

Submission by Frederic Fokkelman

17 June 2014

Access to Justice Review
Chief Minister's Department
Cyril Le Marquand House
St. Helier
JE4 8QT

Senator Paul Routier
Chairman

Dear Chairman,

Submission on quality and depth of property contracts

1. Property contracts are drafted by lawyers or conveyancers, historically by the legal representatives of the party acquiring, upon which those are passed before the Royal Court and subsequently registered at the Registry held by the Judicial Greffe.
2. It is apparently not uncommon for errors and omissions to find their way in property contracts, which in some cases remain undetected until an occasion arises whereby a change in relation to the property is to occur. It is also not uncommon for subsequent contracts to be copied literally from the first or earlier transaction, whereby an error or omission is thereby simply repeated.
An error or omission in the contract can only be rectified by the passing of a Deed of Arrangement, which by definition is based on the agreement of the parties to the contract, or their successors in title.
3. In Jersey many properties have been held by generations of the same family, whereby properties are left in a will to a person or to persons. In those cases normally no new contract is prepared for the property, and the pre-existing contract remains as the (sole) legal record for boundaries, servitudes and covenants.
Consequently an error or omission in the property contract can remain undetected for a long period, possibly even several decades.
In the case of a long timespan occurring before detection of the error, the law firms employed by the parties to the contract may well have ceased to exist, or, may have been amalgamated with another practise, or the property law section of a firm may have been closed.
4. Unlike England and Wales, where law practises are not allowed by law to discard older files, in Jersey the matter of retention of files is at the sole discretion of the professional body entitled 'The Law Society of Jersey'. Its 'Code of Conduct' refers to the particular subject.

Consequently, contemporaneous correspondence, case notes, instructions, or any documentation as to the intentions of the parties to the contract may have been discarded, and more likely so when it concerns an older transaction.

5. In the instant case at the heart of this submission is the case history of a property which had been in the ownership of three successive generations of the same family, spanning a period of 58 years, whereby the property had not been the subject of a transaction before the Royal Court during that period.

Since a dwelling and an adjacent farm were in the ownership of the same family, a parcel of farmland was separated from the farmland and added as a vegetable garden to the dwelling at an early occasion. A permanent boundary fence was installed to create a physical boundary.

Twenty years later the farmland was sold to a purchaser unconnected to the family, and a contract was drafted to transfer the farmland. The physical boundary remained in place. Some 36 years after the sale of the farmland had taken place, the person who had inherited the dwelling found that the contract of the sale of the farmland did contain a grave error and uncertainty, which caused the boundary between the vegetable garden of the dwelling and the farmland to be uncertain.

The physical boundary and the contractual boundary were not the same, and the contract itself proved to be patently ambiguous as to the location of the boundary. At that point in time the law firm which had prepared the contract of sale of the farmland had long been closed, there were no files in existence, and a lawyer who had been involved at the time was found to have no recollection of the matter.

Also the intention of the parties at the time of the sale could not be ascertained since all of the persons involved had passed away.

6. The process by which uncertainties in boundaries are resolved when parties cannot arrive at an agreement is controlled by the Viscount. It concerns an established procedure termed 'Vue de Vicomte'. As a starting point in relation to legal costs the principle is applied that each party pays its own costs, since the (final) decision by the panel of experts appointed for the 'Vue de Vicomte' does allow the creation of certainty for both parties. The process is invoked by consent of the parties. Costs to each party would typically amount to tens of thousands of pounds.

7. It appears to be the case that there is no regulatory body overseeing the legal profession in Jersey. The sole organisation concerned with standards is 'The Law Society of Jersey', a professional body which seeks to 'self-police' the profession. Its 'Code of Conduct' does not contain access to data on various subjects, which are readily made available to the consumer by, for instance, 'The Law Society of England and Wales' and by the 'Solicitors Regulation Authority'.

From a typical consultation document by the SRA is quoted:

'In 2010 Charles River Associates (CRA), commissioned by the SRA, in their report "Review of SRA client financial protection arrangements" estimated that the average value of claims is between £40,000 and £60,000, with exception of conveyancing claims averaging between £60,000 and £180,000.'

8. If an affected party in Jersey was to seek legal redress against a lawyer who was alleged to have been negligent in drafting a property contract, one would need to prove negligence. By definition such action would be costly, however also major obstacles in getting justice would be, inter-alia,

- the party seeking the redress may not be the party who contracted the lawyer, in other words there was no contract between the plaintiff and the negligent lawyer,
- the issue of 'prescription', whereby claims may be time barred by virtue of Court Rules,
- the complete absence of files.

9. Lawyers in Jersey are obliged to have professional indemnity insurance. However, no aspects of this particular subject are placed in the public domain.

By contrast, the SRA states:

'Professional indemnity insurance (PII) is widely recognised as an important protector of consumer and public interests. While the cover directly protects solicitors and law firms (regulated by the SRA) from the cost of claims against them, there are clear benefits to consumers. It provides consumers with greater certainty that any loss incurred (within the scope of the insurance) will be paid without reliance upon the solicitor, or the firm, neither of which may have assets to pay damages.' Further: 'It is therefore important that insurance is in place even after a firm has closed.'

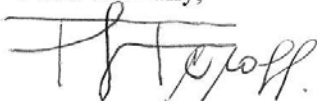
10. In summary, in the sphere of property contracts it is frequently the case that claims do not necessarily arise after the service has been delivered but rather are revealed over time. It is therefore important that the means of redress remain over time. The present justice system prevents this.

This respondent is of the view that the consumer in Jersey in respect of property contracts is getting a very raw deal. There is no protection of the interests of the consumer, and getting redress against faulty work by the legal profession is wholly unobtainable to the least financially endowed consumers.

This submission is based on our own experiences and aims to draw the attention of the Chairman and the Review Panel to the absence of legal redress by the consumer in the case of a lack of quality and depth in property contracts, and thereby to the notable absence of Access to Justice.

I am,

Yours faithfully,



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(There is no objection to this submission being placed in the public domain)