Catriona Mary Fogarty v St Martin's Cottage Ltd

Jurisdiction:	Jersey
Judge:	Collas JA
Judgment Date:	05 October 2016
Neutral Citation:	[2016] JCA 180
Reported In:	2016 (2) JLR 246
Court:	Court of Appeal
Date:	05 October 2016

Text

Between
Catriona Mary Fogarty
Appellant
and
St Martin's Cottage Limited
Respondent

[2016] JCA 180

Before:

Jonathan Crow, Q.C., President; Sir Richard Collas, Bailiff of Guernsey; and David Perry., Q.C.

COURT OF APPEAL

Appeal against judgment and costs.

Authorities

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Fogarty v St Martin's Cottage Limited [2016] JRC 073.

Mauger v Gavey (1720).

Pothier, Des Servitudes Réelles citing Article 230 of the Coutume d'Orleans.

Le Bas v De Caen, referred to by *Le Gros* at pages 263–264.

Felard Investments Limited v Trustees of the Church of our Lady Queen of the Universe [1979] J.J.19.

Pirouet v Pirouet [1985–86] JLR 151.

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Munro v Finlayson [2015] S.L.T. (Sc Ct) 123.

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Buckland v UK (2013) 56 EHRR 16.

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Vidal-Hall v. Google Inc [2015] EWCA Civ 311. [2015] 3 WLR 409, §21 – 43.

Campbell v. MGN Newspapers [2004] UKHL 22, [2004] 2 AC 457.

Douglas v. Hello! Ltd [2006] QB 125.

J.A. Pye (Oxford) Ltd v. UK (2006) 43 EHRR 3 (Chamber) & (2008) 46 EHRR 45 (Grand Chamber)).

Advocates D. J. Benest **and** J. N. Heywood **for the Appellant**.

Advocates C. Hall **and** R. A. Falle **for the Respondent**.

Collas JA

Introduction

1 This is an appeal and cross-appeal from the judgment of the Héritage Division of the Royal Court (William Bailhache, Bailiff, and Jurats Fisher and Marrett-Crosby) dated 10th April 2015 (*Fogarty v St Martin's Cottage Limited* [2015] JRC 068 and reported at [2015] (1) JLR 357 together with an appeal against the costs order of the Bailiff, sitting alone, handed down on 30th March 2016, *Fogarty v St Martin's Cottage Limited* [2016] JRC 073, unreported. The case concerns a long running boundary dispute between neighbouring property owners. The Appellant, who was the Plaintiff in the court below, owns land with a dwelling-house known as 'Clairmont'. It lies to the west of the Respondent's property on which there is a dwelling known as 'Treetops'. It was accepted that part of a wall forming part of Treetops encroached 1 on Clairmont's land. It was also accepted that a longer section of the wall lay within one and a half Jersey feet (1 foot 4 $^{1}/_{2}$ inches imperial) of the boundary and that windows in Treetops were constructed within three Jersey feet (2 feet 9 inches imperial) of the boundary. The issues in contention on the appeal and

cross-appeal can be summarised as first, whether the Respondent has any right to retain the encroachments and, if not, what remedies are available to the Appellant.

2 The Appellant's Order of Justice sought orders that the encroachments be removed within such time scales as the Court may order, that damages be paid to her for the wrongful encroachment until removal, and costs. In its substantive judgment, the Royal Court held that in place of ordering a mandatory injunction requiring the removal of the encroachments, damages would be an appropriate remedy. In her Notice of Appeal the Appellant contends that the Royal Court erred in law in determining that it had equitable jurisdiction to award damages in lieu of removal or demolition and/or if such jurisdiction did exist, that the instant case was an appropriate one in which to exercise the discretion. She seeks an order setting aside the Royal Court's decision and orders that the encroaching wall be demolished and the offending windows be blocked or removed, and payment of damages for the wrongful encroachments until such demolition, removal or blocking.

3 In its cross-appeal the Respondent seeks an order that, contrary to the decision of the Royal Court, the principle of *destination de père de famille* 2 is relevant and in particular that servitudes may be implied which allow the encroaching wall and windows to remain together with accessory rights of access for their maintenance and repair. On its face, the cross-appeal sought in the alternative an order transferring land to the effect that the otherwise encroached land now forms part of Treetops or, in the further alternative, that the parties be compelled to pass a contract to transfer the encroached land in return for the award of damages, but these two alternative limbs were not pursued by the Respondent in its oral submissions.

4 In this judgment, we deal first with the question of whether by virtue of the doctrine of *destination* the Respondent is permitted to retain the encroachments before we consider whether the Royal Court had the jurisdiction, and (if so) whether it was correct to exercise

its discretion, to order the payment of a sum of damages in lieu of a mandatory order requiring the removal of the encroachments. In other words, we address the Respondent's cross-appeal before considering the Appellant's appeal.

The Facts

5 The facts were largely not in dispute. Old photographs and maps were produced to show that historically the areas of land on which each of the two houses, Clairmont and Treetops, have been constructed were two separate parcels of a single agricultural holding. The Clairmont property slopes steeply, rising from west to east. A plan prepared by Derek Clackett, a surveyor who gave evidence on behalf of the Respondent, shows that across the northern boundary of Clairmont, the property rises approximately 2.28 metres over a horizontal distance of 25.066m. In its original, natural, state Clairmont was a *côtil* which supported the higher land to the east on which Treetops has been built. The boundary with which the Court is concerned forms the eastern boundary of Clairmont, the Appellant's property, and the western boundary of Treetops, the Respondent's property.

6 Prior to 1952, the two agricultural properties were in the common ownership of Mrs Joan Isolda Mauger who also owned a third area of land lying to the east of Treetops, with which we are not concerned. In a contract passed before the Royal Court on 23rd February 1952, Mrs Mauger sold to Mr Gerald Arthur de la Haye the *côtil* on which Clairmont has since been built. She retained the land on which Treetops was built later. On 12th February 1971, Mr de la Haye sold Clairmont to the Appellant's father, Dr John Philip Francis Fogarty. On 30th July 1976, Dr Fogarty transferred Clairmont to Philip Francis Malzard who immediately transferred it back to Dr Fogarty but jointly with his wife, Marcia Rachel Fogarty, the mother of the Appellant, for themselves, the survivor of them and the heirs of the survivor. Dr and Mrs Fogarty were later divorced and, on 1st August 1986, Dr Fogarty transferred his interest in the property to the Appellant's mother who then became the sole owner. The Appellant inherited Clairmont as the sole legatee under her mother's will of immoveable estate registered by Act of the Royal Court dated 22nd December 1999. Thus, Clairmont has been in the ownership of the Fogarty family for 45 years and in the sole ownership of the Appellant for the last 17 years.

7 Following the death of Mrs Mauger, the land on which Treetops was later constructed was sold to Alan John Auty by a contract passed before the Court on 15th March 1968. There have been a number of subsequent transfers, to Samuel Henry Alfred Lapidus on 20th October 1972, to Mr and Mrs David Edward Neeve Hartley on 29th July 1977, to Mr and Mrs John Clifford Farley on 1st November 1991 and then to Mr and Mrs Barrie McLean Dodds on 3rd May 1996. Treetops was acquired by Mrs Dodds in her sole name on 19th December 2003 following a divorce. Mrs Dodds sold Treetops to the Respondent on 2nd March 2007. She has subsequently remarried and is referred to both as Mrs Dodds and as Mrs de Carteret.

8 The disputes over the precise location of the boundary between Clairmont and Treetops

have a long history. We take up the story in 2001 although the disputes had been running for some time prior to then. Around the 4th January 2001, the Appellant issued proceedings against Mrs Dodds for a *Vue de Vicomte* in order to determine the precise location of the boundary line. Rather than proceed to a *Vue de Vicomte*, the parties agreed to give joint instructions to an *Arpenteur* to determine the boundary line and, in doing so, they agreed to abide by his decision.

9 Advocate Fred Benest was instructed as *Arpenteur* by letter dated 9th September 2002. At that time, the location of the boundary was defined by reference to certain measurements agreed in the 1952 conveyance. By letter dated 16th October 2002, Advocate Benest reported that he had attended on site where it was apparent to him that the extent of the original bank and relief dependent upon Treetops was unclear. A further complication was that the 1952 measurements were described as being approximate measurements and hence were not sufficiently precise to define the boundary. He noted that:

> *"An Arpenteur's duty enshrined in the oath set out in the 1771 code is to make … "toute bonne et loyale mesure".* You will appreciate that an Arpenteur is not in a position to make a true record of the size of Clairmont because the measurements are not certain, and even if they were it would not be possible to ascertain from where they were precise measurements originally taken in the north western corner.
>
> *I regret to say therefore that I cannot assist you in determining the exact boundary."*

10 He added that he might be willing to give his opinion as to where the boundary was likely to have been. No doubt he hoped that doing so might assist the parties to reach agreement over the precise location of the boundary but he emphasised that it would only be his opinion and if agreement could not be reached, there would have to be a *Vue de Vicomte*.

11 Some time later, the parties did ask Advocate Benest to provide his opinion as to where the line should be established. He suggested that the then existing western wall of Treetops should be the boundary with rights of access for Treetops to maintain the wall and that the boundary line extend from the end of the wall in a straight line to an imaginary point.

12 It is not apparent to us when the walls and openings which now encroach on Clairmont were constructed, although the Royal Court appears to have accepted the Appellant's evidence that they arose out of alterations to Treetops carried out by Mr Lapidus when he was the owner, that is to say between 1972 and 1977. The Appellant's parents objected to the alterations but it appears that their only objection was on the ground that the works would have a detrimental impact on her privacy — i.e. not that they encroached over the boundary line onto the Clairmont property.

13 On 21st November 2003, Advocate Dorey (the Appellant's advocate) wrote to Mrs

Canavan (acting for Mr and Mrs Dodds) stating that the Appellant was prepared to agree to the boundary being formally established as an imaginary line running straight between two fixed points that had been suggested by Advocate Benest and which, she said, had been agreed by the parties. Mrs Canavan was not instructed to reply so, on 7th April 2004, Advocate Dorey wrote to her again observing that Treetops was on the market, stating that it would be necessary for the boundary to be settled in accordance with the agreement reached and proposing the planting of relevant boundary stones. Again there was no reply and further promptings from Advocate Dorey went unanswered until, in an e-mail dated 16th September 2004, Mrs Canavan informed Advocate Dorey that prospective purchasers of Treetops were being put off by the height of trees adjacent to the boundary and asked that the Appellant agree that the trees be cut back to a height which would not deter prospective purchasers. She also proposed that the boundary be clarified in the Deed of Sale.

14 A note dated 18th April 2005 records that a conveyancer from each of Mrs Canavan's firm and Advocate Dorey's firm attended on site together with the Appellant. The attendance note states the following:

> *"I noted that there is a distinctive bow in the building on Treetops and made the observation that as one cannot see the line between the imaginary point and the new stone there might possibly be an encroachment over the line.* Would prefer to see a further boundary stone where the bow takes place. – For some reason there is an unused boundary stone lying on its side at this point."

15 In an email dated 29th April 2005, Mrs Canavan informed Advocate Dorey of her conveyancer's suggestion that the Appellant be asked to agree to the placing of a third boundary stone. The reply from Advocate Dorey reads as follows:

> *"I have spoken to [the Appellant].* Her preference is for two stones, one at the south end (already planted) and one near the north end. She would prefer a stone near the north end in case anything happened to the wall. The unused stone can be utilised for that.
>
> *If we start to introduce stones in the middle we will be descending back into arguments!* At least if we have stones at each end and an imaginary straight line then we have an established boundary and can pass a contract.
>
> *Can Trevor and Roy [the conveyancers] liaise to do the final stone?"*

16 An internal memorandum dated 19th July 2005 to Mrs Canavan from her conveyancer records that the two boundary stones had been planted where indicated by Advocate Benest. He added:

> *"It is impossible at present to strike a line between the two stones due to trees etc, therefore, in my opinion it is essential that a clause be included in the Deed of Arrangement to the effect that the walls and buildings erected along the west*

limit of Treetops may remain as at present established, notwithstanding that they may perhaps encroach over the new boundary line between the two stones. If they do encroach, then Mrs Dodds would not have a contractual right of access on the adjoining property to maintain the same.

If the neighbour is not prepared to agree that the aforesaid provision is included, then ongoing difficulties are likely to incur."

17 Mrs Canavan wrote to Advocate Dorey *"subject to contract"* on 27 July 2005 reporting what her conveyancer had advised her. She wrote:

"Mr Gallichan [the conveyancer] advises me that it is impossible at present to strike a line between the two boundary stones due to the trees situate on your client's property and, therefore, it is essential that a clause be included in the Deed of Arrangement stating that the walls and buildings erected on the west limit of Treetops may remain as at presently established notwithstanding that they may, perhaps, encroach over the new boundary line between the two stones. My client will, obviously, also require right of access on to your client's property in order to maintain her property. It is clear that if Miss Fogarty is not prepared to agree these provisions then difficulties will continue to occur."

18 Advocate Dorey replied on 9th September 2005:

"The parties reached agreement that Advocate Benest would determine where the two boundary stones were to be placed and that the boundary would be a straight line between the two. It is that agreement which needs to be implemented. *Once implemented then if there are any queries with regard to encroachment or the like such will be dealt with thereafter."*

19 The result of the above was that on 2nd February 2007 a contrat de transaction ("the Boundary Contract") was passed before the Royal Court between the Appellant and Mrs Dodds. The recitals to the Boundary Contract described the parties' respective properties and how they had been acquired and recorded their location in St. Lawence before declaring:

"WHEREAS the boundary between the properties of the parties is uncertain and the parties have agreed to de-limit their respective properties by way of two new boundary stones."

20 It continued:

"IT BEING therefore covenanted and agreed between the parties as follows:-

1. ***THAT*** *"Clairmont" is separated from "Treetops" by way of two new boundary stones planted as follows:-*

[the contract recorded the location of the boundary stones by reference to distances from other features on the premises declaring the measurements be taken following the incline of the ground].

***THE** measurements taken following the incline of the ground*.

***THE** two new boundary stones shall belong (without offset) to Miss Fogarty to be maintained and upkept as such in perpetuity*.

The boundary line separating "Clairmont" on its Eastern side with "Treetops" is a straight line taken along the Eastern faces of the two new boundary stones, hereinbefore described, and projected to the South and to the North until attaining the South and North boundaries of "Clairmont".

***THE WHOLE** in perpetuity*.

***AND ALL THE PARTIES SWORE** that they would not act nor cause anyone to act against this present contract on pain of perjury."*

21 On 2nd March 2007, Mrs Dodds sold Treetops to the Respondent for whom Advocate Slater acted in the transaction. Mrs Canavan knew of his involvement prior to the sale and had telephoned him. She made a telephone attendance note recording that she spoke to him *"entre collegue"*. The note of the conversation reads:

"You are acting. I just flag up you need to be aware was a contract of transaction v recently defining the boundary, so now that's done people shld know where they are re any other problems, such as trees or walls."

22 In its judgment, the Royal Court found that at this time the dispute between the neighbours was focussed on trees near the boundary line which obscured the view from Treetops. The Court received evidence from Mrs de Carteret. In her witness statement she said that she was disappointed with the boundary line suggested by Advocate Benest as she had hoped that the trees would be found to be on her land. She said that by 2005 she had separated from her husband and was desperate to sell Treetops. She had noted that some legislation concerning high hedges had come into force, from which the Court inferred that she might have been considering obtaining an executive order for the removal of the trees (paragraph 26 of the Judgment). In cross examination, she said that, at the time, her concerns were about the trees and not about the wall and she did not recall any advice that might have been given by Mrs Canavan regarding the encroachments.

23 For her part, Mrs Canavan confirmed that she had advised Mrs Dodds in relation to the Boundary Contract. She had noted that it did not contain any clauses dealing with encroachment or maintenance. The Judgment records (at paragraph 50):

"the advice which she gave Mrs de Carteret was apparently that Mrs de Carteret really had a choice of options – either pass the contract without the clauses without any rights to maintain etc., or do not pass it. Mrs

> Canavan said she explained what the contract meant and what the missing information on the missing clauses meant, and she was instructed to go ahead. As far as Mrs Canavan was concerned, Mrs de Carteret was aware that when the boundary contract was passed it did not deal with the potential encroachments."

24 On 10th April 2008, five weeks after the Respondent purchased Treetops, Advocate Dorey wrote to Dr and Mrs D Harrison, the beneficial owners of the Respondent, advising them that the purpose of the Boundary Contract was specifically to define the boundary from which two other matters flowed. She advised first that there could be an encroachment and that windows within 2 feet 9 inches from the boundary must be of opaque or frosted glass. Secondly, the Respondent had no contractual rights over the property of the Appellant in order to maintain its property. The letter was the first the Respondent was told about the encroachments.

The proceedings in the Court below

25 The Appellant filed her Order of Justice on 19th February 2010 seeking the relief set out above. Mediation was attempted on 6th September 2012 but was unsuccessful. The substantive hearing took place between 10th and 13th November 2014, Mrs Canavan's evidence having been taken in advance before the Deputy Viscount on 20th October 2014. The substantive judgment was handed down on 10th April 2015. The parties then sought to agree the quantum of damages and agreement was reached by 15th February 2016. In the meantime they had agreed that the date by which any appeal of the judgment was to be filed would be 28 days after determination of the issues of quantum of damages and costs.

26 The costs hearing was held on 2nd March 2016 and the costs judgment handed down on 30th March.

27 The Royal Court found as fact (at paragraphs 28, 29 and 69 of the substantive judgment) that a portion of the wall which forms part of Treetops does indeed encroach over the boundary. Further, a greater part of the wall encroaches over the line of the *relief* (if such a *relief* exists) of one and a half Jersey feet (1 foot 4 $^{1}/_{2}$ inches imperial). Further, a portion of the Treetops building containing windows of clear glass and capable of being opened, together with other openings, such as drains, had been constructed within three Jersey feet (2 feet 9 inches imperial) of the boundary.

28 The two customary reliefs that would apply between Treetops and Clairmont are:

> (i) A *relief* of 1.5 Jersey feet which extends from and along the boundary and upon which no wall or building may be constructed (*Mauger v Gavey* (1720), referred to by Le Gros at page 262); and

(ii) A *relief* of 3 Jersey feet which extends from the boundary line and which proscribes the incorporation of any windows or openings into any structure which is built within that relief (Le Gros at page 262–263, citing Pothier, Des Servitudes Réelles citing Article 230 of the Coutume d'Orleans). This *relief* of 3 feet must still be left even where the *relief* of 1.5 Jersey feet, which prohibits construction, has been extinguished (*Le Bas v De Caen*, referred to by Le Gros at pages 263–264).

29 The Court found that there was no right to retain the walls, windows or openings but in lieu of ordering an injunction for the mandatory removal of encroaching features, the Court held the appropriate remedy to lie in damages.

The Respondent's contentions in the Royal Court

30 The Respondent, as Defendant in the lower court, responded to the Appellant's claim that the encroaching features be ordered to be demolished, removed or blocked up in pleadings that at the date of trial were contained in a Re-Amended Answer. It submitted that the Boundary Contract was entered into in *erreur* and on that ground should be set aside. The supporting allegation was that Advocate Benest had erred in not including the width of the *relief* in taking his measurements, an error which was not known to Mrs Dodds who, as a result, effectively transferred a section of Treetops to the Appellant for no consideration and at great loss to her property. Furthermore, there was no meeting of minds between the parties to the Boundary Contract because if Mrs Dodds had been aware that the Appellant was agreeing to it on the basis that she would later seek the remedy that is now sought, she would never have agreed to the Boundary Contract.

31 In the alternative, the Respondent pleaded that the Boundary Contract should be set aside on the grounds of *lesion or deception d'outre moitié or dol*. In support thereof the Respondent contended that the Boundary Contract was not a genuine contract of *bornement* but in reality a contract of exchange and counter exchange of land pursuant to which Mrs Dodds transferred valuable land for less than one half of the *juste prix* of the land she transferred. The dispute between Mrs Dodds and the Appellant at that time concerned only the trees and the Respondent averred that, by remaining silent in relation to the encroachments, the Appellant was deceitful in failing to make her intentions clear.

32 Alternatively, the Respondent claimed that if the Boundary Contract were valid, the customary law of *voisinage* conferred a right of support in favour of the Respondent's land which prevented the Appellant from doing anything to interfere with that right.

33 The Respondent also relied upon equitable estoppel, alleging that by her conduct the Appellant had acted unconscionably by intentionally leading Mrs Dodds to assume that the passing of the Boundary Contract would not affect the wall and openings and/or the location of the wall and windows.

34 Additionally, the Respondent pleaded reliance on the principles establishing the *maxim destination de père de famille*, the effect of which is that a servitude be implied to permit the encroachments to remain. Finally, if all the Respondent's other arguments failed, it pleaded that damages would be the appropriate remedy.

The Judgment of the Royal Court

35 Regarding the Respondent's claim to set aside the Boundary Contract on the ground of *erreur, lesion, deception d'outre moitié or dol*, the Royal Court held that, as a matter of law, any rights that Mrs Dodds might have had to pursue such remedies were personal to her. The Royal Court could, in principle, order rectification of contracts concerning real property or set aside such contracts in their entirety on any ground on which an ordinary contract be set aside. The fact that the subject matter of the contract was real property did not mean that the ordinary law of contract would not apply. The principle of ensuring certainty of land ownership was, however, an important consideration. Any right to set aside or rectify such a contract was a personal right vested in the contracting parties which did not run with the land and could not be transferred to successors in title. Alternatively, even if such rights were capable of being transferred then, as a matter of fact, the terms of the Boundary Contract were not effective to do so. Consequently, any rights that Mrs Dodds might have had to set aside the Boundary Contract could not be relied upon by the Respondent.

36 The Court held that, in any event on the evidence it had heard, the allegations of *dol* and *erreur* had not been established on the facts.

37 The Court found that neither the Appellant nor her predecessors had caused any damage to the boundary features that would have caused the original bank or hedge to have moved over the boundary line or to have undermined the wall of Treetops. Therefore, on the facts, the Respondent had failed to establish any grounds for invoking the principles of *voisinage*.

38 The Royal Court also rejected the Plaintiff's claim to set aside the Boundary Contract on the ground of equitable estoppel. It did so, first of all, on the basis that on the facts there had been no conduct by the Appellant which encouraged Mrs Dodds to the belief that there was a right to maintain the encroachments and, further, that the Defendant had not acted to its detriment on the basis of any believable representation encouraged or given by the Appellant. Regarding the recommendation from Advocate Benest, as Arpenteur, the Court recorded that he had merely given his opinion as to where the boundary should be because it was impossible to determine that question with certainty.

39 Further, the Court considered that the doctrine of proprietary estoppel is not part of the law of Jersey and aligned itself with the decision in that regard in *Felard Investments Limited v Trustees of the Church of our Lady Queen of the Universe* (1979) J.J.19.

40 No issue was taken in this Court as to the Royal Court's decision in relation to any of the

above findings. We therefore do not consider them further. We should, however, mention that *Felard* is not necessarily the last word on estoppel: although the point was not argued before us, there are later decisions in *Pirouet v Pirouet* [1985–86] JLR 151, *Maçon v Quérée* [2001] JLR 80, *Cannon v Nicol* [2006] JLR 299 and *Reid v Flynn* [2012] JRC 100, in which the Court was prepared to countenance estoppel as part of the law of Jersey.

41 The application of the doctrine of *destination de père de famille* was considered by the Royal Court at paragraphs 59 to 64 of the judgment in this case. The Court followed the earlier first instance decision in *Le Feuvre v Mathew* [1973] J.J 2461, in stating that the doctrine arises:

> ***"where two properties are in the same ownership, but, on division, one can take as assumed by the law that the respective properties would each have the necessary rights over the other in order to maintain the use of the properties as had previously been enjoyed – generally this would be treated as rights of drainage, electricity, rights of way and so on…***
>
> ***… the principle of destination de père de famille is based on the presumed intention of the parties."***

42 The Court found that on the facts of the present case, the doctrine did not apply. Firstly, the Court said it could not draw any presumption of intention because Mrs Dodds " *simply wanted to get her boundaries settled so she could sell her property, and the plaintiff was absolutely determined not to agree any presumed servitudes on the basis that encroachments would be sorted out later*."

43 Secondly, the Royal Court held that the doctrine of destination did not apply because the Boundary Contract did not involve a separation of land previously in single ownership (paragraph 64 of the judgment). The Royal Court gave careful consideration to the alignment of the boundary line. It accepted the Respondent's contentions that the boundary once followed the natural topography of the land (paragraph 58). However, it could no longer be said where that was. Hence, it found that the Respondent's analysis of the historic position by reference to old maps, aerial photographs and the Court's observations on site was not particularly helpful. In his submissions before us, Advocate Falle referred to contracts dating from the early part of the 19th century in which the land on which Treetops has been built is described as including on the western boundary a *fossé, banc* and *relief*. In other words, when the land was in its natural state, the higher land (Treetops) owned the supporting bank, together with, on the lower level, a *relief* which enabled the land owner to maintain the bank and on top of the bank he had piled up earth to form some sort of enclosure.

44 We accept that is a plausible hypothesis but we agree with the Royal Court that it is not helpful in establishing the precise line of the original boundary which had been so difficult to locate that neither the parties nor the Arpenteur were able to agree upon it. Whilst the precise location of the original line could not be established, the Royal Court nevertheless

concluded at paragraph 58 that the boundary established in the Boundary Contract is probably not where it was previously. That is often the nature of a boundary contract because if the line could be clearly established there would be no need for such a boundary contract.

45 It follows from the above that if, which is normally the case and was probably the case here, the boundary line has changed, no one can say with certainty what area or areas of land may have changed hands between the parties in agreeing a boundary contract. That approach led the Royal Court to dismiss the principles underlying *destination de père de famille* (paragraph 64):

> ***"these principles do not apply here because the building forming part of Treetops and the dividing wall did not exist when the single property including what is now both Treetops and Clairmont was divided.*** The boundary contract is not such a contract as divides the property in single ownership as to create two properties. It is as it is described – a boundary contract establishing a line between two properties which already exist."

The Respondent's contentions re *destination*

46 Before us, the parties disagree as to what the Royal Court decided was the consequence of the Boundary Contract regarding the location of the boundary line. The Appellant's case relies upon there having been no transfer of land or, if land was transferred, the extent of the area conveyed is so uncertain that it cannot be said how it might have impacted upon the encroachments.

47 Fundamental to the Respondent's case is paragraph 92(iv) of the judgment which it interprets as a finding of fact that the encroachments did not exist before the making of the Boundary Contract; prior to then they were in the ownership of the Respondent but as a result of the Boundary Contract, the boundary was moved by the parties towards the east, with the result that land which formerly belonged with Treetops was transferred into the ownership of the Appellant and became part of Clairmont. The Court said:

> ***"(iv) If the boundary contract established a boundary which was more or less in the same place as under the original contracts–which we think is very unlikely-then there would have been an easy answer to the criticisms made by the successive owners of Treetops to the height of the trees.*** The plaintiff's parents would simply have responded to say that the trees were well within the property of Clairmont and they were not prepared to have them reduced in height. Such a letter would have been supportable by the contracts. No such letter, for understandable reasons, can be found. Equally, had it been clear that the boundary was where it is now established by the boundary contract to be, one would have assumed that the plaintiff's parents would have objected when the development of Treetops took place under the ownership of Mr. Lapidus. For these reasons, and by reference to the aerial photographs and

> other evidence, we think that the encroachments which now exist were probably created by the boundary contract and probably did not exist before. In the light of the fact that Mrs. de Carteret agreed the boundary contract under pressure of having to sell her property following her divorce, there seems little equity in an order now that the advantage which the plaintiff secured by the boundary contract – which does after all protect her trees – should be enhanced by subjecting the owner of Treetops to a significant financial penalty."

48 The Respondent interprets the statement that "the encroachments which now exist were probably created by the boundary contract and probably did not exist before" as a finding by the Court, on the balance of probabilities, that the Respondent would have been entitled to retain the encroaching structures, including the windows, without valid objection by the Appellant if the parties had not entered into the Boundary Contract.

49 Consequently, the Respondent argues that the structures are not encroachments in the legal sense, although they are in the sense in which the word is used in common parlance, hence the admission of their existence in the Re-Amended Answer. For the legal meaning, the Respondent relies upon the dictionary definition of the verb *"to encroach"* and its French equivalent *"empiéter"*. The former being: *"1.* To seize, acquire wrongfully" and *"2.* To trench or intrude usurpingly [esp. by insidious or gradual advances] on the territory or rights of another" (Shorter Oxford Dictionary). The French equivalent, in *Littré's Dictionnaire de la Langue Française*, is *"gagner pied à pied et par usurpation"* which can be translated as *"to gain step by step and by usurpation"*. Both involve the notion of usurpation or a wrong done by one person on the land of another. In the present case, where the Royal Court found that the encroachments arose as a consequence of the agreement of the parties in entering into the Boundary Contract there was no wrongful act, no usurpation, and hence, it is submitted, no encroachment properly so-called. Furthermore, it is submitted that prior to the parties entering into the Boundary Contract the Appellant had not sought to claim that the Respondent's buildings encroached on her land despite the uncertainty as to the precise location of the line. Her claim was advanced, and was only able to be advanced, following the passing of the Boundary Contract and as a consequence of what the parties had therein voluntarily agreed.

50 In contending that the Royal Court relied upon a definition of the doctrine of *destination de père de famille* which did not describe the relevant law to the facts in issue, the Respondent recited the history of the doctrine. Originating in Articles 215 and 216 of the Ancient Custom of Paris, it was incorporated into the Reformed Custom of Paris, then imported into the Custom of Orléans and the Reformed Custom of Normandy in Articles 619 and 620, thence into the customary law of both Jersey and Guernsey. After the French Revolution, the principles were adopted by the Code Napoleon as Articles 692, 693 and 694 and remain part of the French Code Civil in modern French law. Advocates Christina Hall and Richard Falle, on behalf of the Respondent, cited passages from: Pothier (Des Servitudes at pages 174–175 Tome 16, 1822 Edition) commenting on Articles 227 and 228 of the Coutume d'Orléans); Jean Baptiste Flaust on Articles 619 and 620 of the Coutume Reformée de Normandie; Privileges, Loix et Coustumes de l'Ile de Jersey, commonly known as the Code

Le Geyt (Article 8 at page 66); Dalloz' Encyclopédie Juridique, 2nd Edition, paragraphs 191 to 214; and "Property Law in Jersey" by Rebecca MacLeod, a doctoral treatise published by the Jersey and Guernsey Law Review.

51 From the above, the Respondent's Advocates distilled the following as being the elements of the doctrine of *destination de père de famille* which they say the Royal Court should have applied:

> (a) the two *fonds* must have had a common origin;
>
> (b) the original proprietor (the *père de famille*) must have carried out the works (*aménagement*) when the two *fonds* were in their undivided state;
>
> (c) the *aménagement* must be permanent; a flimsy or impermanent *aménagement* might readily be abandonded; and
>
> (d) the form of division of the original *fonds* whether by sale, gift, *partage*, or, as here, by a contract to create a new boundary is of no consequence, provided that the act itself contains no "contradiction" – that is to say no unambiguous statement negating the purpose and effect of the doctrine which depends on silence as to intention. For *destination* not to occur automatically however, the contradiction must be clearly expressed in the formal act of division. The reason for that, it is alleged, is clear: there must be certainty in the creation of servitudes; hence the critical date is the date of the act of division, and the critical instrument is the instrument of division.

52 The Respondent contends that the Royal Court failed to consider the consequence of finding (in paragraph 92(iv)) that the encroachments arose from the Boundary Contract. Whilst it would normally be the case that a boundary contract merely clarifies the extent of two pre-existing properties without dividing a *fonds* to create a new property, that was not the case here. The Court decided that there had been two acts of division. The first was in the contract of 1952 when the single *fonds* owned by Mrs Mauger was divided and the second was the Boundary Contract in 2007 pursuant to which the line dividing the two *fonds* was shifted towards Treetops by such a distance that the encroachments which had not previously existed were created. It is that second act of division to which the Court should have had regard when considering whether to apply the doctrine of *destination de père de famille*, but it failed to do so.

53 The Respondent also contends that the Royal Court was wrong to disregard *destination* on the ground that it could find no presumed intention of the parties. The commentators and authorities state that evidence of intention is to be found from the written document itself, not from collateral statements by the parties or their hopes and intentions at the time of entering into the contract. There is clear expression of the requirement for any contrary intention to be expressed in the instrument of separation explained in §211of Dalloz' Encyclopédie Juridique (Respondent's Advocates' translation):

> *"There can be no creation of a servitude by destination if the parties have in the act of separation expressed a wish not to maintain the previous subjection of the fonds.* He who claims such a servitude must prove tha the act of separation does not contradict the legal presumption of a tacit agreement and is not otherwise opposed to the recognition of the claimed servitude."

54 The Respondent claims further support from the decision of this Court in *Home Farm Developments Limited v Le Sueur* [2015] JCA 242 in which this Court held in relation to the Jersey law of contract:

> ***"It is well established that, when interpreting a document (including a contract), the Court must ascertain the meaning of the document from the words used, not by reference to the subjective intention of the parties.*** Thus, in *Hyams v Russell* [1970–1971] JJ 1891, ***Ereaut DB said this at 1910—***
>
> ***"We agree that it is a fundamental principle of the law that where there is a written agreement which has a plain and natural meaning it is not permissible to alter its effect according to the intention of one of the two contracting parties, or to adduce evidence in order to show such an intention.*** The only question is, what have the parties said by their contract?""

55 There is no express contrary intention in the Boundary Contract capable of displacing the presumption raised by the doctrine of *destination*. If the Appellant had intended only to define the boundary and to reserve to a later date any agreement to settle the encroachments claimed by her, she would have had to include reference to her intention in the Boundary Contract itself. The Court erred by importing evidence of such a contrary intention from external sources. Alternatively, even if the intention of the parties were not to be inferred solely from the four corners of the contract, the Respondent asserts that there was no evidence of any extraneous statements capable of rebutting or in any way affecting the presumed intention of the parties.

56 The Respondent challenged the Appellant's assertion that a *relief*, or the obligations relating to a *relief*, can be described as a servitude. Advocate Falle gave a learned explanation of the evolution of ownership of land in Jersey tracing the history from the feudal system that pertained in the 12th century, through the Reformed Custom of 1583 which permitted the enclosure of land. In order to protect crops such as apple trees growing on his land from livestock grazing freely on the common pastures, a landowner would dig a ditch on the edge of his property and throw the excavated earth onto his side of the ditch in order to create an earthbank. With the passage of time, the ditch may have become filled in but it remained the property of the landowner to be used by him to give access to maintain the earthbank. A similar area would be left alongside a public road to permit minor repairs and maintenance to his boundaries. It is that area which became known as a *relief* in Jersey or a *repare* in mainland Normandy.

57 Thus, the concept of a *relief* and of other obligations and rights existing between

neighbours began to evolve as part of the custom of the land and hence became an integral feature of the customary law of Jersey. In the Œuvres de Pothier Tome Cinquième, Traités des Contrats de Bail à Rente, de Société, des Cheptels, de Bienfaisance, du Prêt à Usage et du Prêt de Consomption, 1821 edition, Article II, many obligations arising between neighbours are set out and described as forming *"le voisinage"*. Those rights and obligations, Advocate Falle submitted, are part of Jersey law. They include the obligation not to use a property in a way that would annoy the neighbour (principle 235), not to plant trees within five feet of the neighbour (principle 242), and not to build a house within two feet or a wall within one foot of the neighbour (principle 244). The last was said to be justified for two reasons: it prevented mortar falling on the neighbour causing damage, and it also enabled access to the wall with a ladder to effect repairs.

58 Principle 246 described a second type of obligation of *voisinage*. A neighbour may, where there is a *"besoin indispensable"*, pass over the house next door with workmen to build or repair his house on condition that he diligently repair any damage his workmen may have caused. Similarly, when the public road is totally impassable, the neighbour must allow a passage over his property until the obstruction is cleared.

59 *Voisinage* amounts to the body of rights that evolved through custom to regulate the rights and obligations of neighbours *vis-à-vis* each other. The law relating to a *relief* is part of the law of *voisinage*. The principle that *voisinage* is now firmly established as part of the law of Jersey has been confirmed by this Court in *Rockhampton Apartments Limited & Anor v Gale and Clarke* [2007] JLR 332 where in the judgment of McNeill JA, the Court held at paragraph 154:

> ***"Therefore, whilst some of the rights and obligations set out by Pothier may now be covered by other areas of Jersey law, where there are contiguous properties and where there is substantial damage or land or buildings, these should be covered by voisinage."***

60 Advocate Falle submitted that a relief is an accessory to a person's land, part of his own land, not a benefit accruing to a neighbour. Having regard to the manner of evolution, including the fact that the owner with the benefit of the relief owns the *fonds* on which it is sited, it is apparent that a relief cannot properly be described as a servitude. Advocate Falle quoted Pothier's description of it as a ***"quasi-contrat"***, as approved by the Royal Court in *Searley v Dawson* [1971] J.J. 1687, at page 1701. The term *quasi-contrat* is understood as part of Jersey property law. In the lower court in *Gale v Rockhampton* [2007] JLR 27, at para 23, Bailhache B characterised some of the obligations owed by the owner of lower land either as natural *servitiudes* or as arising in *quasi-contract*.

61 The Respondent submits that as a consequence of moving the boundary line, the parties have agreed to be subject to the rights and obligations of *voisinage*. Such rights include the right for the owner of Treetops to have access onto Clairmont with workmen in order to carry out repairs of necessity or *"besoin indispensable"*. The same is characterised by the maxim *qui veut le fin veut les moyens*.

62 In further support of the proposition that the Respondent has a right of access which is to be exercised in a manner least inconvenient to the Appellant as owner of the *servient tenement*, the Respondent's Advocates cited Traité du Droit Civil by Ripert (1932), Exercise du Droit du Servitude by Planiol, paras 2064 to 2066 and Article CCXXIX in Pothier.

63 In a recent decision, the Royal Court applied the law of voisinage in allowing a neighbour access over the land of another to carry out repairs in circumstances of necessity: in *Venturini v Ghyll Limited* [2016] JRC 004. There the Court found that a steep bank was at severe risk of sudden collapse, which threatened substantial damage to the neighbour on lower land, a risk of which the defendant was fully aware and had done nothing to address. The Court concluded that the defendant was in breach of its duty to the plaintiff and held (paragraph 39):

> ***"Where a hazard has been identified and the owner/occupier will not or cannot take all reasonable steps to prevent or minimise the risk, then rather than wait for damage or even injury to occur, it follows that the Court must have the power to permit the owner/occupier of the lower lying land to do so, prima facie at the cost of the owner/occupier of the higher lying land."***

The Appellant's contentions re destination

64 The Appellant submitted that the encroachments did not arise from the passing of the Boundary Contract. Prior to then the boundary line was unclear so the extent of any land changing hands under the terms of the contract is unknown. The encroachments existed prior to then, their existence was known to both Mrs Dodds and the Appellant at the time and the latter had made clear that the matter of the encroachments would have to be resolved after the boundary line had been established. The owners of the Respondent have come to the problem as a result of the negligence of the advocate who failed to advise them properly prior to purchasing Treetops. In short, she seeks to uphold the decision of the Royal Court that *destination* has no application to the facts of the present case. The Royal Court correctly set out the legal principles and applied them correctly to the facts of the case.

65 The Appellant submitted that the intention and purpose of the Boundary Contract was to provide clarity as to the line of demarcation between two existing properties. It was to delineate the properties, not to transfer title, and nothing should be implied as to matters that are not addressed in the contract.

66 If the Appellant's primary submission were wrong and if there were considered to be a latent ambiguity in the contract, direct evidence could be given of the author's intention. The Royal Court had so held in *La Petite Croatie Limited v Ledo* [2009] JLR 116, quoting from 13 Halsbury's Laws of England, 4th ed. (2007 Reissue), paras 208 and 209. In the case of

a latent ambiguity, the Court was entitled to receive the evidence that Mrs Canavan had explained to her client, Mrs Dodds, the risks of passing the contract as drafted without addressing the encroachments.

67 The Appellant's interpretation of paragraph 92(iv) of the judgment is that the Court was explaining the reasons for the exercise of its discretion to award damages in place of a mandatory injunction. It was not determining any facts and the paragraph cannot be relied upon in the manner suggested by the Respondent.

68 When the Royal Court dismissed the application of destination, it clearly did so on the basis that the effect of the Boundary Contract was not to divide an existing property into two new *fonds*. All it did was to clarify the extent of two separate properties created under the earlier division of 1952. The Royal Court was therefore correct in concluding that the principles of destination do not apply.

69 The Appellant took issue with the Respondent's assertion that the structures were not encroachments. Their existence had been admitted in the Respondent's Re-Amended Answer in the lower Court, the case had proceeded on that basis and it was too late for the Respondent to try to assert otherwise.

70 The Appellant relied upon two fundamental principles of Jersey property law namely *promesse à titre ne vaut* and *nul servitude sans titre* in support of a proposition that there must be certainty in title as recorded in the public register. There would be no certainty if a boundary contract were to operate as a transfer of land. Certainty of title would be undermined if an agreement to transfer an area of land of unknown dimensions in a boundary contract were said to create rights or obligations between the parties. The importance of certainty is evidenced by the procedure in Jersey whereby contracts for the transfer of land are confirmed in the Royal Court on oath administered to the contracting parties.

71 There is no foundation for an assertion that the Court may create or extinguish rights without the consent of the parties. Such a proposition flies in the face of the fundamental principles of Jersey property law set out above. The absence of specific performance as a remedy to perfect an unregistered agreement for the sale and purchase of land, as confirmed by this Court in *Taylor v Fitzpatrick* [1979] J.J.1, is an example of the limit of the court's powers. The court may only order transfer of title without consent of the owners in limited circumstances such as by way of licitation e.g. on inheritance or where empowered to do so by statute in matrimonial or bankruptcy proceedings.

72 The Court was correct in holding that destination is based on the premise of the presumed intention of the parties. Here, the Appellant had declared, as the Court found, that the matter of the encroachments was to be resolved after the line of the boundary had been established. There was therefore no presumed intention that the Respondent be permitted

to retain the offending structures.

73 The Appellant did not accept the Respondent's interpretation of the decision in *Venturini*. What the Court held in that case was that the owner of the lower land could apply to the court for an order permitting her to enter the higher land to take steps to prevent a catastrophe, it was not authority for the proposition advanced by the Respondent that the Treetops owner could enter the lower land to effect repairs. The Royal Court had therefore been correct to find that there would be no right for the owner of Treetops to enter Clairmont in order to carry out repair works.

Discussion – the Respondent's Cross-Appeal

74 In our judgment, the present extent of the properties known as Clairmont and Treetops is the product of two contracts of division of property. The first was the conveyance to Mr de la Haye in 1952 wherein the eastern boundary of Clairmont and the western boundary of Treetops was defined by reference to measurements. As the Royal Court said, that is never a satisfactory way of defining boundaries. With the passage of time, doubts arise as to where the measurements were taken from and the topography of the land changes whether by operation of nature or through human activity with resulting uncertainty as to the precise location of boundary features. The Royal Court accepted the unchallenged expert evidence of the Respondent's chartered building consultant specialising in land survey, Mr Paul Treliving, who stated that as a result of the Boundary Contract, parts of the Treetops extension amounted to a physical encroachment over the boundary line established by the Boundary Contract and if the retaining wall of Treetops had a *relief* the whole of the retaining wall would have encroached. The Appellant's engineering surveyor, Mr Dereck Francis Clackett, gave evidence that the boundary stones in the Boundary Contract were planted further to the west of Treetops than previously had been the case.

75 In paragraph 92(iv) of the Judgment, the Royal Court noted that if the boundary had previously been where it is now established by the Boundary Contract to be, the Appellant's parents would have objected when the development of Treetops took place under the ownership of Mr Lapidus. For those reasons and having reviewed aerial photographs and other evidence, the Royal Court came to the conclusion that the encroachments which now exist were probably created by the Boundary Contract and probably did not exist before. By expressing it as being probable, we accept the Respondent's interpretation that the Royal Court found as a fact, in accordance with the civil burden and standard of proof, that the encroachments did not exist prior to the 2007 Boundary Contract but were created as a result of the transfer of land from Treetops to Clairmont in that contract.

76 The fact that that finding was made in the context of the Royal Court's ruling on the exercise of its discretion does not lessen its status as a finding of fact. In our judgment, it is entirely clear, in particular from the reference in the final sentence of paragraph 92(iv) to “the advantage which the [Appellant] secured by the boundary contract”, that the Royal

Court was making a finding of fact that the boundary moved towards Treetops under the Boundary Contract and resulted in the encroachments. Similarly, the fact that the precise extent of that move was unknown because the exact location of the original boundary was uncertain does not in any way detract from the force of the Court's finding that there was a move, and that it resulted for the first time in encroachments.

77 Before proceeding further it will be helpful to set out the procedure in Jersey for transferring land or creating rights over land by agreement between the parties concerned. It was very helpfully summarised by the Royal Court in paragraph 30 of its judgment:

> ***"For many centuries, the structure of the laws affecting land and succession in Jersey was such that contracts of sale were relatively uncommon, but nonetheless it remains true that, from time immemorial, transactions in land have been completed by means of a contract sworn by the contracting parties before the Royal Court.*** Having confirmed with the parties that they are aware of the contents of the deed, the Bailiff (or the Deputy Bailiff or Lieutenant Bailiff) administers the oath to the contracting parties: "Do you swear that you will neither act nor cause anyone to act against this deed of [sale of house, outbuildings and appurtenances] in perpetuity upon pain of perjury?" It is the act of taking that oath which completes the transaction in real estate and the court then has the original contracts enrolled in the Public Registry where they are available for inspection by everyone. The original deed is then returned to the transacting party but has no intrinsic value. Accordingly, a person is able to ascertain the ownership of Jersey real estate by a check in the Public Registry of this Island; and because the practice is to ensure that there is included within the contracts passed before the Royal Court a full description of the property which is the subject of the transaction, with its boundaries and servitudes affecting it, the Public Registry search establishes certainty for those who are transacting in other respects with the landowner in question. Wills of real estate are similarly registered on the death of the testator; as are contracts of division of inherited estate. It is true that there is sometimes a potential gap in respect of property inherited by the sole and principal heir on intestacy and in respect of undisturbed occupation of ***property for 40 years nec vi, nec clam, nec precario, but these exceptions as it were prove the rule that the general policy is to look to the Public Registry for proof of title.*** These simple conveyancing procedures form the rationale for the maxim nul servitude sans titre."

78 As well as the maxim *nul servitude sans titre* there is, as the Appellant contended, another fundamental principle of Jersey property law, *promesse à titre ne vaut*, from which it follows that unregistered agreements for the purchase and sale of land cannot be perfected by the Court with an order for specific performance. The Public Registry contains a register of contracts and other documents such as wills of immoveable property which can be relied upon by persons seeking to establish the ownership of any area of land and the rights and servitudes affecting it. However, it is not a complete and exhaustive record of title: it is more in the nature of a register of contracts. As the Respondent's Advocate submitted, a

prospective purchaser of land cannot rely and act solely upon what is to be found in the Registry. It is necessary to attend on site in order to see how the property and any structures upon it lie in relation to their neighbours. It is only by viewing the property that a conveyancer acting for the prospective purchaser will be in a position to advise as to any servitudes or other obligations to which it may be subject by operation of law. To that extent, the Appellant's contention that the Register is inviolable must be qualified.

79 The customary law of *relief* may apply in circumstances where structures are erected on or near a boundary. The parties agree that the correct definition of the two types of relief is as described by *Le Gros* and set out above. We accept Advocate Falle's learned exposition of the origins and evolution of the law of *relief*.

80 The Jersey cases and the commentators have not been entirely consistent nor rigorous in their use of the labels “servitude” or *“relief”* or *“voisinage”*. Attempts to classify *“relief”* or one or other of the associated rights are not necessarily helpful. Describing *“relief”* simply as a servitude does not accurately describe all its aspects. In particular, the concept of a servitude does not reflect the fact that the area of a relief adjacent to a wall belongs to the owner of the wall. Neither is it particularly helpful to us to describe *relief* and the rights and obligations pertaining to it as a *quasi-contrat*, an expression which is understood in French law to include concepts that we would describe as *torts*. However that expression is helpful in conveying the sense that a *relief* arises by operation of law, not by an agreement between neighbours.

81 The premises on which Treetops was constructed may historically have included a *relief* on its western boundary but it does not include a *relief* in the Boundary Contract. The boundary between it and Clairmont is the straight line between the two boundary stones, both of which belong to Clairmont (and, curiously, are expressly stated to be without offset that is to say, without relief). Thus the only mention of *relief* is in relation to the boundary stones, in respect of which the Respondent does not have a *relief*. The consequence being that if the Respondent were now to construct a wall within one and a half Jersey feet of the boundary, or to make openings or windows of clear glass within three Jersey feet of the boundary, the Appellant could lawfully object and require their removal. However, we are not concerned with future structures but with structures that existed before the 2007 contract was passed. Absent any express rights allowing them to remain, it is necessary to consider what rights may or may not have been created or preserved by operation of the doctrine of *destination de père de famille*.

82 In our judgment, the finding by the Court in paragraph 92(iv) that the encroachments were probably created by the Boundary Contract and probably did not exist before is crucial. The logical and necessary consequence of that finding is that the Boundary Contract did involve a transfer to the owner of Clairmont of a parcel of land which previously belonged to the owner of Treetops. While, the Royal Court had earlier dismissed consideration of *destination de père de famille*, inter alia, on the ground that there had been no division of property in 2007, merely a clarification of a boundary between two existing properties, the Court did not then revisit that decision after it had come to the conclusion it reached in

paragraph 92(iv).

83 We are grateful to the parties' Advocates for their learned research into the origins and development of the customary principles involved in this appeal. We agree that where a customary principle has been incorporated in the Code Civil and remains part of modern French law, it is appropriate to look not only at the customary authorities but also at modern French authorities to see how the customary principles have evolved and are to be applied in modern Jersey law. To do so is no different from looking to the development of English common law in those areas where Jersey law has followed those developments.

84 Articles 619 and 620 of La Coutume Reformée du Pais et Duché de Normandie defined destination as follows (as translated by the Respondent's Advocates):-

> *"Article 619*
>
> *When a man puts out of his hands part of his house or a house which has views and drains or other servitudes over another which he retains he must especially and specifically declare which servitudes he retains over the hereditament which he puts out of his hands, or which he constitutes on his own both to the place, scale, height, measure as well as kind of servitude, otherwise the hereditament sold shall remain free at the expense of the Vendor.*
>
> *Article 620*
>
> *And with regard to the house retained by the Vendor matters shall remain in the state that they were formerly."*

85 On the face of the above, the two articles appear to conflict with one another. However, the commentary added by Henry Basnage in the second volume of his commentaries published in 1645 at Rouen makes clear that Article 620 is applicable in circumstances such as the present. After recording that Article 620 conforms with Article 215 of the Coutume of Paris and Roman Law, he said (our translation):

> ***"By a judgment given in relation to Mr Brice, the seventh July 1666, it was held that a private individual who had sold part of his house and the other he retained having views over the one that he had sold without having retained a right of servitude, could not be forced to block his views, the judgment given in favour of Pernelle Chapelain of Saint Catherine of Rouen; the reason for the decision having been based on this article and it must not be presumed that the one who sold part of his house would have wanted to prejudice himself so noticeably without an express provision."***

86 Jean Baptiste Floust in his Explication de la Coutume et de la Jurisprudence de Normandie, second volume, published in Rouen in 1781 sought to explain the apparent conflict between articles 619 and 620. He wrote (Respondent's Advocates translation):-

> *"From this it must follow, it seems to me, that it is necessary to regard Article 619 as having decided only that the land sold shall remain free of all servitudes with which the Vendor would have been able to charge it or of all servitudes that the Vendor would wish to impose upon it and that Article 620 intends that the retained house should remain with the Vendor in the state it was before and at the time of the sale.* These two articles mean, in my opinion, that the Vendor shall not be able to force the purchaser to suppress the views the drains and other similar servitudes that the house sold had on the house retained and that for his part the purchaser will not be able to force the Vendor to supress the windows and the drains that the retained house had on the house sold; that it is obligatory upon both sides that matters remain in the state where they were at the time of the separation or sale; it must be the same as in the matter of the division between heirs or partners."

87 It is thus clear from the commentators that both Article 619 and 620 are compatible with each other and are aspects of the same principle. In the present case, it is Article 620 which is more apt to describe the situation where Treetops claims the right to maintain its walls and windows in the same state as they were before the Boundary Contract.

88 *Destination* remains part of modern French law as provided for in Articles 692 onwards of the Code Civil (our translation):

> ***"Art.692***
>
> ***Destination du père de famille validates title with regard to continuous and apparent servitudes*** .
>
> ***Art.693***
>
> ***There is destination du père de famille only when it is proved that the two properties actually divided have belonged to the same owner and that it is by him that matters have been put in the state from which the servitude results*** .
>
> ***Art.694***
>
> ***If the owner of the two properties between which there exists apparent evidence of servitude disposes of one of the properties without providing in the contract for any provision relating to the servitude it will continue to exist actively or passively in favour of the alienated property or over the alienated property*** .
>
> ***[Art.695 is not relevant.]***
>
> ***Art.696***
>
> ***When a servitude is established one is deemed to have agreed to all that is***

necessary to use it .

Thus the servitude for drawing water from the well of another necessarily includes a right of way."

89 The doctrine of *destination* as understood and applied by the modern French courts is discussed in Dalloz, Encyclopédie Juridique 2 e edition. The doctrine is based on the tacit agreement of the parties. The manner in which such agreement is established by the French courts is explained in Paragraphs 211 et seq. There is a rebuttable presumption that the two properties created by the act of division are to be maintained in the state they were at the time of division. The presumption may be rebutted by a contrary indication in the instrument of division: paragraph 211 (quoted above):

> ***"There can be no creation of a servitude by destination if the parties have in the act of separation expressed a wish not to maintain the previous subjection of the fonds.*** He who claims such a servitude must prove that the act of separation does not contradict the legal presumption of a tacit agreement and is not otherwise opposed to the recognition of the claimed servitude."

90 The rebuttable presumption and the manner in which any contrary indication may be proved are further explained in paragraphs 214 to 221 when comparing the differences between Articles 692 and 694. The former imposes a requirement that the servitudes be *"continues et apparentes"* whereas the latter applies where there is a *"signe apparent"* of a servitude. In other words Article 694 may apply to servitudes that are *"apparentes"* even if they are not *"continues"*. Paragraph 224 explains the distinction (our translation):

> ***"Article 694 must be interpreted in the sense that when the person who relies upon destination de père de famille to uphold a servitude, produces a deed of separation not containing any provision relating to a servitude, the deed and the absence of contradiction in it confirm the legal presumption of tacit agreement and the judges content themselves to require that the arrangement [aménagement] constituting the servitude be apparent.*** On the other hand, article 692 applies to the assumption in which no deed of separation is produced; the judges appear then to be more cautious; and do not apply the presumption of tacit agreement except to arrangements [aménagements] capable of constituting servitudes that are not only apparent but 'continues'."

91 In respect of Article 692, Dalloz states that the person who relies upon a servitude that was continuous and apparent when the properties were divided is not obliged to produce the deed of separation. The fact of the existence of the state of the properties at the time of division may be proved by witnesses. Proof of the same is sufficient to raise the presumption that the parties tacitly agreed that the servitude should continue to exist. Paragraph 218 (our translation):

> ***"The person who relies upon destination de père de famille is thus not***

obliged to produce the deed of separation of the properties to establish that the deed contains no contradiction. The presumption of tacit agreement is then fully in play; it is up to the person who denies the existence of the servitude to prove that the deed clearly opposes the maintenance of the servitude."

92 Where the arrangement or layout of the properties at the date of separation was such as to give rise to an alleged 'continuous and apparent' servitude, the parties are presumed to have agreed that the right or servitude may continue to be enjoyed or to exist unless the opposing party can establish a contrary indication in the deed of separation.

93 *"Destination"* is recognised in the customary law of Jersey. Philippe Le Geyt wrote Privileges Loix et Coustumes de L'Isle de Jersey commonly referred to as the Code le Geyt towards the end of the 17th century in which he stated (Respondent's Advocates' translation):-

"I am here only relating things as I believe the majority of practitioners would agree them to be."

In Article 8, page 66 he set out his understanding of the practice of destination in Jersey: (Respondent's Advocates translation):-

"When a man puts out of his hands part of his house or [a house, which has views and drains or other] permanent servitudes on another house which he retains or when the house retained has such servitudes on that which he is alienating, things must remain in the state that they are at the time when one is contracting. But as for the servitudes "discontinues" they remain extinguished in each case unless there is something said to the contrary. It is thus in respect of divisions of inheritance between co-heirs or other consorts" .

94 In Rebecca MacLeod's doctoral treatise " Property Law in Jersey" she wrote:-

"The name of the doctrine (Destination) itself also refers to one person only: the owner of the single piece of land before division. It is true that both the intention of the seller and the intention of the buyer and seller are required albeit at different stages. The actions of the owner before division demonstrate his intention 'that one plot serve the other' and it is at that stage that the intention of the seller alone is required. Common intention of both parties is required (or may be imputed) when *the land is divided, for there can be nothing to negate the creation of the servitude in the hereditary contract.* Failure by both parties to exercise a power of veto could be described as a 'convention tacite'. Nevertheless, the essence of destination is a state of affairs, set in place by the owner of a piece of land, which would amount to a servitude were the land divided (and which is still on-going at the time of division). The intention of the 'pére de famille' dates from the time when the servitude-type use is

commenced. The will of any other party who will become owner of part of the land only bears on the matter at the time of conveyance to that party, whose only input is the capacity to prevent a servitude being created by demanding provision in the deed to that effect."

95 In *Le Feuvre v Matthew* [1973] J.J. 2461, the Royal Court accepted that the doctrine arises where two properties are divided although it cited a quotation from Houard, Dictionaire Analytique, Historique, Etymologique, Critique et Interprétif de la Coutume de Normandie 1780 ed. dealing with a different aspect of the doctrine. It concerned the treatment of moveable assets that may have been used in conjunction with immoveable property when the property of a deceased comes to be distributed under a legacy in a will or on the taking of a *préciput*. In *Le Feuvre*, the Royal Court defined the circumstances in which a servitude could be created by an operation of the doctrine of destination in the following way:-

> ***"1 The properties subsequently divided must formerly have been held in one ownership*** .
>
> ***2 When in such ownership the properties must have been used in such a way, or have been in such a physical state, that it could be said that one of the properties drew from the other a right of service which would have constituted a servitude (of the nature defined below) if the "fonds dominant" had not at that time been in the same ownership as the "fonds servant" and such a position must have continued to exist at the time of the division of the properties*** .
>
> ***3 After the division of the properties, the servitude claimed for the benefit of the "fonds dominant" under this principle must be one which is "continue", "apparente" and "permanente"; it need not be a servitude of necessity*** .
>
> ***4 If the division is effected by the instrument of the former sole owner, there must be no expression of intention which is expressly contrary to the implied continuance of the position existing at the time of division*** .
>
> ***5 For the purpose of ascertaining whether one of the properties drew from the other such a right or service at the time of the division and, if so, the nature and extent of it, parol evidence is admissible."***

96 The right of service claimed in *Le Feuvre* was a right of way. The Court in that case did not refer to the Coutume Reformée and thus did not consider the distinction between Articles 619 and 620. The right claimed in the present case, deriving from Article 620, is the right for the owner of Treetops and it successors to retain the walls and windows in the state they were prior to the Boundary Contract, a right which will run with the land enabling them to oppose any application by the neighbour or her successors to have them removed. It is therefore akin to a right of servitude, whether or not it would be properly describable as such.

97 In its judgment, at paragraph 62 in the present case, the Royal Court noted that the principle of *destination* as set out in *Le Feuvre* is based on the presumed intention of the parties. However, it concluded on the facts that it was impossible to draw any presumption because Mrs Dodds simply wanted to settle her boundaries and the Appellant was determined not to agree any servitudes on the grounds that the encroachments could be sorted out later. The Court therefore dismissed *destination* because it could not be presumed that the parties shared a common intention to allow the encroachments to remain.

98 In our judgment, the Royal Court was not entitled to look for evidence of the intention of the parties other than in the agreed terms of the Boundary Contract. The Court had correctly said that ensuring certainty of land ownership was an important consideration and that the principles underlying the maxim *la convention fait la loi des parties* had additional force because the contracting parties had sworn on oath to abide by the terms of the contract. If further confirmation were required, the general principle of Jersey contract law as confirmed by this Court in *Home Farm Developments* and cited above that, where a written agreement has a plain and natural meaning, it is not permitted to alter its effect according to the alleged intention of one of the two contracting parties, or to adduce evidence in order to show such an intention, is also applicable to contracts for the sale of land. Furthermore, there was no latent ambiguity in the Boundary Contract which would have justified any resort to the authorities on which the Appellant sought to rely in that regard.

99 Thus, the starting point in seeking to establish the relevant intention is to look at the Boundary Contract for its plain and natural meaning. It recited that *"Mrs Dodds is the owner of the house "Treetops", extensions, garage, buildings, swimming pool, lands and appurtenances … with (inter alia) the banks and offsets of the North and of the West, joining (inter alia) by the west to "Clairmont" belonging to Miss Fogarty"*. The plain and natural meaning of those words is that Mrs Dodds owned the whole of the structure erected on her property comprising Treetops together with the offsets. It also recited that the Appellant owned Clairmont, with no mention that she also claimed to own any part of the structure of Treetops. The plain and natural meaning of the contract is that the parties were seeking to define the boundary between their respective dwellings and their appurtenances.

100 However, it is not the intention of the two parties when passing the contract that is most relevant. It is clear from the Coutume Reformée de Normandie, the Code Civil and the relevant French authorities cited above that what is to be presumed is the intention of the former common owner at the time of the division of the property when selling part of it to a purchaser. The presumption is that the vendor's retained property is to continue in the state it was prior to the sale with such rights or servitudes as are required to enable matters to remain as they were. It is presumed that the former common owner would not act to his prejudice.

101 Applying those principles to the present matter:

(i) The property known as Treetops presently owned by the Respondent and the adjoining land which would have the benefit of the right to object to the walls, openings and windows under the principles of *relief* were in the common ownership of Mrs Dodds prior to the Boundary Contract.

(ii) The existence of the windows, walls and openings was clear, they were "continuous and apparent".

(iii) There is nothing in the provisions of the Boundary Contract to negative the presumption that Treetops was to continue to be enjoyed as previously.

102 Consequently, by the application of the doctrine of *destination de père de famille*, the Respondent and its successors in title as owner of Treetops have the benefit of a right in the nature of an implied servitude enabling the encroachments to remain as they were at the time of completing the Boundary Contract in 2007. That is to say, both the pure encroachment of a section of wall and the infringements caused by a further section of wall and the offending windows and openings in Treetops that would be in breach of the customary *reliefs* if they were to be constructed now may remain in such state. Accessory to that right is the right to enter upon Clairmont's land for the purpose of maintaining the structures in case of necessity or *"besoin indispensable"*. On that ground, for the reasons we have stated, we would allow the Respondent's cross-appeal.

The Appellant's Contentions on her Appeal

103 In light of that finding, the question of the appropriate remedy to be awarded to the Appellant if there were no right to retain the encroachments does not arise but we will go on to deal with the issues raised in the Appellant's appeal (not least because the matter was fully argued before us and is a point of general public importance).

104 The Appellant sought to uphold the Royal Court's findings that the Respondent's property had encroached onto Clairmont and that the Respondent had no rights which would allow the encroachments to remain but claimed that the only applicable remedy was an order that the offending structures be removed or demolished and/or that the windows be obscured and prevented from opening. Her case is that the Royal Court had no power to order damages or, alternatively, that if it had the jurisdiction to do so, the Court misdirected itself as to the circumstances in which the discretion may be exercised and, in the circumstances of this case, ought not to have made an order for the payment of damages as a substitute for ordering that the encroachments be removed.

105 In support of her contention that the Court had no power to award damages in lieu of a mandatory order for removal or demolition, the Appellant relied upon the Royal Court's decision in *Felard*. There, the Court was concerned with a building which breached a restrictive covenant agreed by the parties by contract. In an earlier decision, the Court had said that in England the case would be dealt with by way of proprietary estoppel but it held

that the law of proprietary estoppel was not part of the law of Jersey. At a later hearing, the Court had to consider what remedies were available to it. It said that it was being asked to legalize a breach of a servitude of which the Church had the benefit against the wishes of the Church. It recited that it had no power to enforce an agreement to create or extinguish a servitude where one of the parties refused to pass the necessary contract before the court and saw no difference between that and the power to vary the terms of a servitude against the wishes of one of the parties. The Court cited *Corbin v Lee* (1934), 12 C.R. 348 where the plaintiff complained that his neighbour's house and its foundations seriously encroached on his land. In that case, the Court refused to grant the prayer of the plaintiff and ordered the parties to pass a contract of rectification at the expense of the defendant and ordered the payment of damages of fifty pounds by way of compensation. There is nothing in the Order of Court to indicate the defendant's consent although the subsequent contract stated that the parties *"sont convenus"*. It is therefore unclear whether the defendant was in reality consenting to the order of the Court or merely to the subsequent deed to which it was agreeing in accordance with the Court's order. Before us, the Appellant distinguished *Corbin* on the ground that it was decided on the grounds of consent. In *Felard*, the Royal Court said it could find no other case where the Court had awarded damages instead of the strict remedy and concluded that it had no power to award damages in lieu of an order for removal.

106 Felard was considered by this Court in *Ernest Farley & Sons Limited v Takilla Limited* 1989/22 C. A., May 11th, 1989; unreported, where the Court said this:

> ***"When granting relief for the breach which they found of clause 6 of the contract, the Royal Court said they would, if free to do so, have considered substantial damages a proper remedy, but under the decision in*** *Felard Investments Limited v Church of Our Lady Queen of the Universe (Trustees) (No.2)* (1979) J.J.19 ***they had no power to award damages in lieu of an order for removal.*** Mr Mourant expressly disclaimed any challenge to the Royal Court's decision on this point. We too should have considered damages, if such an order were legally available, an adequate remedy for the breach of clause 3, but in view of Mr Mourant's attitude we have not pursued the point. We therefore express no view upon it, beyond stating that both the decision in the *Felard Investments* ***case and the extent of its operation remain open for consideration in this Court."***

107 In the present case, the Royal Court stated that it understood the Court of Appeal's comments in *Takilla* to imply that, at least on this point, *Felard* was not necessarily correctly decided. The Appellant contends that the Royal Court's reasoning in departing from, or distinguishing, *Felard* and *Takilla* was flawed both in law and in logic in that she considers the decision was based on three fallacies:

> (a) that, in relation to pure encroachments over the boundary line, by preventing an owner of land from enforcing his rights over that land, the Court is not in any way encumbering his land such as to create or extinguish a form of servitude and/or any

other form of proprietary right;

(b) that, in relation to encroachments onto the customary law *reliefs*, the Court is not in any way extinguishing property rights which are, or are akin to, servitudes which the owner has over the land of his neighbour; and

(c) that the inherent jurisdiction of the Court is such that it is empowered to create remedies as the perceived justice of a particular case requires.

108 The Appellant relies upon the maxim *nul servitude sans titre*. Servitudes may be created either by contract or by operation of the customary law in certain limited exceptions such as by *destination de père de famille*, but the Court has no power to create servitudes. It cannot enforce a promise in relation to land as expressed in the maxim ***promesse à heritage ne vaut***(paragraph 24 of the judgment in *Felard*). If the Court cannot compel someone to honour a promise in relation to immoveable property, it is axiomatic that it cannot compel the transfer of land or the creation of servitudes or proprietary rights where no promise was ever given. By permitting the encroachments to remain notwithstanding the *relief*, the Royal Court was seeking to extinguish servitudes against the wishes of the dominant owner. Furthermore, by permitting the pure encroachments to remain, the Royal Court has either created a servitude or some other right more onerous than a servitude, preventing the owner of Clairmont from using her property in any legal manner which she sees fit for an indefinite period of time; a restriction which is claimed to be a gross infringement of her property rights.

109 The decision is said to have practical implications which lead to absurdity. A structure built in breach of a binding restrictive covenant not to build in a certain place and entered into voluntarily by the parties will be enforced by ordering demolition of the structure, notwithstanding that the structure may be entirely within the land owned by the person who constructed the offending structure, whereas a person who builds on his neighbour's land in breach of a customary law *relief* may be permitted to retain the structure against the wishes of the owner of the land on which it is built.

110 Insofar as the Court was exercising its inherent jurisdiction, the Appellant contends that the Royal Court misdirected itself as to the extent of its jurisdiction. Inherent jurisdiction does not empower the Court to act as it sees fit. In *Mayo Associates S.A. and others v Cantrade Private Bank Switzerland (C. I.) Limited and another* [1998] JLR 173 (C. A.) this Court held that the vital clue as to the nature of inherent jurisdiction in its procedural setting is necessity but the conclusion that it would be fair or just to order something to be done does not determine whether there is inherent jurisdiction to do it. In this case the Royal Court used its inherent jurisdiction to create a remedy which did not previously exist and did so in order to override the operation of the customary law. It had no power to do so.

111 In the alternative if, contrary to the Appellant's submissions, the Court had the power to award damages in lieu of an order for removal, the Court misdirected itself as to the principles to be applied when deciding to exercise the discretion.

112 In exercising its discretion, the Royal Court failed to have regard to the practical consequences of allowing the encroachments to remain without any right of access for the Respondent to maintain them so they will remain for an indefinite period of time, that is to say, until they fall down. When they collapse, they could potentially cause damage to Clairmont and/or to the Appellant and others persons on her property. Consequently, the Appellant's property is alleged to be unsaleable. The potential liability together with the need to re-site replacement structures within the Respondent's property without infringing any rights of *relief* is said to have the effect that Treetops is also now unsaleable. The Royal Court acknowledged that there was a need for the parties to come to an agreement as to the rights which necessarily have to be granted to enable the structures to remain and indicated that it expected the parties to do so. But they have for a number of years attempted and failed to reach any agreement.

The Respondent's Response

113 In its reply, the Respondent supports the judgment of the Royal Court as to the existence of a power to award damages and in the exercise of its discretion in this case. It opposes the Appellant's contention that allowing an encroachment to remain is the same as creating a servitude against the wishes of the owner of the subservient land. It argues that it is not, and that denial of a remedy is not the same as the creation of a right. The Court has the power to do justice between the parties and to act in such manner as it considers equitable. It describes the Royal Court as a court not so much of equity but as of *équité*, a concept recognised in Jersey as explained in *Ex parte Viscount Wimborne* [1983] J.J. 17 by Crill, DB, in the context of trusts:

> ***"It may well be that "equity" in Jersey inclines more to the French "équité than its English counterpart.*** I have not been able to find the word "équité" in the Ancienne Coutume de Normandie, or in the Commentators but I note that in the Dictionnaire de Droit et de Pratique (of France it is true and not only of Normandy) by De Férrière, published in 1771, there appears the following under the title of Equité:-
>
> ***"EQUITÉ, est un juste temperament de la Loi, que en adoucit la rigeur, en consideration de quelques circonstances particulières du fait*** .
>
> ***Ainsi cette equité est un juste retour au droit naturel, en retranchant les fausses & rigoureuses consequences qu'on veut tirer de la disposition de quelque Loi, par une trop regoureuse explication des termes dans lesquels elle est concue, ou par de vaines subtilités que sont évidemment contraires à la Justice, & à l'intention de Législateur*** .
>
> ***Cette équité, que doit être la règle de la Justice, doit être préférée à la disposition de la Loi même, lorsque la question qui se présente à juger n'est pas expressement décidée par la Loi, ou que le sens & les paroles de la Loi peuvent, à cause de leur ambiguité, recevois quelque interprétation*** .

> ***Le Juge peut donc alors pencher du côté le plus équitable, & le plus approchant du droit de nature, que est appellé summa ration, in lege 43.*** Ff. de religiosis & sumpt. funer. Autrement il pourroit, pour s'être attaché trop scrupuleusement à la rigeur de la Loi, devenir injuste. Summum jus, summa est quandoque injuris; unde mitigatio juris, quam Cicero, in Orat. Pro Cluentio, Legum laxamentum vocat, stricto juri est anteponeda; maximè si Lex Scripta clara & aperta non sit .
>
> ***Mais quand la Loi est claire & certaine, qu'elle ne reçoit, ni par rapport à sa décision, ni par rapport aux termes dans lesquels elle est concue, aucune interprétation, le Juge est dans l'obligation de la suivre ponctuellement*** .
>
> ***Comme il ne lui est pas permit de s'en écarterm ay cas qu'il trouve trop d'injustice à la suivre, il doit avoir recours au Prince pour savoir quell sens il veut qu'on lui donne.*** Leg.1, cod. De Legibus."

The above quotation was translated by the Respondent's Advocates:

> ***"Equité is just a tempering of the law which in particular factual circumstances, mitigates its vigour.*** Thus equité turns to the natural Law for justice, stripping away false and rigorous consequences that might be inferred from the provision of same Law by an over rigorous construction of the terms in which it is conceived, or by the empty subtleties which are obviously contrary to justice and the intention of the legislator .
>
> ***This equité which must be the rule of justice is to be preferred to the letter of the Law when the question presented for judgment is not expressly answered by the law or the sense and words of the Law are capable, because of their ambiguity of, giving rise to different meanings*** .
>
> ***The Judge must then lean to the most equitable side and that most proximate to the law of nature … Otherwise it could, I being closely fixed to the rigour of the Law, become unjust …***
>
> ***But when the Law is clear and certain, such that it does not admit of any argument as to its interpretation whether by decision or as a result of the terms in which it is framed, the Judge is obliged to follow it to the letter*** .
>
> ***As it is not permitted to him to depart from it in a case where he finds it too unjust to follow it he must have recourse to the King …"***

114 The Respondent submits that the grant of a mandatory injunction for removal of the encroachments is a discretionary remedy and that the Court has inherent jurisdiction to decide in what circumstances to exercise its discretion to grant, or not to grant, the remedy. Furthermore, the Royal Court's approach in the present case is consistent with the decision of this Court in *Mayo*.

115 In their submissions, the Advocates acting for the Respondent gain support from the flexible remedies available in other jurisdictions such as the English courts' inherent jurisdiction as explained in *Finance and Economic Committee v Bastion Offshore Trust Company Limited* [1994] JLR 370, quoting from Halsbury:

> ***"[inherent jurisdiction is].*** a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

116 They look also to Scottish law, for example, *Graham v Swan and Others (Magistrates of Kirkcaldy)* (1882) 7 App. Cas. 547, where the appellant had a right to demand the removal of stables erected on common land and the Court held that it had a discretion in exceptional cases to deny a party applying for a remedy which he would normally be entitled to if the equitable circumstances justified such a course of action. The rationale for the decision was clarified in *Anderson v Brattisanni's* [1978] S.L.T. (Notes) 42:

> ***"There is, however, an equitable power in the Court, in exceptional circumstances, to refuse enforcement of the proprietor's rights at least in a question of encroachment by a neighbouring proprietor … The existence of this power has been recognised in cases such as …*** *Grahame v Mags.* Of Kirkcaldy ***….From these cases it is clear that the power may be exercised when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage which it would give to the unsuccessful party. The power will, however, be exercised sparingly and it may be deduced that because it is exercised the Court will have to be satisfied that the encroachment was made in good faith in the belief that it was unobjectionable, that it is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and that its removal would cause to the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor…The question accordingly comes to be whether in the proved circumstances of this case the refusal of the sheriff to order the removal of the flue can be supported as a proper exercise of the equitable discretion of the court."***

117 The Respondent's Advocates say that the relevant principles of Scottish law have recently been summarised in *Munro v Finlayson* [2015] S.L.T. (Sc Ct) 123:

> ***"i) The principle is part of the law of civil remedies, not the law of property.*** In its application it creates no new rights; it merely prevents the proprietor from exercising a right .
>
> ***ii) The principle is an exception based on equitable considerations*** .

iii) The party seeking its application must have acted in good faith, or as in *Grahame v Magistrates of Kirkcaldy*, ***not done so but thereafter had taken steps to remedy its failings***.

iv) The principle will be applied only sparingly and in exceptional circumstances .

v) It has, to date, been applied only in cases where the encroachment was by a physical thing, such as a gable wall or an extractor flue attached to a wall .

vi) The encroachment must be inconsiderable and does not materially impair the proprietor in the enjoyment of his property, by which is meant his property as a whole and not the piece of ground which has been encroached .

vii) Its removal would cause to the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor. In calculating that advantage the court will take into account whether or not the encroaching party has offered compensation or, if not, whether it is open to the court on the evidence to fix a value for reasonable compensation .

viii) Future as well as part economic loss will be taken into account."

118 In summary, the Respondent submits that on the facts found by the Royal Court, it had the power to grant an equitable solution. In awarding damages, the Court was seeking to do justice between the parties and the outcome of the case does not have the serious practical consequences outlined by the Appellant or, if it does, the Appellant is in a position to agree to grant the rights required to enable the encroachments to remain and be maintained.

Discussion — the Appellant's Appeal

119 The Royal Court sought to do justice between the parties in the circumstances of what is an unusual case. Having found that there was no right to retain the encroachments, the Court found it would be unjust to require their removal and instead ordered the payment of damages as being what was fair and equitable. If we had not found in favour of the Respondent's cross-appeal, we would have agreed.

120 The principles of *nul servitude sans titre* and *promesse à titre ne vaut* are well established. There is no doubt that persons, including third parties, must have confidence in the register of transactions stored in the Public Registry. However, the Register is not a complete record of title, as Advocate Hall rightly submitted. It is necessary to attend on site to view how a property is situate in relation to its neighbours in order to establish what servitudes, rights and obligations may affect the title, whether they be natural servitudes or

those that arise by way of *destination* or otherwise by operation of law.

121 Any person inspecting Treetops or Clairmont would see the existence of the encroachments and would be put on notice that there may be rights and obligations between the parties that are not apparent from inspection of the Register. Furthermore, we see no reason why the Order of the Court requiring the payment of damages should not have been registered in order to give the requisite public notice.

122 The first, and possibly only, precedent of an order for payment of damages in lieu of ordering removal is the case of *Corbin*. Full reasoned judgments were not usually delivered by the Court in those days, or if they were delivered, they were not recorded. It is therefore impossible to know the true *ratio* of the decision but it is at least possible that the Order was made in the face of opposition from the plaintiff. The subsequent deed of rectification would have expressed it to be made by consent both because that is the convention and also because the plaintiff was consenting, having been ordered to do so by the Court.

123 In *Felard* the Royal Court equated the extinction or variation of a servitude with the creation of a servitude. The Court may have no power to do the latter of its own motion but it does not follow that it does not have the power to do the former, or to order a party to do the former, in exceptional circumstances.

124 The Royal Court is a court of original jurisdiction whose powers were not created by statute. It has the powers of a court of equity or *équité* as it decided in *Ex parte Viscount Wimborne*. (So far as labelling is concerned, we are not convinced that describing the power to award damages as arising from the Court's “inherent jurisdiction” is entirely accurate. Rather, we would prefer to found our judgment on the original, equitable jurisdiction of the Royal Court).

125 We derive support for our approach in this regard from the fact that, although specific performance will not be ordered of a *promesse à heritage*, the Court may in certain circumstances award damages against the defaulting party: see *Basden Hotels v Dormy Hotels* [1968] 1 JJ 911 commenting on *Guiton v De Gruchy* (1870) 9 CR 70.

126 It is also permissible to look to courts in other jurisdictions as we commonly do in looking at the law and courts of England and Wales or, as here, at French or Scottish law.

127 The Appellant sought to distinguish a number of the Scottish cases cited by the Respondent on the ground that they were decided on grounds that do not support the proposition for which they were advanced. However, she supported the principles cited above from Munro as to the manner in which any discretion could be exercised.

128 There is no doubt that a discretion exists under Scottish law, where the leading case

appears to be the House of Lords' decision in *Grahame v Swan* (1882) 7 App. Cas. 547, in which Lord Watson said:

> ***"It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy which, in ordinary circumstances, they would be entitled as a matter of course.*** In order to justify the exercise of such a discretionary power, there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights."

129 As in Scotland, so in Jersey where we have ***"drunk from the same fountain"*** (quoting Hodge J.A. (as he then was) in *Haas v Duquemin* [2002] JLR 27).

130 It will only be in exceptional cases where the reasons for denying a litigant his ordinary remedy will be sufficiently cogent, but as a court of *équité* the Royal Court has the power to do so where such is required in order to achieve the interests of justice. The present case indicates how an appropriate remedy is more likely to be found in the principles of the long-established customary law, a body of law which is not immutable and has and does evolve over time or indeed by application of the law of human rights to which we turn below.

131 In substance, the Appellant's contention is that the Royal Court had no jurisdiction to deny her an order for removal or demolition of the alleged encroachments. She submits that the Court was obliged to grant a mandatory injunction requiring removal of the offending structures. In our view, that is not correct. A Court's power to grant injunctive relief is always discretionary both in accordance with the principles of the Courts of equity in England and Wales and under the definition of *équité* in *Ex parte Viscount Wimborne* cited above.

132 It follows from the discretionary nature of the Court's power to grant such *relief* that there will be circumstances where it will be appropriate for the Court to refuse to grant a mandatory injunction requiring removal or demolition of encroachments. We do not propose, in this judgment, to set out a definitive list of the factors for the Court to consider. Such factors may be varied and numerous.

133 In the present case, the Royal Court had regard to the factors that were appropriate in the circumstances of the case and we would not be minded to interfere with the exercise of its discretion if it were necessary for us to consider it.

Human rights

134 Irrespective of whether customary law has always recognised a jurisdiction in the Royal Court to refuse an order for demolition and to award damages in lieu, the Respondent argues that it should certainly be prompted to do so now by virtue of the Human Rights (Jersey) Law 2000 ("the HRL"). In addition, the Respondent argues that the HRL is relevant

not only to the existence of the Court's jurisdiction in this regard, but also to the discretionary exercise of that jurisdiction in any given case. It relies specifically on Article 8 of the European Convention on Human Rights ("ECHR") and on Article 1 of the First Protocol ("A1.P1"). The Appellant submits in response that these provisions have no application.

135 The competing arguments of the parties on these points could have occupied a lengthy appeal and a substantial judgment on their own, but in the interests of efficiency they were dealt with only in writing before us, and we will deal with them relatively briefly in this judgment.

136 The first question is whether the HRL has any application at all in the context of litigation between land owners in the private sector (as opposed to disputes involving a State entity as one of the litigants). We consider that it does. So far as the jurisprudence of the Strasbourg court is concerned, our attention was drawn to a number of authorities in this regard, and we would place particular reliance on *Zehentner v Austria* (2011) 52 EHRR 22, at §75, and *Buckland v UK* (2013) 56 EHRR 16, at §65 (noting the separate opinion of De Gaetano J, with which the other judges did not agree). So far as domestic law is concerned, the Royal Court is a public authority under the HRL, and as such it is required by Article 7 to act in a manner that is not incompatible with Convention rights. Contrary to the Appellant's argument, that obligation is not limited to a duty to conduct a fair trial compatibly with Article 6 of the ECHR: rather, it also includes an obligation not to make court orders which violate any of the other protected Convention rights of the litigants.

137 The second question is what impact (if any) the HRL is capable of having on customary law as a matter of general principle. So far as that is concerned, three points should be borne in mind. First, it is axiomatic that the Royal Court is not bound by its own previous decisions. Second, customary law represents the custom of the land from time to time: it is capable of evolving, and it should do so in order to meet the demands of a changing society. Third, in considering any arguments as to whether, and if so how, customary law should evolve in any particular direction, the courts should take into account the provisions of the HRL: in this regard, we would draw an analogy with the approach taken to the potential impact of the Human Rights Act 1998 on the evolution of the common law in England & Wales (see *Vidal-Hall v. Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409, §21 – 43, analysing *Campbell v. MGN Newspapers* [2004] UKHL 22, [2004] 2 AC 457 and *Douglas v. Hello!* Ltd [2006] QB 125).

138 The third question is whether the rights protected by Article 8 of the ECHR and by A1.P1 are engaged in cases of this kind, involving boundary disputes and allegations of encroachment as between neighbouring owners of domestic properties. In our judgment they plainly are, and the reasons are obvious.

139 The fourth question involves analysing the impact of Article 8 of the ECHR and A1.P1 on the jurisdiction of the Royal Court to refuse an order for demolition and to award damages

in lieu in cases of encroachment. So far as that is concerned we are quite satisfied that, if customary law were to dictate that the Royal Court had no jurisdiction in any circumstances to refuse an order for demolition in any case of encroachment, irrespective of how trivial the encroachment might be and irrespective of how damaging and expensive the destruction might be to the property of the encroaching owner, then Jersey law would plainly be incompatible with the requirements of Article 8 of the ECHR and of A1.P1. The rights protected by those provisions are not wholly inviolable: interference can be justified so long as (i) it satisfies the requirement of legality, (ii) it pursues a legitimate objective and (iii) it does so in a manner that is proportionate (i.e. in simple terms, it strikes a fair balance). The third criterion is the critical one in this case. Any rule of law which is utterly inflexible and incapable of yielding to the particular circumstances of any given case is liable to offend against the principle of proportionality, unless there is a truly overriding public interest which absolutely demands such inflexibility. In our judgment, there is no overriding public interest which demands that the court must in all cases of encroachment order demolition, irrespective of the merits (cf the decision on adverse possession in *J.A. Pye (Oxford) Ltd v. UK* (2006) 43 EHRR 3 (Chamber) & (2008) 46 EHRR 45 (Grand Chamber)). Accordingly, if customary law had imposed a mandatory obligation on the court to order demolition in all cases, and equity was powerless to mitigate the effects of that rule no matter how harsh and unjust they might be, then the requirement of proportionality could not be satisfied.

140 The Respondent also sought to argue that a rule of law which compelled the court to order demolition in every case of encroachment would also violate the requirement of legality (the first criterion mentioned in paragraph 137 above) because it would be insufficiently accessible, precise and foreseeable in its application. We would reject that argument. Indeed, if such a rule existed, the true ECHR objection would be the exact opposite: far from producing results that would be unpredictable, the true complaint would be that it would produce results that were all too predictable – namely, the obligatory demolition of any encroachment in all cases, irrespective of the merits.

141 The decision in *Felard* was, of course, given many years before the HRL was enacted. It is striking that even then the court expressed some regret at reaching the conclusion it did (see p. 26). In our judgment, équité is the tool which the courts should use in order to fashion results which it does not regret. For the reasons we have given, if which is not the case we had reached the conclusion that *Felard* was rightly decided and that customary law unaided by the HRL would have precluded the Royal Court from ever refusing an order for demolition and ordering damages in lieu, then we would have reached the conclusion that the HRL would now have come to the rescue and fortified the Court's equitable jurisdiction by equipping it with the necessary power.

Conclusion

142 We have concluded that the Royal Court found that the structures that are now described as encroachments existed and formed part of Treetops before the Boundary Contract and can only be considered to be encroachments because the boundary line was moved closer

to Treetops by virtue of that contract. As a result, the effect of the Boundary Contract was to transfer an area of land from Treetops to Clairmont. Applying the principles of *destination de pére de famille*, it is clear that Mrs Dodds did not intend to act to her prejudice when disposing of the land, there is therefore the right for the house and its appurtenances to remain in perpetuity in the state they were before the Boundary Contract was passed. The owner of Treetops also has a right of access of necessity *"besoin indispensable"* to enter upon Clairmont with workmen to maintain and repair the boundary wall causing the least inconvenience to Clairmont and on rectifying any damage caused to the property.

143 If it were necessary so to decide, we would have held that the Royal Court had the power to order damages in lieu of a mandatory order for removal or demolition and that it correctly exercised its discretion to order damages in the circumstances of the present case.

144 The parties are invited to make applications and submissions in writing in respect of costs both in this Court and in the Royal Court by lodging the same within 14 days. We expect that this Court will deal with the applications on paper without the need for an oral hearing, but the parties are invited to indicate if they would prefer an oral costs hearing, and if so why.

[1] The word "encroach" connotes (or might be thought to connote) an intrusion over a boundary line which is unlawful. One of the issues in this case is whether the fact that parts of the Treetops wall overstep the boundary line is indeed unlawful. For the avoidance of doubt we are using the word "encroach" in this part of the judgment in a neutral sense, without intending to imply any answer to that question at this stage.

[2] The doctrine is sometimes called "destination de père de famille" and sometimes "destination du père de famille". In this judgment, we will generally use the former, unless quoting from a text which uses the latter. In her doctoral treatise on Property Law in Jersey Rebecca MacLeod noted, on page 156, that comparable doctrines exist in other jurisdictions. In Louisiana it is known as "destination of the owner" (art 741 CC) but in Quebec it is called "destination of proprietor" (art 1181 CC), without the definite article.