is not appropriate in all cases where justice so requires.

2.2 Defects in the present law

The present law is open to a number of objections:

- It makes the litigant's remedy dictated by an aspect of procedure rather than the needs of justice.

- It precludes one of the most significant remedies of the court.

- It gives rise to anomalies. Thus, specific performance would in principle be available to enforce an agreement to sell a property holding company, to sell a "share transfer" flat, to create a judicial hypothec or to grant a "paper" lease (one of nine years or less). But it would not be available in the case of an agreement to sell the underlying immovables owned by a holding company, to sell a "flying freehold" flat, to create a simple conventional hypothec or to grant a "contract" lease as regards the portion of the term that exceeds nine years. In the present context, the only material difference between the two sets of cases is procedural: in the latter, but not in the former, a contract must be passed under oath before court. There appears to be no valid reason of policy why the available remedies should be differentiated.

- The Jersey position contrasts starkly with English law. In England specific performance is almost invariably awarded in actions enforcing contracts for the sale or other dispositions in land. The English courts take the view that a specific item of landed property will have a unique significance to the would-be purchaser, lessee or licencee. Damages are thus unlikely to be an adequate remedy. This view appears to be generally reasonable, although it is submitted that each case should properly be treated on its merits. Where it is a purchaser who is in breach, it might be thought that the vendor would generally be adequately compensated by an award of damages, especially if the land is readily marketable. Yet in pursuance of the doctrine that equitable remedies should be mutual, the English courts also tend to grant specific performance to an innocent vendor as well as a purchaser.

2.3 Reform of the present law

Notwithstanding such objections and criticism, the principle that "*promesse à héritage ne vaut*" is so well established that a legislative amendment is necessary.

In the context of the Commission's recommendation (see p.6 above), of an overall reform of Jersey conveyancing, which would dispense with the element of an oath, it may well be that the obstacle to specific performance would fall away. Thus in the absence of the need for an oath, it may well be that no express legislative provision permitting orders for specific performance is necessary. Nevertheless, although reasonably clear, the rationale behind the maxim is not wholly free from uncertainty, and it seems advisable for the reforming legislation to make express provision. The remedy of specific performance would, in fact, be one amongst several new powers of the court which are needed (see p.25 below).

It is not proposed that the legislation should specify how such powers are to be exercised; the legislation would only state that the court could exercise these powers whenever it considered just to do so. It is generally considered that the remedy of specific performance in Jersey is a discretionary power. Thus the court can be guided by way of persuasive authority and by relevant case law in other jurisdictions. The effect of this will be to allow the court to use the remedy of specific performance flexibly, being guided by case law, but with the overall aim of doing justice between the parties. Rigidity can be avoided. There may well be cases where overriding features make an order of specific performance inappropriate, and damages the better remedy, even if at first glance damages appeared to be inadequate. This might be the case, for example, when the terms of the contract are ambiguous and understood differently by the parties, where the successful party has acted unfairly or where the completion of the conveyance would cause undue hardship, and in other cases where the court would exercise its discretion to refuse specific performance. The court's power to grant specific performance would be sufficiently flexible to cater for such difficult cases. The amending legislation could also make provision for further court orders (if necessary) whose exact content would depend upon the precise requirements of the new conveyancing procedure.

The amended law would expressly enable the court to grant specific performance and to appoint, if need be, a named person (such as the Viscount) to execute contract on behalf of a recalcitrant party, at that party's cost.

2.4 Trusts of land and specific performance

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In this context it is also worth mentioning that, under English law, as soon as a specifically enforceable contract for the sale of land is made, the purchaser becomes the owner of the land in equity; the vendor is a constructive trustee for the purchaser, subject to the terms of the contract between them. It is unclear whether this trust is to be classified as an implied trust or a constructive trust. As Jersey law appears already to recognise implied and constructive trusts of land (see p.32), there will be argument that beneficial title transfers as soon as a specifically enforceable agreement for sale comes into existence. This would be beneficial as a deterrent to the practice of gazumping. Any legislation should make this clear and perhaps include a facility for the registration of an interest under agreement of sale in the Public Registry to put others on notice of the position.

E. PRESCRIPTION AND ESTOPPEL

Prescription is the gaining of a right or title by lapse of time. It is either (a) negative, so called because the title or right given thereby arose originally from the real owner being barred from his remedy to recover the land or enforce the right in question or (b) positive from immemorial or long usage.

Prescription is relevant to two fundamental rules of Jersey real property law. The first rule which emanates from the customary law is the forty year rule known as "possession quadraginaire" and is restated in the Code of 1771 as follows:

"Les personnes qui ont possedé 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 possedée, la possession quadraginiare donnant un droit parfait, et incontrovertible, selon l'ancienne Coutume de l'Isle, excepté en matière de servitude, laquelle ne peut s'acquerir par la préscription, fut-elle Centenaire: mais dont on peut se liberer, ou acquérir la liberté par la préscription, c'est-à-dire, lorsque la servitude n'a point été exercée par quarante ans continuels."

This rule has to be considered in conjunction with the second rule of the customary law enshrined in the maxim "nulle servitude sans titre".

The effect of those two rules is that a person can (a) acquire title to real property and (b) lose the right to use or enforce an easement or restrictive covenant (both being "servitudes") if in the case of (a) the person has had uninterrupted peaceful possession of the property for forty years and in the case of (b) by the non usage or enforcement of the servitude for forty years but a person cannot acquire a right by way of servitude by usage of forty years or longer.

The application of those rules was considered at length by the Royal Court in the case of *Felard Investments Limited and The Trustees of the Church of Our Lady, Queen of the Universe (1979)* (*Felard No 2 1979*) which related to the infringement of a building restriction. The Court held that a servitude could only be created by deed passed before the Royal Court and that there is no power in the Court to create, vary or extinguish a servitude against the wishes of the owner of the land thus affected. Having also found that the doctrine of proprietary estoppel as known in English law does not exist in the law of Jersey, the Court decided that the only remedy available was to order the demolition of the building which had been constructed in breach of the servitude as the Court did not have power to award damages in lieu even if it had been minded to do so (which in the circumstances of the case it was not so minded). This rule of customary law has been emasculated and the decision in this case eroded by subsequent decisions of the Royal Court (discussed more fully below) in which the Court has introduced the English doctrine of proprietary estoppel. Until the issue comes before a Court of Appeal, it will remain in flux unless appropriate legislation is enacted.

There are two aspects which fall for consideration.

Firstly, is the period of forty years required to acquire title to land or, by non usage, to lose a right of servitude too long and should it be reduced to say ten years as applies to actions in respect of movable property? It is the view of the Commission that the rule should be changed to ten years reflecting the change which has occurred in society and the speed of travel and communication from when these rules evolved to the current time. This would greatly reduce the time spent on title checks in conveyancing where the title has to be checked back forty years every time a property changes hands and could lead to quicker and cheaper conveyancing.

Secondly, the absence of any discretion in the Court in dealing with cases involving breach of servitude can be unfair and create injustice depending on the circumstances of the case and the conduct of the parties. It does appear inequitable that someone could remain silent whilst another erected a building in breach of a restrictive covenant but retained the right exercisable at any time within the next forty years to require its demolition. The Commission believes for the reasons discussed below that the Royal Court should have discretionary powers to make such order as it considers just and that if an action is not brought within a reasonable period of the commencement of the breach the award of damages should be the only remedy available unless the party affected can justify the failure to assert their rights in an opportune time.

The doctrine of proprietary estoppel has more recently been defined, in brief terms, by the Jersey courts as follows: "Where 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." (*Macon v Queree 2001*). The doctrine is not merely a defensive shield; it is used by the English courts to impose a very wide range of remedies in order to satisfy the demands of justice in the case. The court found that proprietary estoppel is part of the law of Jersey, enabling it to make an award of damages to the aggrieved party in respect of a failed expectation of inheritance of land. This appears to be an arbitrary grafting of a doctrine of English land law onto a part of the Island's jurisprudence which is more thoroughly embedded than most in Jersey customary and Norman sources. Nevertheless, it is not surprising that in the desire to do justice between the parties the court, presided over by an English Queen's Counsel, should

introduce doctrines developed in England, being the foreign jurisdiction with which, by virtue of their training and language, modern Jersey lawyers and judges will be most readily familiar. On the basis of the decision in *Macon v Queree* it would appear that proprietary estoppel is part of Jersey law, although it is in direct conflict with the Royal Court's decision in *Felard Investments Limited and the Trustees of the Church of Our Lady, Queen of the Universe* (*1978)* ("*Felard No. 1 1978*").

A key feature of proprietary estoppel in England is the extreme flexibility of the courts in determining the appropriate relief, once a case for proprietary estoppel has been established. Injunctions may be imposed, security created, title transferred, damages awarded; trusts, leases, licences and life interests may be created. But the Jersey courts are presently constrained to award little more than damages. This is a serious limitation. In particular, if a *Felard*-type case came before the court again, in circumstances where the party who had erected the building could indeed establish an estoppel, it would still remain difficult, and perhaps impossible, for the court to give any effective relief. Would the party, in whose favour the estoppel worked, be awarded damages and yet at the same time be ordered to demolish the building, since the court could not sanction the extinguishment of the servitude? That would be an absurd result. This emphasises the need to give the court wide new powers to direct and/or declare the transfer, varying, creation and extinguishment of interests in land. Such powers would enable the court to determine the appropriate remedy in cases of breach of restrictive covenant or encroachment and generally expand the range of relief available to the court in such cases of proprietary estoppel.

<u>Current Defects in Law</u>

The problem lies, at root, in the court's inability (other than in certain exceptional circumstances) to direct and/or declare the transfer, varying, creation or extinguishment of interests in land. This arises as a result of the way the Island's land law and conveyancing procedure has historically developed. There appear to be four principles underlying this difficulty. At the risk of some simplification, and subject to exceptions, those principles appear to be as follows:

- the creation, transfer inter vivos, varying and extinguishment of immovable interests requires an agreement between the parties;
- this agreement must satisfy a particularly "extreme" level of formality (that is, it must be a contract passed under oath before court);
- notwithstanding a contractual commitment to do so, a party cannot be compelled to carry out this formality (although in appropriate cases damages may be awarded);
- immovable interests must be registered in the Public Registry (in the form of the agreement passed between the parties).

It would be difficult to argue that any other than the first and last of these principles has a prima facie justification in the modern age. As regards the second principle, the overall simplification of conveyancing procedures is a primary purpose of the Law Commission's present review of Jersey land law; whilst regarding the third principle, orders of specific performance have already been discussed. The first principle – that there must be an agreement between the parties – is no doubt entirely justified as a guiding rule. But it is already subject to modest inroads in appropriate circumstances. One might mention the statutory exception provided by Article 35 of the Matrimonial Causes (Jersey) Law, 1949, the court's decisions in *Ritson v. Slous* (1973) and *Lane v. Lane* (1985-6), the acquisition of title by prescription and the creation of servitudes by "*destination de père de famille*", by long usage or more generally the creation of legal and natural servitudes. A power to make immovable orders by way of relief in cases of proprietary estoppel, which by definition fall short of a binding contract, has been found useful and equitable in England. The same is true of the power to extinguish a restrictive covenant or alter title by awarding, in special cases, damages in lieu of an injunction. It is doubtful whether an alteration to Jersey conveyancing procedures, which *inter alia* does away with the element of an oath, can be relied upon alone, by implication, to allow the court to exercise the necessary

new powers. It will be better for the new legislation to give the court express powers in all these respects.

As regards the last principle – that immovable interests are registered – if the effect of the court's order would, in itself, be to alter any matter registered in the Public Registry, as where a servitude is extinguished as a result of the court's order, it will be appropriate for the court to make a declaration accordingly and for the declaratory order itself also to be registered in the Registry. In this way the fundamental principle will remain that title and servitudes affecting land should, so far as possible (and there are already established exceptions) be apparent from a search of the Public Registry. In this way the fundamental principle will remain that title be apparent from a search of the Public Registry. It is true that prior to the matter being brought to court and judgment being given, a would-be purchaser will not be aware if a servitude will, in the event, be extinguished. But in many cases the breach of servitude will be apparent during the course of a site visit and this should put the purchaser's lawyers on enquiry. More generally, it can be anticipated that the court would take into account the effect of any proposed order on an innocent third party before determining the appropriate relief.

In the context of the decisions in *Felard*, it is relevant to note that a servitude would potentially be extinguished in two quite separate circumstances. The first arises if the court did apply the doctrine of proprietary estoppel in circumstances that meant the effective termination of the servitude (*cf. Felard No. 1 1978*). The second is where, conversely, the court finds that the defendant is without any legal right or defence but also, by reason of the plaintiff's conduct or the inherent injustice of an injunction, orders that the appropriate remedy is a sum of damages (*cf. Felard No. 2 1979*). The legislation will need to enable the court to make the appropriate order in both scenarios, the first being where the defendant has a right to the apparent breach and the second being where he does not, but allied to exceptional circumstances. The same issues apply to the erection of a building encroaching on the plaintiff's land.

Consistent with a point made earlier, it is proposed that the legislation should set out the new powers of the court without specifying how such powers should be exercised, beyond stating that they may be exercised wherever the court considers it just. The court will then be able to turn, by way of persuasive authority, to established judicial authority, for the exercise of like powers in other relevant jurisdictions. Similarly the court will be able to award damages for a continuing breach of restrictive covenant or an encroachment in accordance with its general discretion to deny injunctive relief. The court's powers would also include the express power to order specific performance of an enforceable contract to transact in immovables. Whether the court should also be empowered to create express trusts over immovable property will depend on the view taken on our recommendations as to such trusts (see section J).

Recommendations

That legislation be enacted to make provision:

(i) for the prescriptive period for actions in relation to immovable property and rights therein to be reduced from forty years to ten years;

(ii) that in any action involving immovable property in Jersey the court should be expressly empowered to make such order as it considers just, including any one or more of the following orders on such terms as the court thinks fit:

- an order (whether by way of specific performance of an agreement or otherwise) effecting or directing the transfer, creation, varying or extinguishment of any interest in or in relation to immovable property (including freehold title, servitudes, hypothecs, life interests, "contract" leases and also "paper" leases and licences) including, if it considers it just, an award of damages to the injured party in lieu of an injunction restraining or removing the breach of servitude, notwithstanding that the effect of the award of damages may be to extinguish or vary the servitude;

- an injunction directing a person to cease carrying out or to carry out a specified act;

- an order directing a person to pay damages to another in such sum as the court considers just;

- a declaration of a person's right in or in relation to immovable property;

- that any order of the court which has the effect of varying particulars registered in the Public Registry should also be registered;

- such further order as the court thinks just.

F. HYPOTHECATION

The Loi (1880) sur la Propriété Foncière ("the 1880 Law") introduced two methods of consensual hypothecation. One (commonly referred to as "reconnaisance") was by the acknowledgement by the debtor of the obligation before the Royal Court and the registration of the Act of the Court in the Public Registry. The other was by the passing of a deed before the Royal Court ("simple conventional hypothec") between the debtor (borrower) and the creditor (lender) setting out the terms of the borrowing and describing the property over which the debt was secured. The intention of the 1880 Law was that the former created a hypothec over all the real property of the debtor (that is land and buildings) whereas the latter only created a hypothec over the property specified in the contract. The only other significant difference is that the right of the creditor to enforce the obligation against a third party owner of the property on which the hypothec was secured by way of "reconnaissance" is prescribed after ten years from the date of its creation whereas under the simple conventional hypothec the right does not become prescribed until the debt is extinguished.

The practice which has evolved whereby hypothecs created by way of reconnaissance are not generally secured on all the real property but only on a specified property by limitation in the Act of the Court whereunder the obligation is acknowledged has rendered the distinction between the two types of hypothec redundant. There is, however, another significant factor, namely costs. The simple conventional hypothec is more costly to create attracting stamp duty at the rate of one half per cent plus £8.00 Jurats stamps and legal fees of a further one half per cent for each of the debtor and creditor which inevitably fall to be discharged by the debtor. The reconnaisance on the other hand costs one half per cent in stamp duty payable by the debtor and on average 0.25% of the borrowing in legal fees but this has to be repeated every ten years during the existence of the borrowing and lenders are generally unwilling to take a transfer of a reconnaisance as opposed to a simple conventional hypothec, so that where a borrower changes bankers it usually means he incurs the registration charges for a fresh hypothec by way of reconnaisance in favour of the new bank.

There does not seem to be any justification for perpetuating the present dual system of consensual hypothecation but rather to move to a single system of hypothecation by consent. The immediate solution would be to cease the simple conventional hypothec method of hypothecation and to maintain only the reconnaisance system which no longer requires the parties to appear before the Royal Court but is effected by the lodging of the documents with the Judicial Greffe. The only change that would be required apart from the amendment of the relevant provisions of 1880 Law to prohibit the creation of any further simple conventional hypothecs would be to also rescind the prescription period relating to reconnaisance and allow for their transfer in a specified form registerable in the Public Registry for a nominal fee.

The Commission would not advocate changing the present provisions of the 1880 Law as regards judicial hypothec obtained by the registration in the Public Registry of judgments of the Royal Court or that relating to legal hypothecs. It is examining the question of hypothecation of movable and immovable property generally and intends to bring forward recommendations for a method of hypothecation which will apply to both forms of property. At that juncture, and if the Commission's recommendations are adopted, then it would be possible to rescind the 1880 Law in its entirety with a new law on hypothecation and security interests.

Recommendations

That:

1. The provisions in the 1880 Law on simple conventional hypothecs be amended to prohibit the creation of simple conventional hypothecs after a specified date.

2. The provisions of the 1880 Law on hypothecs created by acknowledgement by Act of the Royal Court be amended to abolish the prescription period applicable to such hypothecs and that the benefit of such hypothecs be assignable by registration with the Judicial Greffe of a form of transfer executed before a prescribed witness on payment of a nominal fee.

3. That lenders should have a power of sale similar to that contained in the Security Interest Law to enforce their security when the debtor fails to discharge the obligations of the loan.

G. SUCCESSION TO IMMOVABLES

In the case of moveable property the principal heir on an intestacy is required to obtain a Grant of Letters of Administration before being able to deal with the assets and administer the estate on pain of being held to have intermeddled in the estate at his peril. No such requirement exists in regard to immoveable property. It is not possible to ascertain from the Public Registry the legitimate owner of immoveable property which has devolved on intestacy. Not only is this dangerous for would be purchasers of such property in ensuring that they obtain good title, but it renders it difficult for any third party such as a neighbour who may have a legitimate matter on which he requires to deal with the owner. There does not appear to be any good reason to maintain this distinction between intestate succession of moveable and immoveable property or that the procedure for moveable property should not equally apply to immoveable property.

Recommendation

That the provisions of the Probate (Jersey) Law 1949 as to the requirement for a Grant of Letters of Administration or Probate for movable property be extended to include immovable property (where deceased died intestate as to immovable property) and be registered in the Public Registry. Letters of Administration or Probate for immovable estate could be applied for by the Administrator/Executor whose responsibility it would be to ensure registration of an affidavit of heirship from the heirs in title in an intestacy or the registration of the will of immovables as the case may be in testate succession.

H. RENTES

The 1880 Law contains provisions in respect of rentes anciennes (an ancient type of mortgage which provided for payment in kind i.e. wheat, etc.) and rentes nouvelles (a form of Sterling denominated mortgage usually created as part of the consideration on the sale of property or to secure an annuity). Most of the rentes anciennes have been reimbursed and rentes nouvelles, save for those rentes known as rentes viageres or life annuities, are rarely created nowadays.

Rentes Anciennes

Before 1880, rentes anciennes were not reimbursable. The only method of relieving land of a rente was by assigning to the rente owner the benefit of a comparable rente in substitution therefor. However, even this did not extinguish the debtor's obligations: the assignment had the effect of hypothecating all the debtor's real estate, present and future, to the perpetual guarantee of the assigned rente. Thus, if the assigned rente was lost, the assignor or his heirs had to replace it or repay it. The 1880 Law (and subsequent laws) have made all rentes except rentes viageres (unless they are nouvelles and the contract expressly provides for reimbursement) and certain exceptions referred to in Article 41 of the 1880 Law, reimbursable. Save for those exceptions referred to in Article 41, Article 37 of the 1880 Law gives

the debtor of a rente anciennes the right to compel the rente owner to accept reimbursement at the price laid down by this Article, according to the nature of the rente, after giving three months' notice. Article 37 also sets out the procedure to be followed where the rente owner refuses to accept reimbursement of the rente. In terms, the owner of the rentes may be compelled to do so by an action in the Samedi Division of the Royal Court.

By the *Loi (1970) Touchant Le Remboursement des Rentes Anciennes* from 10th March 1971, the owner of a rente ancienne perpetuelle has the right, after the sale of the immoveable on which the rente is due or of the sale of part of such immoveable, at a price which exceeds the reimbursement value of all the rentes anciennes due on such immoveable, to compel the owner of the immoveable by six months' notice in writing to reimburse the said rente. Article 12 of the *Loi (1915) Sur la Propriété Foncière (Guaranties)* places an obligation upon a purchaser to reimburse the value of a rentes anciennes which exceeds half the purchase price of the property, within a year of the purchase. Not surprisingly, given today's prices in relation to real estate, Article 12 will have long fallen into disuse.

Rentes Nouvelles

Article 30 of the 1880 Law states that all perpetual rentes created, consented or constituted under the Law must be established in pounds sterling payable on 31st December each year, and payable and redeemable in such sums as the parties to the contract may stipulate. In default of such stipulation, the sums are not less than £5.00 or in one sum if the rente does not exceed five pounds. Article 31 of the 1880 Law states that all new perpetual rentes are redeemable at the price stipulated in the contract or, if no price is agreed, at the rate of £20.00 for each £1.00 of rente.

Article 32 of the 1880 Law relates most specifically to rentes viageres, that is life annuities. Every new life annuity must be created or constituted in pounds sterling and payable at the time and in the manner stipulated in the contract. A life annuity cannot lawfully be sold, transferred or mortgaged by the person in whose favour they are created unless the contract so permits. Neither, according to Article 20, may they be redeemed unless the contract so permits.

Every new rente (perpetual or for life) constituted as the whole or part of the purchase price of a bien-fonds is *ipso facto*, a type of hypothec. The hypothec bears the date of the contract of sale, provided the contract is duly registered.

Most of the rentes anciennes have been reimbursed and rentes nouvelles are rarely created nowadays. Nonetheless, a conveyancer is obliged, when checking title, to ensure that any potentially existing rentes have been repaid. This can be and often is a time consuming matter. With the exception of life annuities, which may easily be secured by means of the hypothec recommended at Section D, it is submitted that the time has now come for all rentes anciennes and nouvelles to be extinguished.

Recommendation

1. That the provisions of the 1880 Law in regard to rentes anciennes be repealed.

2. That the Loi (1970) Touchant le Remboursement de Rentes Anciennes and the Rentes Publiques (Redemption) (Jersey) Act 1990 be rescinded and replaced with a law requiring all rentes anciennes to be reimbursed within one year whereafter they shall be deemed to be extinguished and the amount of the value of those so extinguished to create a personal unsecured debt as against the chargee at the date immediately prior to the extinguishment of the same.

3. That the provisions of the 1880 Law in regard to rentes nouvelles be repealed and that the holders of such rentes be entitled to require their reimbursement or replacement by an hypothec in the form recommended at D within a specified time. Any rente not reimbursed or replaced as above would, as with rentes anciennes, create a personal unsecured debt as against the chargee at the date immediately prior to the extinguishment of the same.

4. That all part considerations and annuities be secured by means of the hypothec recommended at D.

I. TRUSTS OF IMMOVABLE PROPERTY IN JERSEY

History

In 1860 Royal Commissioners were appointed to research, *inter-alia,* the law of trusts in Jersey. The result of their research was the finding that, at the time, there was no law "expressly forbidding the creation of trusts by an act *inter vivos*...". It was, however, recognised by the Jersey Lawyers giving evidence to the Commissioners that for the previous forty years, transactions purporting to create trusts for public objects had taken place. Those trusts were considered to be of great value to the public: their validity, however, had never been challenged and there was a divided school of thought concerning their enforceability. The absence of statutory or common law on trusts was summed up by the Commissioners with the words "the Law of Jersey does not recognise Trusts". The recommendation was made that a Law be enacted confirming the validity of public trusts of land created by contract *intervivos* and it was effectively out of such recommendation that the Loi (1862) sur les Teneures en Fideicommis et l'Incorporation d'Associations ("the 1862 Law") was born.

Article 1 of the 1862 Law, as amended, and in translation provides as follows:-
"It is lawful to take, acquire, hold and possess through and in the name of a fideicommis and in trust for the object specified in this article, all types of immoveable property, on condition of the observation of the provisions of this Law, namely:

1. For every cause of public utility;
2. For the use and benefit of the following associations, viz. commercial or industrial associations and charitable, artistic or sporting societies;
3. For the service of the Anglican religion or any other religious denominations;
4. For the establishment of schools or places of education."

However, only those incorporated associations or societies created under Article 1(2) have "the right to receive, hold, and possess every kind of testamentary legacy, whether movable or immovable which may be made to them". Those fideicommis constituted under Article 1 (1), (3) and (4) may only acquire land or receive gifts thereof by contract intervivos. The reason for this distinction is unclear and, it is submitted, unnecessary. Even less clear and less convincing is the reason behind the prohibition under the Trusts (Jersey) Law 1984 (“the 1984 Trust Law”) relating to express trusts of immovable property (see below).

Matthews and Sowden in their publication "The Jersey Law of Trust" (3rd edition) ("The JLT") have given much consideration to the issues surrounding trusts of immovable property in Jersey. They have also carried out a detailed review of that part of the report of the Royal Commissioners of 1860 relating to trusts.

Paragraph 2.3.9 of the JLT states:-
"The view of the Royal Commissioners of 1860 was not merely that "Trusts of realty, in favour of private individuals…are…absolutely unknown" (Report, XXV) although they recommended an enactment to deal with *public* Trusts of Immovables, they declined "to suggest the general introduction of trusts", on the basis that "the inhabitants of Jersey are not …prepared for such a change at present; and it could scarcely be introduced without a fundamental alteration of their whole system of [immovable] property, which, with the exception of the complications arising from the law of guarantee, is remarkable for its simplicity" (Report, XXVI)."

The need for change

If the recommendations of the Law Commission are to be adopted, they will invariably involve a fundamental and necessary alteration to the whole system of immovable property. It is submitted that the time for such a fundamental change has now come.

The Public Registry, as the name suggests, was intended to be and remains today open to the public. Registration of

title was and remains instrumental in ensuring transparency in relation to ownership of land and thus assisting in the prevention of fraud.

The Housing (Jersey) Law 1949 ("the 1949 Law") allows the purchase of immovable property in Jersey by companies and the shares of such companies may be bought and sold without any infringement of the 1949 Law. In practice, however, it is conceded that the Housing Committee will rarely grant consent for the purchase of immovable property to a company save where that company intends to develop the land into multiple units of accommodation for onward sale. The Housing Committee would then give consent for the property to be purchased by the company on condition that, once developed, the units of accommodation be occupied solely by persons qualified as A–H or J under the Housing Regulations.

The provisions of the 1984 Trust Law and in particular Article 10 (2) (a) (iii) makes clear that Trusts of Immovable Property situated in Jersey are invalid:-

"subject to Article 10a a trust shall be invalid –

a) to the extent that…

(iii) it purports to apply directly to immovable property situated in Jersey.

The 1984 Trust Law makes it clear that only that part of the trust relating "directly" to immovable property in Jersey shall be invalid in Jersey. Thus a trustee may validly hold shares in a property owning company without infringing the 1984 Trust Law. This appears to be a distinction without a difference. Given also that a settlor is able to sell immovable property and settle the proceeds himself, it does seem absurd to disallow a trust where a settlor conveyed immovable property to trustees, placing the trustee under a duty to sell the property and to hold the proceeds thereof upon certain trusts. This would be a kind of trust known to English law as a trust for sale under which the beneficiary's interests are in the proceeds of sale and not in the land itself, which would appear to avoid the prohibition under the 1984 law . In *Latter v The Dean (1948)* 50H 305, 310, an intervivos trust of the proceeds of sale of Jersey immovables was held valid, perhaps for this reason".

It should be noted that the provisions of the 1984 Trusts Law appear to apply to express trusts only and not to constructive trusts. This view is supported by Matthews and Sowden at paragraph 7.16 of the TLJ:-

"…A Jersey Trust is invalid to the extent that it "purports to apply" to Jersey immovables. These words are apt to cover an *express* trust, but not one imposed by the law or by the courts. Moreover, our Arts (50) (3) (tracing) and 29 (constructive trustees) contain no limitation on the kind of property which may be subject to a proprietary claim. Indeed, both provisions refer to "property", which is defined by Art 1 (1)(1) to mean "property of any description wherever situated". It would be absurd if the beneficiaries of a Jersey Trust could not trace into Jersey land bought, in gross breach of trust, by a trustee with trust funds, or if such beneficiaries could lay claim to shares bought with a bribe given to the trustee but not Jersey land bought with the same bribe. It would be an affront to justice in such a case to say that the Trustee held such property free from any trust (cf art (10)(5)). In our view it is clear that there may be a constructive trust of Jersey immovable property."

This view has been supported by the judgment of the Royal Court in the case of "*In the matter of the Esteem Settlement and the Number 52 Trust*" (RC January 2002) where the Royal Court found that a constructive trust existed conferring a proprietary interest in property including immovable acquired with stolen funds. Similarly in the case of *Murphy v Thomas* (RC 2001) the Court held that the Plaintiff had an interest in the property to which she had contributed part of the purchase consideration although title was vested in the sole name of the Defendant.

Recommendation

The Law Commission recommends that the 1984 Trust Law and the Law on Wills and Succession be amended to

make provision for trusts of immovable property. It further recommends that the new law on registration and hypothecation provide for the registration of all documents of title relating to property acquired or held by the trustees.

At present, the law of Jersey does recognise trusts of interests in immovable property. It is submitted that the provisions of Article 10 (2) (a) (iii) of the 1984 Trust Law are no longer sustainable and should be rescinded. The 1984 Trust Law does contain adequate safeguards for innocent purchasers for value and for trustees vis-a vis creditors for the trust estate so no other legislative amendment would be required other than to update the 1862 Law as regards public type trusts which in the Commission's view should still be subject to scrutiny by the Royal Court.

J. SUMMARY OF RECOMMENDATIONS

1. An amendment to the Royal Court Rules introducing a mandatory requirement for all conveyancing to be conducted in the English language; the adoption of a glossary of terms and a standard form of deed of conveyance to be executed under hand by the parties before a prescribed witness and filed with the Judicial Greffier on any week day before 2.30pm for registration the same day.

2. The provisions of the 1880 Law on simple conventional hypothecs to be amended to prohibit the creation of simple conventional hypothecs after a specified date.

3. The provisions of the 1880 Law on hypothecs created by acknowledgement by Act of the Royal Court to be amended to abolish the prescription period applicable to such hypothecs and that the benefit of such hypothecs be assignable by registration of a form of transfer executed before a prescribed witness with the Judicial Greffe on payment of a nominal fee and include a power of sale exercisable by the lender to enforce his security.

   All part considerations and annuities to be secured by means of this one remaining form of hypothec.

4. The abolition of the provisions of the 1880 Law relating to rentes anciennes.

5. The rescission of the Loi (1970) Touchant Le Remboursement de Rentes Anciennes and the Rentes Publiques (Redemption) (Jersey) Act 1990 be repealed and replaced with a law requiring all rentes anciennes to be reimbursed within one year, whereafter they shall be deemed to be extinguished and the amount of the value of those so extinguished to create a personal unsecured debt as against the chargee at the date immediately prior to the extinguishment of the same.

6. The rescission of the provisions of the 1880 Law relating to rentes nouvelles and a provision that the holders of such rentes be entitled to require their reimbursement or replacement by an hypothec in the form recommended at Section D within a specified time. Any rentes not reimbursed or replaced as above would, as with rentes anciennes, create a personal unsecured debt as against the chargee at the date immediately prior to the extinguishment of the same.

7. An amendment to the Probate (Jersey) Law 1949 as to the requirement for a Grant of Letters of Administration for movable property to be extended to include immovable property (where deceased died intestate as to immovable property) and registered in the Public Registry.

8. Legislation to make provision for the prescriptive period for actions in real property to be reduced from forty years to ten years.

9. Legislation be enacted granting discretionary powers to the Royal Court when dealing with actions including a breach of servitude, such powers to include, but not to be limited to any one or more of the following orders on such terms as the Court thinks fit:

   9.1 An order (whether by way of specific performance or an agreement or otherwise) effecting or directing the transfer, creation, varying or extinguishment of any interest in or in relation to immovable property (including freehold title, servitudes, hypothecs, life interests, contract leases and also paper leases and licences);

   9.2 An injunction directing a person to cease carrying out or to carry out a specified act;

9.3 An order directing a person to pay damages to another in such sum as the Court considers just;

9.4 A declaration of a person's right in or in relation to immovable property;

9.5 Such further orders as the Court thinks just.

10. For the avoidance of doubt, in any action for breach of a servitude which is threatened or continuing the Court should expressly be empowered, if it considers it just, to award damages to the injured party in lieu of an injunction restraining or removing the breach of servitude, notwithstanding that the effect of the award of damages may be to extinguish or vary the servitude.

11. Legislation should provide for any order of the Court which has the effect of varying particulars registered in the Public Registry to be registered.

12. Agreements relating to a transaction in immovable property, to be enforceable, provided they are in writing signed by both parties in the presence of independent witnesses and contain prescribed essential terms. The essential terms may be those currently prescribed under the Security Interests (Jersey) Law 1984.

13. The Trusts (Jersey) Law 1984 to be amended to provide for the creation of trusts of immovable property in Jersey.

14. The Loi (1851) sur les Testaments d'Immeubles to be amended to remove the prohibition on the creation of testamentary trusts of immovable property.

15. The Loi (1862) sur les Teneures en Fideicommis et L'Incorporation des Associations to be amended to provide for any fideicommis thereunder established to receive bequests of movable and immovable property.

As stated in the preliminary report issued in July 1999 the above are proposals for the short term as the Commission is of the opinion that in the long term the conveyancing system should be changed from the present registry of deeds to a registered title system as exists in England and Wales. The above proposals should facilitate such a change and eventually lead to an electronic system of conveyancing as is envisaged in England by the Land Registration Act. The Commission would intend to commence work on a further report on its long-term proposals once the consultation process has been completed on this report.

SCHEDULE 1

GLOSSARY OF WORDS

A fin d'héritage	In perpetuity
Adduction (f)	The supply/conveyance
Aboutissant	Abutting
Affiche (f)	Notice board
A fin de plus amplement	In order to more adequately
Agrandissement (m)	Extension (to a building)
Aile (f)	Wing
Aire (f)	Area
Alinéa (m)	Indented line, paragraph
Aménager	To make up
Angle (m)	Corner
A piétons	On foot
Appartenance/s (f)	Appurtenance(s)
Appentis (m)	Outhouse/lean-to-shed
Apprivoisé	Tame

Approvisionnement (m)	Supply
Arbuste	Shrub
Asphalte (m)	Tarmac
Assiette (f)	Site
Assiette solide (f)	Solid base
Assujetti	Subject to
Atelier (m)	Workshop
Auberge (m)	Inn
Au pourportant de	Co-extensive with
Avant-toit (m)	Eaves of roof
Avis (m)	Notice
Avoisinant	Neighbouring
Ayant droit	Assigns
Bailler à termage	To lease
Bail à termage	Lease
Bailleur (m)	Lessor, landlord
Bailler et Vendre	To sell subject to incumbrances
Bailler, ceder et transporter	To gift subject to incumbrances
Banc d'arbustes (m)	Bank of shrubs
Banc d'épines (m)	Thorn hedge
Barrière (f)	Gate
Becquet de terre (m)	Small piece/strip of land
Bel (m)	Farmyard
Béton (m)	Concrete
Béton-armé (m)	Reinforced concrete
Bié (m)	Brook
Bié de moulin	Mill-course/race
Bien-fonds (m)	Corporeal hereditament
Billet-à-ordre (m)	Promissory Note
Boiserie (f)	Woodland
Boîte de dérivation (f)	Electricity junction box
Boîte de distribution (f)	(JEC) section pillar
Boîte pour le compteur électrique (f)	Electricity meter box
Bordure du troittoir (f)	Kerb
Bornage (m)	Boundary
Borne (f)	Boundary stone (previously established)
Bosquet (m)	Copse/grove
Bout (m)	End
Buisson (m)	Bush
Cadastreur (m)	Surveyor
Carre (f)	Edge
Carrefour (m)	Crossroad
Carrossable	Roadworthy
Cassé et annulé	Null and void
Ceder et transporter	To gift
Chaumière (f)	Cottage
Chantier (m)	Work site
Chasse (f)	Driveway
Chassîs de fenêtre (m)	Window frame

Chaussee (f)	Roadway, causeway
Chemin convenable (m)	Roadway for vehicles properly made up
Chemin particulier (m)	Private roadway
Clos (m)	Field
Clos et etanche	Wind and water tight
Clôture (en fil de fer) (f)	Enclosure (wire fence)
Compteur éléctrique (m)	Electricity meter
Caution (f)	Surety
Contrebanque (m)	Retaining bank
Contrefort (m)	Buttress
Convenable	Suitable
Corps de bien fonds (m)	Corpus fundi
Cotière	Façade/side
Dallage (m)	Paving/flagging
Dalle (f)	Paving/flagstone
Dépôt (m)	Deposit
Désservir	To serve
Donataire (m)	Donee
Donateur (m)	Donor
Donation, cession et transport héréditaire	Hereditary gift
Donner, ceder et transporter	To gift
Douaireière (f)	Dowager
Douet (m)	Brook
Douet (m)	Stream
Droit d’accès	Right of access
Droit de chemin et passage	Right of way and passage
Droit d’usufruit et jouissance	Right of life enjoyment
Eau pluviale	Surface water
Echafaudage (m)	Scaffolding
Écurie (f)	Stable
Égout collecteur (m)	Main drain
Égout public (m)	Public drain
Embouchure (f)	Opening
Embranchement (m)	Junction
Encoignure (f)	Internal corner
Les épurs et immondices	Sewage
Etage mansardé (m)	Attic
Étage supérieur (m)	Upper floor
Étang (m)	Pond
Fenêtre à guillotine (f)	Sash window
Fil de fer (m)	Wire fence
Du feu en tôle (m)	Sheet metal
Fonds (m)	Property/land
Fosse (f)	Pit
Fosse d’aisance (f)	Cess pool
Fosse à purin	Slurry pit
Fossé et relief (f)	Manure heap
Fosse septique (f)	Septic tank
Le fossé	Bank

Sans fourniture ni garantie	Without liability to make good any loss or to guarantee title
Garant	Guarantor
Grille (f)	Railing
Haie vive (f)	Hedge
Hêche (f)	Gate
Héritage (m)	(compared) hereditament
Hôgard (m)	Stack-yard/open shed
Hypothèque conventionnelle (f)	Contractual hypothec
Hypothèque foncière (f)	Ground hypothec
Hypothèque légale (f)	Legal hypothec
Hypothèque simple (f)	Simple hypothec
Jardin potager (m)	Vegetable garden
Lieu de stationnement	Parking space
Lisière de terre (f)	Strip of land
Longeant	Bordering
Lotissement (m)	Housing estate/plot
Mansarde (f)	Attic
Marais (f)	Marsh
Morceau de terre (m)	Tiny piece of land
Mue-à cochons (f)	Pigsty
Mur de cloison (m)	Dividing wall
Mur de soutènement (m)	Retaining wall/bank (holds back land on higher level)
Mur de soutien (m)	Supporting wall (i.e. weight above)
Mur en blocs de béton (m)	Concrete wall
Des nocs et gouttières	Downpipes and gutters
Palissade (f)	Fence
Parterre (m)	Flower bed
Pignon (m)	Gable
Portique (m)	Porch
Par un petit bout	By a small section
Pension de famille (f)	Guest House
Pension bourgeoise (f)	Lodging House
Pièce de terre (f)	land (small piece)
Pierre angulaire (f)	Cornerstone
Pierre à paver (f)	paving stone
Pierre ou devise (f)	boundary stone (now being established)
Pilier de hêche (m)	gate-post
Placard (m)	Poster/notice
Plaque d’égout (f)	manhole cover
Plate-bande (f)	Flower/grass border
Planche de bord	Fascia board
Possession propriétaire	Proprietary possession
Pouce (m)	Inch
Poutre (f)	Beam, girder
Au préalable	In advance/beforehand
Preneur (m)	Lessee
Puisard (m)	Soakaway

Puits (m)	Well/shaft
Quote-part (f)	Share (portion)
Raccordement (m)	Connection
Rebord de fênetre (m)	Window sill
Recours à icelui	To which reference may be made
Regard (m)	Inspection chamber
Relief	Offset
Rente viagère (f)	Life annuity
Réservoir d’emmagasinage (m)	Storage tank
Réservoir de mazout (m)	Oil tank
Rocaille (f)	Rockery
Rond-point (m)	Roundabout/turning point
Ruelle (f)	Narrow road
Ruisseau (m)	Brook
Serre (f)	Greenhouse
Seul et même corps de bien-fonds	One sole corpus fundus
Souffrir	Allow`
Surplomber	To overhang
Système d’égout (m)	Drainage system
Tailler	To prune
Talus (m)	Slope
Tour d’echelles (f)	Ladder span
Treillage (m)	Trellis
Trou de sonde (m)	Borehole
Tuyau d’égout collecteur (m)	Collecting drain
Tuyau de trop plein (m)	Overflow pipe
L’usufruit et jouissance	Life enjoyment
Vendre, ceder et transporter	To sell
En verre dormant	Frosted/opaque glass

Any words not defined above to have their ordinary meaning.

SCHEDULE 2A

DRAFT CONVEYANCE

DATE

This day of two thousand and

PARTIES

(1) Vendor/Donor/Transferor
(2) Purchaser/Donee/Transferee
(3 etc) Third parties

NATURE OF TRANSACTION

Sale/Gift/Cession/Exchange etc. and form of tenure

PROPERTY

Name/address/location

CONSIDERATION

Amount payable in cash and amount, date and name of creditor of any existing hypothecs to be assumed by transferee.

COMPLETION

Date for payment of consideration and granting of possession.

THIRD PARTY PROVISIONS

State nature of third party agreements.

SCHEDULES

1. Description of each parcel of property conveyed with site plan.
2. Existing servitudes affecting property stating their derivation
3. Any new servitudes being created.
4. Root of title.
5. Details of any tenancies affecting the property.
6. Details of any hypothecs over the property to be assumed by transferee.
7. Exclusions from warranty of title.
8. Details of third party provisions.

ATTESTATION CLAUSE

Parties to execute under hand before prescribed witness.

SCHEDULE 2B

EXPLANATORY NOTE ON DRAFT CONVEYANCE

PARTIES

State full christian names, surnames and maiden names as appropriate and full postal address of each of the parties. In the case of corporate bodies state the registered office.

NATURE OF TRANSACTION

State whether sale, gift, cession, exchange etc. and form of ownership, i.e. in common or joint, life enjoyment or reversion etc.

PROPERTY

State name and full postal address and field numbers of land.

THIRD PARTY PROVISIONS

If the third party is surrendering a right or concurring with a statement included in another part of the schedules a simple statement to that effect would be made but if the provisions are more extensive then they should be included in a separate schedule 7 which can be incorporated by reference in this section.

SCHEDULES

1. Description

The description should include the nature of buildings and land, the boundaries, the appurtenances and dependencies. The plan should show the extent of the property with the ownership/party ownership of demarcation walls/position of boundary stones/points and demarcation lines clearly marked and names or numbers of adjoining properties.

4. Title

The root of title should trace back ten years or the last registered transfer of the property if earlier.

7. Exclusion from warranty of title

The transferor shall be deemed to warrant a good unencumbered title of the property free of all rights, easements, encroachments and restrictions or defects which may affect it of which the vendor was aware or could not have been unaware except as otherwise expressly disclosed in the Schedules or which are known to or can be perceived by a prudent and diligent buyer.

SCHEDULE 3

LEGISLATIVE AMENDMENTS

Should our proposals be implemented, the following enactments will require amendment:-

1. The Code of Laws for the Island of Jersey 1771;
2. The Loi (1840) sur le Registre Public des Contrats;
3. The Loi (1862) sur le Registre Public des Contrats;
4. The Loi (1880) sur la propriété Foncière;
5. The Royal Court Rules;
6. The Probate (Jersey) Law 1949;
7. The Trusts (Jersey) Law 1984;
8. The Loi (1851) sur les Testaments d' Immeubles;
9. The Loi (1862) sur les Teneures en Fideicomis et L'Incorporation des Associations.

Below is a summary of recommended legislative amendments.

1. The Royal Court Rules to be amended to provide *inter alia* for*:*

1.1 All contracts for the conveyance of land to be drafted in the English Language;
1.2 The incorporation of a draft conveyance together with an explanatory note; and
1.3 The incorporation of a glossary of terms for guidance.
1.4 Discretionary powers to be granted to the Court for dealing with actions brought in breach of servitude.

2. The introduction of a new law on Land Registration and Hypothecation to provide, *inter alia* for:

~~1.1~~2.1 All registrable contracts of land to be signed/sealed (as appropriate) by each of the parties to the contract or their respective attorneys before a prescribed witness who shall be a locally qualified Advocate or Solicitor who shall cause the relevant contract to be filed with the Judicial Greffier.

2.2 All registrable contracts of land, including partage, hypothecs and all billets registering a charge over land to be handed to the Judicial Greffier by no later than 2.30 pm on any given working week day for registration on that day, failing which registration to be deemed to have taken place on the next working day.

2.3 The provisions of the 1880 Law on simple conventional hypothecs be amended to prohibit the creation of simple conventional hypothecs after a specified date.

2.4 The provisions of the 1880 Law in regard to rentes anciennes be repealed.

2.5 The Loi (1970) Touchant le Remboursement de Rentes Anciennes and the Rentes Publiques (Redemption) (Jersey) Act 1990 to be rescinded and replaced with a law requiring all rentes anciennes to be reimbursed within one year whereafter they shall be deemed to be extinguished and the amount of the value of those so extinguished to create a personal unsecured debt as against the chargee at the date immediately prior to the extinguishment of the same.

2.6 All part considerations and annuities be secured by means of the hypothec recommended at D.

2.7 All attorneys and tuteurs to register their respective Powers of Attorney or Acts of Court confirming appointment (from 1771 code).

2.8 The Public Registry to remain available to the public wishing to make enquiries on the Pride system or in the historic books (from 1771 code).

2.9 Upon appointment of the new Registrar, such Registrar to take oath before the Royal Court (from 1771 code).

2.10 The Probate law to be amended to the extent that the requirement of a Grant of Letters of Administration for immovable property be extended to include immovable property (where the deceased has died intestate as to immovable property) and to be registered in the Public Registry.

2.11 The Registrar to make a back up copy of all contracts to be registered (from Art. 1 1840 Law).

2.12 Failure to register a hypothec or Billet in relation to a charge to mean that such hypothec or charge will remain unsecured (from 1771 Code).

2.13 All trust instruments of trusts which purport to hold immovable property in Jersey to be registered in the Public Registry;

2.14 The Trusts (Jersey) Law 1984 to be amended to allow trusts to acquire and hold immovable property in Jersey;

2.15 The Loi (1862) sur les Teneures en Fideicommis et L'Incorporation des Associations to be amended to allow Trusts created under this law to receive bequests of property, movable and immovable;

2.16 The Loi (1851) sur le Testaments d'Immeubles to be amended to remove the prohibition on the creation of testamentary trusts of immovable property.

SCHEDULE 4

Jersey Law Review

THE EFFECT OF THE *FOURNITURE ET GARANTIE* CLAUSE IN A HEREDITARY CONTRACT

Article by Dr John D. Kelleher

In a standard hereditary contract relating to immovable property there are many standard clauses. The exact meaning of some of these clauses is not always immediately clear; similarly their effect. One such clause is that which purports to provide a reciprocal guarantee on behalf of the parties to the contract.

The *fourniture et garantie* clause, with slight variations depending on the nature of the contract, is with the exception of gifts, never absent from an hereditary contract relating to immovable property. Its more or less standard form is as follows:

> *"Partant s'obligèrent lesdites parties pour elles et leurs hoirs respectifs à la fourniture et garantie réciproque du contenu des prémisses selon droit."*

The inclusion of a *fourniture et garantie* clause in an hereditary contract is in fact a matter of choice for the parties, but it is invariably included. But what does it mean? And what is its effect?

The *fourniture et garantie* clause is an engagement by the parties to the contract, which binds them and their respective heirs, to indemnify the other; the vendor in the event that the title to the property described in the contract is somehow defective; the purchaser in case of breach of his obligations thereunder. The word "*fourniture"* applied to the guarantee exercisable on the movables and the *rentes* of the guarantor. Since 1880 there can no longer be a guarantee on a movable so the word is now redundant in that regard. *Rentes* are, of course, increasingly irrelevant in modern conveyancing. The word "*fourniture*" survives, no doubt, as a matter of conveyancing practice.

The *fourniture et garantie* clause was a standard feature in pre-1880 hereditary contracts relating to immovable property, but its effect was the subject of major criticism. Of the system of *garantie*, the Commissioners of 1861 stated:

> "It is difficult to conceive a system more vicious in principle, or more calculated to create confusion".

According to R.P. Marett, the draftsman of the reforming *Loi (1880) sur la propriété foncière* which did so much to reform the evils of the system, *garanties* were the "*principales causes des complications qui règnent dans notre système de propriété foncière".*

The reforms effected by virtue of the *Loi (1880)* ensured that a guarantee arising post 6th September, 1880 did not automatically confer an hypothec over the guarantor's immovable property. Instead, an action *en garantie* is required and the right to so action is prescribed after thirty years (Article 44). The final paragraph of Article 45 stressed the importance of the *fourniture et garantie* clause:

> "*Lorsque l'alienation aura été faite avec une stipulation expresse que c'est sans fourniture ni garantie de la part de l'aliénateur, l'acquéreur n'aura point de recours en garantie vers lui; mais il jouira des autres droits et privilèges mentionnés dans le présent Article, selon le cas. Le donatire et le legataire seront assimilés à l'acquéreur sans fourniture ni garantie."*

With what Marett called their *"effets pernicieux"* removed to a great extent by the *Loi (1880)*, guarantees continued and continue to form a standard clause in contracts relating to immovable property. But their effect was changed by the reaction to judgment in one of the more celebrated cases in Jersey property law.

The issue of what is guaranteed or warranted in an hereditary contract of immovables was discussed in *Kwanza Hotels Ltd v Sogeo Company Ltd.* The case involved the purchase of a property which included a chalet described by an estate agent as "owner's accommodation". In fact the chalet had been erected without planning consent and could not be used for human habitation.

At both instances in *Kwanza*, Poingdestre's *Les Lois et Coutumes de L'Ile de Jersey* was quoted with approval:

> "*Tout homme qui a vendu, baillé, assigné, cedé, eschangé, engagé, hypothequé, ou allotty en partage & diussion de chose commune; est tenu à garantir la chose vendue, bailleé, assignée, cedée, eschangée, engagée, hypothequée ou allottie pour ledit Partage ou division; non seullement quant à la proprieté & possession, mais aussy quant aux charges, empeschements & servitudes qui la diminuent de valleur, & la rendent moins estimable."*

Thus every vendor (and not only a vendor who gives a guarantee) has responsibility for the character or quality of what he sells, be it immovable or movable, and this relates not only to ownership and possession, but also to charges, *empeschements* (unfortunately not defined by Poingdestre) and servitudes. However as the Court of Appeal noted at 114, Poingdestre is unfortunately silent as to how the liability of the vendor is affected by the knowledge or ignorance of the purchaser.

Poingdestre goes on to say that the parties can negate or extend the ambit of this basic position of guarantee:

> "*En tous Contracts les parties contractantes peuvent de consentement mutuel, s'obliger l'un l'autre a des garanties extraordinaries… et aussy peuvent ils se descharger l'un l'autre des garanties ordinaires."*

Ereaut, Deputy Bailiff, at first instance concluded that the standard "Le tout tel qu'il est…" clause serves to negate the implied warranty in an hereditary contract save as to title. The then standard clause ran as follows:

> "*Le tout tel qu'il est avec tout et autant de droits, appartenances et dépendances comme en peuvent appartenir situé en la paroisse de, etc."*

His reason for this conclusion was that the words: "*Le tout tel qu'il est*":

> "must be deemed to have some meaning and I consider that they are similar to the expression referred to in Domat, and mean that the purchaser takes the property as he finds it" (page 77).

The extract from Domat states that:

"*Si un héritage est vendu comme il se comporte, ou ainsi que le vendeur en a bien et duement joui, ou avec ses droits et conditions; ces expressions et autres semblables, n'empêdhent pas que le vendeur ne demeure garand des servitudes cachées et des charges inconnues: comme seroit une rente foncière à laquelle l'heritage feroit asseris*."

Ereaut, Deputy Bailiff, interpreted this passage to draw:

"a distinction between "*vices cachés*" which affect title and those which do not. The implied warranty as to title remains, but in other respects is negated."

Domat appears to say that if a property is sold such as it is or with words to similar effect, this does not negate the vendor's responsibility for hidden servitudes and unknown charges; in other words, for defects that go to title.

Ereaut, Deputy Bailiff's findings gains some support from the fact that good conveyancing practice requires that, where in an hereditary contract there is to be no guarantee, the contract must expressly say so: "*le tout sans fourniture ni garantie*", as in the case of a donor making a gift. The view is clearly taken that the exclusion of the *fourniture et garantie* clause is not enough: the exclusion must be express.

The effect of the *Kwanza* judgments was a new standard clause, reputedly drafted by counsel who appeared in that case:

"*Le tout tel qu'il est avec tout et autant de droits, appartenances et dépendances comme en peuvent appartenir et dans l'état ou il se trouve avec tous ses vices apparents ou cachés, s'ils existent…"*

Post *Kwanza* hereditary contracts contain both a *fourniture et garantie* clause and this new clause, commonly known as a *vice caché* clause. However the combined effect of these two clauses was surely not planned. From the point of view of the vendor's obligations under the contract the latter appears to run contrary to the former. This interpretation turns on what is covered by the term *vice caché*.

In the Court of Appeal, after running through the same authorities as cited at first instance, the Court said at page 119:

"This is not an entirely consistent line of authority, but in our judgement the relevant principles do emerge reasonably clearly. The doctrine [of *vice caché*] applies not only to physical faults, but also to legal limitations of the enjoyment by the purchaser of the thing sold. This was clearly the view of Poingdestre. A fault is not 'hidden' if the purchaser could have discovered it either by examining the thing sold himself or (as Pothier expressly said) by getting it examined by somebody qualified. The critical questions is whether the fault would have been revealed by an examination, more than superficial but less than minute, such as a reasonably careful purchaser could have made either himself or through someone appointed for the purpose."

On the face of it therefore, title is covered by the term *vice caché*. Contemporary conveyances are stated to exclude liability for vices *apparents ou cachés*. Quite how such a clause sits with the *garantie* clause is unclear. However the potential effect is that no guarantee to title is provided by a vendor. Of course, the point is potentially irrelevant given that a purchaser's lawyer researches title prior to contract and the lawyer will be actionable for missing a defect in the same. However it could be relevant if, say, for some reason the lawyer was not actionable, and recourse against a vendor was contemplated. It is something which should be clarified. Furthermore, it is submitted that this unclear position provides an example of standard conveyancing documentation which is somewhat anachronistic and which contains clauses the meaning of which is shrouded in mystery.