

## Jersey & Guernsey Law Review – February 2014

### CONFERENCE PROCEEDINGS

#### ***FUTTER AND PITT: MISTAKES BY TRUSTEES***

A look at the Supreme Court decision and the way forward

Scott Atkins

#### **Overview**

1 The Institute of Law arranged a half-day conference on 20 November 2013 to consider the Supreme Court's decision in the co-joined appeals of *Futter v HM Revenue & Customs* and *Pitt v HM Revenue & Customs*<sup>1</sup> together with Jersey's response in Amendment No 6 to the Trusts (Jersey) Law 1984.

2 Advocate Fraser Robertson (Appleby) opened the conference by thanking the panel and guests for attending and looking forward to an afternoon's discussion and analysis of *Futter* and *Pitt*.

#### **The Supreme Court decision in *Futter* and *Pitt***

##### ***Lord Millett***

3 Lord Millett had a seminal role in the development of the role of developing the law of mistake *vis-à-vis* trustees' decisions. He began his talk by saying how much he had been looking forward to explaining why he was right in his *ex tempore* judgment in *Gibbon v Mitchell*<sup>2</sup> and that the Supreme Court had been wrong in *Pitt*.

4 Lord Millett pointed out that, contrary to the title of the conference, the decisions in *Futter* and *Pitt* were not about mistakes by trustees. The former did concern a mistake by a trustee but the latter involved a mistake by the settlor. The decision of the Supreme Court in *Futter* confirmed that a proper exercise of a trustee's powers cannot be set

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<sup>1</sup> *Futter v HM Revenue & Customs* and *Pitt v HM Revenue & Customs* [2013] UKSC 26.

<sup>2</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304.

aside unless it can be shown that the trustee had breached the trust or a fiduciary duty. By taking professional advice, the trustees in *Futter* could show neither. Their decision stood and they were at risk of being held liable for negligence. Such a claim could be successfully resisted by the inclusion of an exemption clause in the trust deed.

5 There were two grounds for a settlor setting aside a transaction for mistake: mistake of fact and a mistake, as Lord Millett had held in *Gibbon v Mitchell*, as to the effect of the transaction (but not as to its consequences). The decision in *Pitt* re-visited Lord Millett's distinction between "effects" and "consequences" which he had made in *Gibbon v Mitchell*. The Court of Appeal had effectively upheld that distinction but it was rejected by the Supreme Court despite a line of existing case-law in support of the distinction. Worse still, in his Lordship's view, was that the Supreme Court had not indicated when the court would set aside a voluntary transaction for mistake, apart from saying that the mistake must be serious.

6 Lord Millett explained the basis behind "effect" and "consequence". "Effect" meant that the grantor had misunderstood the legal effect of his voluntary transaction. He acknowledged that, in many instances, both words could be interchangeable. In a memorable analogy, he said that the effect of going out in the rain without a raincoat or umbrella is that one would get wet and perhaps catch a cold. That could also be said to be the consequence of going out in such conditions. But, on some occasions, "effect" and "consequence" could mean radically different things: a kiss could have an extraordinary effect or give rise to extraordinary consequences. The former might be remembered with pleasure; the consequences best forgotten! The rationale behind Lord Millett's distinction between "effects" and "consequences" was to keep the law of mistake for voluntary dispositions within reasonable bounds and to prevent every grantor from setting aside their transaction merely because they had subsequently changed their mind or were mistaken about the commercial consequences of their transaction.

7 Apart from a mistake of fact, Lord Millett felt the true ground for setting aside a voluntary transaction was whether the grantor misunderstood the effect of his grant. This did not occur on the facts of *Pitt*. Mrs Pitt was not under any mistake of fact nor did she misunderstand the effects of the settlement she entered into. The effect of the settlement was to manage her husband's compensation sum and this was achieved. The adverse (commercial) consequence was that there was a substantial charge to inheritance tax but that was not the same as the settlement having an adverse legal effect.

8 The test substituted in place of a mistake of fact or "effect" for setting aside a transaction by the Supreme Court was that the court would set aside a transaction if the mistake was serious. Lord Millett

questioned what was meant by this new test. He said that it must mean that the transaction must stand unless it would be unconscionable for the beneficiaries who were to be stripped of their entitlements to object and that had to be ascertained objectively. Such a test was, incidentally, satisfied on the facts of *Gibbon v Mitchell*.

### **Richard Wilson**

9 Richard Wilson (Barrister, 3 Stone Buildings, London) provided a valuable insight into the Supreme Court's decision in *Futter and Pitt* having been instructed to act on the appellant's behalf.

10 After charting the history of the rule in *Re Hastings-Bass*,<sup>3</sup> as developed in *Mettoy Pension Trustees Ltd v Evans*,<sup>4</sup> *Green v Cobham*,<sup>5</sup> Mr Wilson explained how Lord Walker had endorsed a comment by Lightman, J in *Abacus v Barr*<sup>6</sup> that there had to be a failure by a trustee to consider that which he was under a duty to consider before a trustee's decision could be set aside. If the trustee had sought professional advice, Lightman, J had said that there would be no breach of duty. *Seiff v Fox*<sup>7</sup> had seen Lloyd, LJ preferring not to follow the decision in *Barr* but instead *Mettoy* itself, meaning that there was no need for a trustee to breach his duty to the trust for the rule in *Re Hastings-Bass* to apply.

11 In the Court of Appeal in *Futter*, Mr Wilson explained that Lloyd, LJ reconsidered his view in *Seiff v Fox* and held that the correct approach was that set out in *Barr*. A trustee had to have breached his duty to the trust for his decision to be set aside. That decision was voidable and the court had a discretion to rescind the transaction. This view was upheld by Lord Walker in the Supreme Court.

12 Mr Wilson said that Lloyd, LJ had referred to it as a breach of fiduciary duty but that it seemed to him to amount to no more than a breach of the duty to take reasonable care and skill. Such a breach would mean that the ultimate fault lay with advisers giving incorrect advice as opposed to trustees who followed it.

13 Mr Wilson thought that it was frustrating that the Supreme Court had not said whether it was necessary to show that the trustee would have acted differently had he not breached his duty or whether it was enough to show he might have acted differently. The *In re Hastings-*

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<sup>3</sup> *In re Hastings-Bass* [1975] Ch 25 (CA).

<sup>4</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.

<sup>5</sup> *Green v Cobham* [2000] EWHC 1564 (Ch).

<sup>6</sup> *Abacus v Barr* [2003] 2 WLR 1362.

<sup>7</sup> *Seiff v Fox* [2005] 1 WLR 3811.

*Bass* rule, separate from the mistake doctrine, still had a role to play but its role was opaque when it was not clear whether aggrieved beneficiaries had to show that the trustees would or might have acted differently from how they actually did.

14 Mr Wilson posed a number of intriguing questions based on the decision in *Futter*: what is the trustee's duty when exercising a discretion? Does taking professional advice render a decision incapable of being challenged? How will the law develop in other off-shore jurisdictions following the Supreme Court's decision?

### **The Channel Islands' approach: judicial and legislative responses to the decision**

#### ***Sir Philip Bailhache***

15 Speaking as a Minister in the Jersey Government, Sir Philip's talk initially concerned tax avoidance and tax evasion, which he described as "where angels fear to tread". He reminded the conference of the comments of the Royal Court in *In re S Trust*<sup>8</sup> where the court said that tax avoidance was perfectly legal but evasion was fraudulent and that it remained open for citizens in Jersey to minimise their tax liabilities provided such arrangement was both transparent and within the law.

16 Sir Philip's view was that the enactment of Amendment No 6 had dealt the Deputy Bailiff's comments in *In re B Life Interest Settlement*<sup>9</sup> a "severe, if not mortal" blow. In that case, the Deputy Bailiff had essentially agreed with the English Court of Appeal's judgment in *Futter* and *Pitt* in limiting the application of the rule in *In re Hastings-Bass*.

17 The details of Amendment No 6 were explained. The amendment provides, *inter alia*, that an application to set aside a transaction may be made by a trustee. It matters not whether the trustees were at fault in their decision-making, still less whether they breached a fiduciary duty. The effect of the amendment is to provide that the court is able to intervene to set aside careless or negligent actions of a trustee. The amendment has been commented on in publications of leading London solicitors, suggesting that it makes Jersey a more attractive place to manage trusts.

18 Sir Philip pointed out that Amendment No 6 gives greater protection to beneficiaries. It means that errors made by trustees can

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<sup>8</sup> *In re S Trust* [2011] JRC 117.

<sup>9</sup> *In re B Life Interest Settlement* [2012] JRC 229.

be corrected more easily without the beneficiaries having to take legal action against their trustees.

19 The only regret that Sir Philip had about the enactment of the amendment was that the contrary arguments to it were never articulated in the States' Assembly. Such was a natural consequence of the absence of political parties in the Jersey legislature. It meant, however, that the question of whether beneficiaries should have more protection than the average member of the public was never debated. Nor was it questioned whether it was in the public interest for the trustee to play the "get out of jail free" card of the rule in *In re Hastings-Bass*.

20 Sir Philip considered how the Royal Court would respond to the amendment. He did not think it would affect the court's approach to the mistake jurisdiction as set out in *In re A Trust*.<sup>10</sup> It was more difficult to say what the likely approach of the court would be with regards to the *Re Hastings-Bass* part of the amendment. The amendment enables the court to intervene in trustees' decisions but the exercise of such a discretion is likely to take the court into difficult territory. Given the recent comments in *Le Monde* by the Director of the Centre for Tax Policy and Administration of the OECD that action should be taken to prevent small countries being designated "*paradis fiscal*" and benefitting from favourable tax arrangements, the court may have to trace a fine line between tax-planning and aggressive tax avoidance. The new General Anti-Abuse Rule in the UK's Finance Act 2013 may be a helpful pointer in tracing this fine line.

#### **Advocate Fraser Robertson**

21 Advocate Robertson's talk concerned three areas: (i) mistake and its relationship with Jersey customary law of *erreur*; (ii) recent judicial developments in Jersey concerning *In re Hastings-Bass*; and (iii) personal observations on the *In re Hastings-Bass* statutory development in Jersey and an overview of the reaction from the Crown dependencies.

22 The Jersey law of mistake had been set out in such cases as *In re A Trust* and *In re S Trust* and involved the court asking three questions: (i) did the settlor make a mistake? (ii) if so, would the settlor not have entered into the transaction but for the mistake? and (iii) was the mistake so serious to make it unjust on the part of the donee to retain the property?

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<sup>10</sup> *In re A Trust* 2009 JLR 447.

23 The Jersey approach was heavily criticised by the English Court of Appeal in *Pitt v Holt*<sup>11</sup> which regarded it as far too relaxed ignoring, as it did, the difference between “effect” and “consequence” set out by Millett, J in *Gibbon v Mitchell*. However, the Supreme Court had itself disagreed with the Court of Appeal’s view and held that for an operative mistake, there had to be a causative mistake which was so serious that it had to be unconscionable for the court to refuse relief. Advocate Robertson thought this was such a shift away from the previous English position of effects and consequences that it might be said, tongue in cheek, that the law of Jersey was now the law of England.

24 Advocate Robertson thought that, as far as mistake was concerned, Amendment No 6 was largely otiose except in connection with the customary concept of *erreur*. In *In re B Life Interest Settlement*, the Deputy Bailiff believed that *erreur* could not be applied to a trust, since it was derived from a legal system (France) that had no notion of the trust. However, *obiter*, the Deputy Bailiff thought that when considering transfers into a trust (as opposed to transactions during the administration of a trust) the principles to be applied might well include principles derived from Norman customary law. Amendment No 6 specifically provides, however, that *erreur* has no application to the meaning of mistake in trust law. But Advocate Robertson questioned whether art 47(e) achieves its objective in that, arguably, it may not apply to initial gifts which establish a trust, because at that point, it may be said that the trust does not exist.

25 Advocate Robertson then commented on the Jersey case of *In re Onorati Settlement*<sup>12</sup> which was decided ahead of the enactment of Amendment No 6. The Royal Court thought that advocates would have to explain carefully why Jersey should take a different approach from the closely reasoned judgments in the English Court of Appeal and Supreme Court. Curiously, the court never commented on the draft amendment.

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<sup>11</sup> *Futter v Futter; Pitt v Holt* [2011] 3 WLR 19 (CA).

<sup>12</sup> *In re Onorati Settlement* [2013] JRC 182.

26 The amendment removes the need for any fault to be established on the trustee's part. Such an approach avoids both the uncertainty and costs involved in suing professional advisers who have given incorrect advice. Moreover, the Minister for Economic Development believed that this approach would strengthen the Island's standing as the leading offshore trust jurisdiction. Advocate Robertson noted that this belief appears to be well-founded, as a number of intermediaries in London have noted that Jersey appears to be offering something different from other offshore jurisdictions. It has, he said, even been suggested that a trustee's failure to consider exporting a trust to Jersey may well be a breach of trust.

27 Advocate Robertson considered the position of other offshore jurisdictions. In Guernsey, it seems that the Island's courts are likely to pay close attention to the Supreme Court's judgment in *Futter and Pitt* and so there is thought being given to introducing a statutory amendment to the Guernsey Trust Law.<sup>13</sup> Advocate Robertson thought that there seemed to be no desire for such an amendment in the Isle of Man.

#### **Question and answer session**

28 The conference ended with a lively and interesting question and answer session with the panel of speakers.

#### **Full conference proceedings**

29 The Institute will publish edited papers from the conference later this year.

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### **IMMOVABLE PROPERTY: THE ISSUES ACROSS SECTORS, ACROSS JURISDICTIONS**

#### **Claire de Than**

1 The Institute of Law's conference on 21 October 2013 provided an opportunity to examine the law of immovable property and related issues across time as well as across several jurisdictions. This is a field of law which, in Jersey, continues to have customary law as the

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<sup>13</sup> Trusts (Guernsey) Law 2007.

source of its key principles and concepts, supplemented of course by judicial interpretations and by legislation. Various challenges arise from this, including how to interpret and adapt ancient customary law for modern concerns and markets, and whether concepts from other jurisdictions should be imported. Three interrelated themes emerged from the day's papers: what we can learn from the past; what we can learn from other jurisdictions; and the potential challenges and opportunities in the future of immovable property law. This report will provide an overview of the conference papers and discussion, in advance of the publication of the full papers. As will be seen, the conference publication will be a valuable resource for all lawyers with any practice in this field.

### **First session: a historical look at Jersey immovable property law**

2 The first session began with "The process of conveyancing in the Channel Islands" by John Bisson.<sup>14</sup> This paper described the evolution of conveyancing practices from the original handwritten records to the modern computerized system and the use of public registries, highlighting differences in practice across the Islands and the resulting advantages and disadvantages of practice in each jurisdiction. For example, Jersey does not currently allow "DIY" conveyancing, since contracts must be presented to court by an advocate or solicitor, but Sark and Alderney do not have such a barrier. There are also marked differences in the speed of change across the Islands: Alderney has had registered land title since 1949, in contrast with Jersey; and Guernsey changed the language for contracts to English in 1969, whereas Jersey did not do so until 2006. Pressures on land transactions were also explained, including the large fall in contracts registered since 2008, the due diligence requirements of anti-money laundering laws, the changes to residence qualifications, the noticeable increases in stamp duty over the years, the intense competition for conveyancing work and the resulting sharp fall in fees, particularly for residential conveyancing. The future might hold a system of registered conveyancing due to such pressures and the advances in technology.

3 The second speaker, Dr Rebecca McLeod,<sup>15</sup> focused on "The law of servitudes" in Jersey, tracing the history of servitudes from Roman law to the reformed custom of Normandy, and their modern application in Jersey. Customary law recognizes more forms of servitude than did Roman law and distinguishes between real and personal servitudes,

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<sup>14</sup> Appleby Global.

<sup>15</sup> Anderson Strathern.



although some authors include a mixed category. Remaining problems in the definition and scope of servitudes were examined, including the concept of *mutualité* as viewed by different authors, the distinction between legal and natural servitudes, and the fact that Jersey law is unclear about how it theorizes servitudes. The lack of clarity remains since courts have not yet had the opportunity to consider the law of servitudes in Jersey as a whole. The paper also examined the possibilities of reform, including quasi-contract of neighbourhood, or indeed abandoning the current categories of servitude.

4 The third presentation, by Stéphanie Nicolle,<sup>16</sup> was entitled “Social and legal change in Jersey’s immovable property law”, and elaborated upon two key areas where change has been implemented by courts, statutes and usage. First, the power of dealing with and disposing of land, where the historical preoccupation with keeping property in the family and with male heirs led to property being protected for the heir by banning some contracts about land and dealings with land, including the making of wills. Social attitudes began to change and such restrictions were challenged from 18th century onwards since fortunes were no longer inherited, they could also be self-made. However changes in courts’ attitudes were slower than those of legislators, as may be seen from examination of the key relevant cases. Secondly, there have been changes in the nature and reasoning of public restrictions on the use of land: they were utilitarian in basis until the 20th century, then other grounds began to be recognized, such as protecting the environment, and aesthetics. There has also been increased recognition of third party rights and appeals in planning law: the Island Planning (Jersey) Law 1964 neglected third party rights since it contained neither a requirement to post notice of the plans nor a right of third party appeal, and the only objections which could be taken into account were planning considerations, not objections that the development was adverse to the objector’s own property. Again social attitudes have changed, and a greater perception of the rights of individuals may be seen in the 2002 Planning and Building (Jersey) Law, which includes a statutory right of objection, a third party right of appeal, and a duty on the planning authority to take into account the effect on neighbours and others working or living in the area. The paper concluded that planning law can do things impossible under private law, and examined how lawyers should advise clients if the law is out of step with social attitudes, using case examples.

## **Second session: Jersey immovable property law today**

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<sup>16</sup> HM Solicitor-General of Jersey 1994–2008.

5 Advocate Richard Falle's<sup>17</sup> paper, "Interference with property rights—the state, creditors, spouses", examined the history of security of title in Jersey and the limitations thereon. Originally, possessory rights could be defended by possessory actions, including a *Clameur de Haro* for recent dispossession. Then proprietary rights evolved, probably in the 13th century, to a right to claim stronger title than the person in possession within 40 years of dispossession. But private land rights have always been subject to disturbance of various kinds: the Crown could and did seize land in emergency for the defence of the realm; however the Crown's arbitrary powers have always been subject to *la coutume*. The States of Jersey originally did not have compulsory purchase powers, but from the 19th century onwards, the States took on powers to interfere with private titles, e.g. the 1870s laws to build railways east and west of St Helier, and the 20th century granting of rights for private utility companies to carry out powers over private land, usually with some form of compensation. More radical change took place as the needs of a growing population had to be met: the Housing (Jersey) Law 1949<sup>18</sup> gave States powers to acquire land for housing and took control over all sales and leases, so that nobody could sell or lease their land without the consent of the Housing Committee. Private rights were thereafter subordinated to the public interest. Further, the Island Planning (Jersey) Law 1964 and the Planning and Building (Jersey) Law 2002 gave the States dramatic powers, including the power to zone land, resulting in the effective removal of the right of a private landowner to change the use of or otherwise develop his own land, without the consent of States. The circumstances in which creditors may interfere with security of tenure were also examined: the court has injunctive powers to restrain the sale of a debtor's estate at the instance of a creditor. The oldest form of interference by creditors was *décrêt*—a process designed to sever the debtor's title to land, primarily for the benefit of his creditors, a process which has caused clear problems and unfairness. The replacement, *dégrévement*, has fundamental flaws due to its speculative nature, although these have been mitigated by cases and by the Bankruptcy (*Désastre*) (Jersey) Law 1990. The paper then identified other revolutions in this field, principally the impact of the 1949 Divorce Law, concluding that the effect of the latter was to enable a court to take a coach and horses through all the previous secured property rights on the land.

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<sup>17</sup> Bois Bois.

<sup>18</sup> Abolished and replaced by the Control of Housing and Work (Jersey) Law, 2012, which contains similar powers.

6 Dr Ross Anderson's<sup>19</sup> presentation, "Ownership in common and joint ownership", began by identifying the problems of small legal systems, including the lack of cases stating general legal principles, which makes it difficult to identify what the law actually is on particular issues in the absence of a legal Code. Small legal systems have a particular need for clear general principles and foundational concepts. He then examined the legal position in Jersey, where joint ownership is exceptional, and the consequent problems of fitting joint ownership into the general structure of Jersey property law, particularly given the lack of supporting cases. The legal positions and recent case law of England and Scotland were outlined and compared with that of Jersey, especially on the issue of severance. The paper concluded by outlining reform possibilities: one partial solution for Jersey might be to adopt the Scottish approach to survivorship.

7 "The three bases of tenure for multi-unit properties in Jersey—long leasehold, flying freehold, and share transfer" and the advantages and disadvantages of each, were the subject of Advocate Georgina Cook's<sup>20</sup> presentation. Share transfer has been popular since the 1960s but can be seen in much earlier cases, and involves a society made up of shareholders who agree amongst themselves about how the property is to be managed. Bespoke articles of association provide that ownership of a particular block of shares gives the right to occupy a particular unit, with clarity as to the rights created. One disadvantage is that shares are movable property and so charges are difficult to create over the property. An advantage was savings on stamp duty, but this anomaly has now been removed by law. The share transfer structure was not ideal for Jersey since it did not provide a method for disposing of the freehold of an apartment. Hence lawyers looked to France and the flying freehold, where land is developed and before a unit is sold, the owner registers a Declaration of Co-ownership which sets out the basis on which land is held and divides property into Private Unit and Common Parts. Title is acquired by contract passed before the court since it is an immovable asset and has to be treated in exactly same way as any other immovable property, and charges secured over flying freehold property are straightforward. People tend emotionally to prefer flying freeholds to share transfer.<sup>21</sup> The third method, long leasehold, has not yet been popular in Jersey, both for emotional reasons and through lack of a statutory structure supporting

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<sup>19</sup> Glasgow University.

<sup>20</sup> Bois Bois.

<sup>21</sup> A similar trend has been seen in English land law, where the introduction of commonhold has had little impact, arguably since it does not mesh well with how people view their relationship to the land.

it: there is no statutory right to extend the lease or buy the freehold; and there are no statutes governing the landlord's conduct, so there is a lack of protection for leaseholders. The situation is complex: a lease of more than 9 years is a contract lease and must go before Royal Court, so is deemed to be immovable property; a lease up to 9 years is a paper lease. The States began to convert existing long leaseholds to flying freeholds due to problems which had arisen, but although the problems have been cured by statute, long leasehold still has not taken off in Jersey. But this might be changing—there is a new development using long leasehold and long subleases, with share transfer structure as part of it. The paper concluded by looking to the future: unless UK legislative protections are mirrored, Jersey buyers are unlikely to change their preference for one structure over another, but emerging hybrid forms may make it more difficult for purchasers to understand what they are buying.

### **Third session: outside influences on Jersey immovable property law**

8 The afternoon began with “Till death us do part: the ‘exalted’ position of the widow in Medieval Normandy” by Professor Meryl Thomas.<sup>22</sup> She examined the stereotyping in legal history of women as maidens, wives and widows, and the effect which such constructs had upon the (limited) property rights of women in medieval Normandy. Wives retained ownership only of a small proportion of their moveables, with everything else controlled by husbands. Widows were also under the control of male relatives, whereby a male family member could be entrusted with a widow's property or she could enter a life of religious service and her property would be returned to her. A biblical explanation of women's medieval position has often been advanced, with women under the authority of men as the “natural order of things”. But the same position predates the Bible, and could be a biological explanation based on perceived weakness, or could be because the Roman concept of *autoritatus* influenced Norman thinking. Women could not succeed their parents and the law forbade marriage below one's own station, so a woman had to find a man of the correct rank in order to access a dowry. The paper examined dower-related issues and controversies under Normandy's customary law, compared with the rest of France, and with particular focus on immovable property and how the historical developments in Normandy shaped women's rights over property. The paper concluded that widowhood was potentially the most powerful stage of a woman's life, and at least a noblewoman could lead a relatively independent life,

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<sup>22</sup> Cayman Islands Law School.

with potential access to huge wealth from dower and *acquêts*. She could enter a convent or nunnery and lead a semi-religious, semi-secular, semi-autonomous life. She could also choose to live under the authority of a male relative. Hence, although Norman laws were harsher than those in the rest of France, women's property rights were still protected to some extent.

9 The next presentation, "Creditor enforcement, secured property and the insolvency dynamic" by Professor Paul Omar,<sup>23</sup> traced the real property roots of insolvency procedures from the ancient Greeks and Romans through *cession de biens*, *remise de biens* and *désastre*. As the various medieval procedures arrived in Jersey in the mid-15th century, they were adapted to local circumstances. As they developed, they revealed the concern of local courts in relation to what happens to the land, so the development of Jersey insolvency procedures is very much tied to the developments in real property law. *Désastre*, the fully-formed insolvency procedure in Jersey, began in the 18th century when courts decided that it was convenient to amass all the various claims together and deal with them at once. *Remise* in Jersey attached itself to the importance of having real property as a qualification, the logic being that an over-extended debtor may well have a sizeable asset which is not currently very productive, the land, so giving a respite for a period of time might allow the debtor to refinance in order to pay off some of the debt. Thus *remise* was only available to the asset-rich; there are still echoes of the past in procedures today, since *remise* is only available if the debtor's property is sufficient to pay off the secured creditors as well as paying something to the unsecured, and there must be land among the property.

10 The problems within *cession de biens* and *dégrévement* were also elucidated; the latter is an archaic procedure which is probably not human rights compliant, and its truncated yet complicated procedures have not been amended in line with changes in society. Courts have also developed practices which differ from the written law, there is little protection for unsecured creditors and there is no equivalent in the *cession* or *remise* procedures for the spousal protection available in the *désastre* law. The full version of the paper will also discuss the recent case of *In re Estates & General Devs Ltd (in liquidation)*,<sup>24</sup> which raises a number of important issues for Jersey and was apparently the first occasion on which a local court had to deal with an application by fixed charge receivers in relation to Jersey immoveable

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<sup>23</sup> Nottingham Trent University and Visiting Professor at the Institute of Law, Jersey.

<sup>24</sup> [2013] JRC 027 (4 February 2013).

property. Article 49 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 creates an anomaly on the facts of that case since it gives the home creditor rights to which the foreign creditor simply does not have access, with a potential discrimination issue as a consequence.

11 Professor Andrew le Sueur<sup>25</sup> then examined the issue of “Is Jersey safe from challenge in Strasbourg?” Issues raised included the human rights compliance of the Control of Housing and Work (Jersey) Law 2012. Jersey is one of the most densely populated territories in world, so the States have tried to find policy tools to control the number of people settling there. Without many border or residence control tools at their disposal, legislators seek to control access to housing or jobs. Hence there is a significant amount of government control on the property market, bringing with it significant impact on people’s lives. The Human Rights (Jersey) Law 2000 is very similar to the Human Rights Act 1998 and has two different stages of impact: first, an important influence on policy-making and law-drafting; and secondly in the day-to-day application of the legislation to individuals. Under the 2000 Law, if a dispute arises, there is a heavy obligation to give effect to human rights which may involve the stretching of the wording of the Law; or a court can make a declaration of incompatibility. Professor le Sueur explored the scope for potential human rights challenges to the 2012 Law under arts 6, 8, 14 and art 1 of the First Protocol to the ECHR. In relation to art 6, Jersey courts and tribunals meet the general requirements of independence and impartiality but it is useful to be able to argue the implied art 6 right, that where there is a dispute of “simple facts”, the European Court of Human Rights requires that a national court has full jurisdiction over the matter, and that the court itself must look at the evidence and come to a conclusion about the facts. Property law disputes fall under the definition of “civil rights and obligations”, which has not been articulated very clearly by ECHR cases. However, there are some highly relevant cases, including *Gillow v UK*.<sup>26</sup> To be justified, interference with a person’s property rights must be proportionate to a legitimate aim, and policy goals must meet a necessity test; however increasing population and the associated difficulties may necessitate protective legislation until such time as the circumstances have changed and render it unnecessary, and it may be legitimate to show preference to persons who have strong ties to an Island when exercising a discretion e.g. to grant occupation licences. The paper’s conclusion was that we may be fairly confident that the 2012 Law is in itself compliant with human rights, but

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<sup>25</sup> Essex University, former Director of studies at the Institute of Law.

<sup>26</sup> (1986) 11 EHRR 335.

that it would be surprising if there were not from time to time litigation about the Law's application to particular individual circumstances.

#### **Fourth session: immovable property law in other jurisdictions**

12 The final session was opened by Dr Jahiel Ruffier-Méray,<sup>27</sup> who took a comparative approach to the real property laws of Jersey and Guernsey, then added a French legal perspective. Many facets of French influence on Jersey's law and legal system were elaborated, including the form of judgments until 1950, the *Code Civil*, French customary law, and language. The system of immovable property law is complex but it has much to say about the nature of real property rights and the liberties, powers and immunities which attach to them. The division of competence across different courts in the Channel Islands reflects the complexity of the nature of real property. French law has a simpler system since it attempted to unify concepts of real property into a single idea, but this has caused problems as the complexity, subtlety and richness of immovable property concepts were lost. Each historical period has recognized a different nature of property, as utility, sacred right, sovereignty over a thing, or limitations. The Channel Islands' lack of a revolution led to a great difference of approach from France, enabling them to adapt to changes in society. The paper concluded by asking whether immovable property and intellectual property should be treated similarly by the law.

13 The penultimate paper was "The free constitution of real rights on immovable property in France" by Dr Sylvain Ravenne.<sup>28</sup> It has often been asked whether it is possible to innovate in the creation of property rights, particularly over immovable property, or whether the rights over such property are limited to those listed in the *Code Civil*: usufruit/usufruct, use/occupation, and easements. Freedom to create real *sui generis* rights was stated to exist in the *Caquelard*<sup>29</sup> judgment of 1834, but there is a dearth of subsequent case law supporting this position. There has been very little discussion of the issue in recent years, but a renewed focus has been provoked by the *Maison de Poésie*<sup>30</sup> judgment of 31 December 2012, which confirmed that "the owner may agree, subject to the rules of public order, to a real right conferring the benefit of a special enjoyment of his property." The paper outlined the theoretical and practical relevance of this development, including new ways of enjoying rights over shared

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<sup>28</sup> Université François- Rabelais, Tours.

<sup>29</sup> C. cass. Req., 13 February 1834.

<sup>30</sup> C. cass. 3<sup>e</sup> civ., 31 October 2012, n° 11-16304, *Bull.* III, n. 159.

property, then examined the potential meanings of the words “right of special enjoyment” used by the court. It excludes security interests and easements, but may relate to part of a building such as a storey. There is also much debate about the duration of real rights of special enjoyment: on the facts of the *Maison de Poésie* case, the real right was designed to be co-extensive in time with the legal person to whom it was assigned; thus Dr Ravenne argued that, since legal persons may be perpetual, it is possible that perpetual real *sui generis* rights may now be valid. Again, there is an issue about whether *sui generis* real property rights are subject to extinguishment via prescription.

14 The final paper of the conference was “The UK and London residential markets: implications of new legislation, focusing on the ATED and CGT regime”, by Simon Aldous,<sup>31</sup> who gave a detailed update on property markets and trends in London, including forecasts. Prime London property market growth is now significantly different from nationwide figures, which leads to questions as to the sustainability and causes of the divergence. Since 2005, the prime central London market has been dominated by non-UK buyers, with a high proportion of second-home buyers and investors. The new-build and second-hand sales within the central London market are still dominated by UK purchasers and the Western European market. Growth has not been uniform even within the prime London market, with some areas and types of property particularly booming. Understanding the different buyer profiles enables identification of the risks in the market: for example second-hand sales are more at risk to increases in interest rates, taxes and financial instability; the risks for new-build sales include changes in supply, the new company tax, and further offshore taxes. International demand is likely to increase over the next few years, and there is little need for concern about the prime markets, although the paper identified some areas which could potentially be impacted by financial instability, increasing property taxes and over-supply of new-build homes. One current issue is the Mansion Tax and its lack of differentiation between taxpayers and tax-avoiders, and will be expensive to administer. The paper concluded with a discussion of the potential impact of the Help-to-Buy scheme and of the General Election in 2015.

15 In sum, the conference papers will provide a wealth of resources for the future of immovable property law in Jersey and the other Channel Islands, with much potential wider impact. Recent legislative developments in the Channel Islands, and cases from a variety of

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<sup>31</sup> Savills.



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jurisdictions, made this conference a timely opportunity to reflect on historical concepts, legal transplants, and reform.

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