

BEYOND THE BOUNDARY

by Tim Hart

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Jersey has a developed and sophisticated body of law which plays a key role in attracting international business to the Island. However, the size of the jurisdiction inevitably means that the number of cases coming before its courts is limited, particularly in “domestic” areas such as property law. Over the past few decades there have been very long stretches without any decisions of significance. Of course, the resolution of disputes between parties without the courts having to pronounce on the issues at stake is in many ways to be welcomed – litigation is best avoided if possible – but the consequence is that important points of law can remain unclear.

For those of us who advise on property law, the last few years have, however, seen a number of cases of significance, with the courts clarifying the law in a number of areas, including rights of way, co-ownership, the rights and duties of neighbours and the position of unmarried partners.

2016 was another fruitful year in this regard, not least because of the Court of Appeal decision in *Fogarty v St Martin's Cottage*, a dispute between neighbours regarding alleged encroachments. Encroachment covers not only building on a neighbour's land but also not leaving a 16 ½ inch offset from the boundary or having a window or other opening less than two feet nine inches from the boundary. It is a topic which has always been something of an obsession for Jersey property lawyers and conveyancers, and for good reason: previous court decisions have made clear that the only remedy available to the court was to order demolition of the offending item, however minor or unintentional the encroachment.

In *Fogarty*, the Royal Court decided in 2015 that in certain appropriate cases the court could order the payment of damages in lieu of demolition. In fact, the Court of Appeal was able, applying a separate legal principle, to decide that the owner of the offending structures had the legal right to keep them in situ. However, the Court

of Appeal made clear that it endorsed the Royal Court's position regarding the availability of damages. Although demolition is the default remedy, the court has the power to award damages "where such is required in order to achieve the interests of justice."

Another aspect of the *Fogarty* decision is particularly noteworthy. Having decided that there was a legal right for the "encroaching" structures to remain, the Court of Appeal decided that accessory to that right was the right to enter upon the other party's land for the purpose of maintaining the structures in case of necessity. In similar vein, the Royal Court had in another 2016 case, *Venturini v Ghyll Limited*, allowed a neighbour access over the land of another to carry out repairs in circumstances of necessity. In that case, 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 owner of the higher land was fully aware and had done nothing to address. In such circumstances, rather than wait for damage or injury to occur, the court decided that it must have the power to permit the owner/occupier of the lower lying land to take steps to prevent or minimise the risk, prima facie at the cost of the owner/occupier of the higher lying land.

In these and other recent property cases, the Jersey courts have shown themselves to be admirably keen to develop the customary law by applying established legal principles in an appropriately flexible and pragmatic manner. Long may this trend continue.

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