LETTER TO THE EDITOR

Dear Sir,

1 My object in this letter is to question the validity and effect of a hereditary contract dated 12 June 2015 ("the contract"). This, a gift from the Crown, is the purported conveyance to the public of the seabed and all the foreshores surrounding the Island of Jersey excepting only those parts of the Ecrehos and Minquiers reefs which are above the high water mark of the spring tide. On the strength of the contract, the Department for Infrastructure now claims proprietary possession and in December 2017 published a paper entitled "Encroachment upon the foreshore". The titles of a number of property owners whose land extends to the high tide mark have since been challenged, raising for conveyancers questions bristling with technical interest, for those whose titles are affected potential cost and uncertainty, and for the wider community concerns for the continuing inviolability of proprietary rights in land.

2 As Seigneur of the fief of Lulague dit Mourier in the parish of St John which claims foreshore at Ronez, I consider my title to have been disparaged by the passing of the contract. Save therefor, I have no personal or professional interest to declare. I also have to make it clear that although I am a member of the editorial board of this *Review*, the views expressed below are mine alone.

3 It is my opinion that the contract is defective. Not only is the subject matter of the gift uncertain in extent but it appears to have been made without regard to settled principle, third-party rights, conveyancing practice and the Jersey law of property, all of which would appear to justify the following observations.

1. The words of conveyance employed in the contract are at first sight, wide, comprehending—

> "all that foreshore situate all around and adjacent to the . . . Bailiwick of Jersey including . . . all those parts of the land, rocks, reefs, islands, islets and beaches which are found thereon"

and the seabed. This description is however, qualified, because what is to pass in virtue of the conveyance is expressly limited in these terms—

> "The Public being bound to conform to all the clauses conditions and restrictions to which Her Majesty was subject for and on account of the title rights and interests of Her Majesty now given

> ceded and transferred of which Her Majesty has been possessed from time immemorial and by sovereign right."

It is not in issue that title to everything described above and possessed from time immemorial [foreshore] and by sovereign right [seabed) would pass with that conveyance. But what of those "title[s] rights and interests" in the "land, rocks, reefs, islands, islets" such as Green Island, and beaches which Her Majesty has not possessed from time immemorial or at all? It must be arguable that on a proper construction only land with the provenance expressly given could have passed in the contract. The development of that argument is however not central to my purpose in writing this letter. What follows is not unrelated but it is my theme that the parties intended by the passing of the contract to suppress private titles in the foreshore.

2. The Crown's paramount feudal title to land in right of the Norman dukes is not in question. The nature and extent of its proprietary rights in land are, however, like those of any private person, determined by law and subject to investigation and proof. Fundamental to the proof of title is a demonstration of provenance. It follows that, if the Crown's claim to have enjoyed immemorial possession of all the foreshores surrounding Jersey is not sustainable, its capacity to pass title must be vulnerable to scrutiny. In what follows, I seek briefly to demonstrate that the provenance given in the contract is not only in large part inaccurate but, worse, seriously misleading. The evidence is clear: the Crown could not claim immemorial or indeed any Crown possession of those many foreshores which for centuries fell within the strictly territorial jurisdiction of the Seigneurs of maritime fiefs. Such jurisdiction existed largely to enforce feudal rights, *e.g. varech*, which before the Abolition of Seigneurial Rights (Jersey) Law 1966 were fundamentally based upon ownership of the foreshore. Moreover, that seigneurial jurisdiction and its exercise over the foreshore were for centuries repeatedly recognized by judgments of the Royal Court and the Privy Council.

3. Support for this position is not entirely dependent upon ancient authority. Before the International Court of Justice in 1953, the Crown succeeded in proving sovereignty over the Minquiers Reef, basing its case upon the territorial jurisdiction of the Seigneur of Noirmont over the foreshores of that fief.

The pleaded reply of the United Kingdom states this on the question of the fief of Noirmont[1]—

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[1] ICJ, vol 1, at 533.

> "An essential fact to be stressed regarding the Fief of Noirmont is that the Minquiers were considered to be part of that fief. In the submission of the Government of the UK, the Minquiers were included within the Fief of Noirmont by the Crown's exercise of its manorial right to the wreck of the sea".

Professor Wade, counsel for the UK Government, who was also a distinguished historian, had no doubt—

> "There can be only one conclusion: the basis of jurisdiction and of the claim was territorial, and only territorial. If a claim was made, or jurisdiction exercised, it could only be on the basis that the wreck had been washed up on the Lord's shore."[2]

The finding of the court was equally clear. Citing the *Grand Coutumier de Normandie* as authority, it stated—

> "The Court inclines to the view that it was on the basis of this ancient Norman Custom that the Manorial Court of Noirmont dealt with them on behalf of the Lord in whose fief the wreck is found: the Lord of Noirmont . . ."

4. It is worth recording that Professor Wade, when addressing the ICJ, was able to confirm that this same custom continued to be recognized in Jersey in 1953. He said this—

> "It is totally contrary . . . to all those feudal concepts that seemed to have regulated such matters in Jersey, it is contrary to English law, and it is contrary to Jersey Law at the present time . . ."[3]

The source of that information must surely have been Mr Cecil Harrison, then Jersey's Attorney General, also appearing for the Crown.

It is surprising to note the striking inconsistency between the Crown position in 1953 and the advice given by the Crown Officers in 2015 which founded a claim to Crown title to all the shores around the Bailiwick based on "immemorial possession". It is surely also ironic to recall that this was the very claim made by the Men of the Islands in response to the mediaeval *Quo Warrantos* and one which would ultimately be conceded and confirmed to them by Edward III in his Great Charter of 1341, and thereafter repeatedly confirmed by successive sovereigns and finally by Parliament.

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[2] ICJ *The Minquiers and Ecrehos Case*, oral arguments *etc*. vol II, at 125–127.
[3] Vol 1, at 128.

5. All this of course is not to cast doubt on Crown title to the seabed under territorial waters. The seabed has always belonged to the Sovereign. There is moreover no evidence that any interest in the seabed under the waters around Jersey has ever been granted to a subject. But seabed and foreshore have throughout legal history been treated as distinct legal entities. The seabed is not and never has been in law or in physical fact, part of the foreshore. The attempt therefore in this procrustean contract to conflate an unchallengeable title to the seabed with a quite different one to the foreshore was to do violence to established legal concepts.

6. Apart from provenance, there is the issue of formal validity. Article 21 of the *Loi (1880) sur la Propriété Foncière* provides that a contract conveying a parcel of land must, on pain of nullity, define its boundaries. The conveyance of foreshore does not constitute an exception to the law. It must be subject to the same formal requirements as any other parcel of land. It follows that it was wrong in practice to bundle the foreshore and seabed together and describe them in effect as a continuous strip of land surrounding the Island of Jersey.

7. It is difficult to release the conveyancers from all responsibility for the shape and substance of the contract. Apart from an obligation to treat foreshore as land, separate and distinct from the seabed, they must have known of the existence of third-party titles, that the foreshore is not one but is made up of a number of discrete parcels, each part of a maritime fief, only some of which had ever been in the possession of the Crown. Failure to reflect those facts in the contract amounted to an unsupported assertion that no private titles in the foreshore exist.

8. The Crown's landed titles in Jersey are well known. Until 1966, the parties to a contract of transfer of land were obliged to make a declaration of the fief—Crown or private—upon which the land to be conveyed was situated. It has always been easy to identify the Ancient Domain. Over the centuries accounts of the Crown estate have been made at intervals in surveys known as *Extentes*. Established by Royal command, their preparation was closely supervised by the Royal Court. The *Extentes* therefore constitute an unchallengeable record of the contents of the Crown estate at particular times with the effect that, if a given parcel of land is not mentioned in the *Extentes*, it is generally accepted that it is not on the Ancient Domain. The *Extentes* are published documents accessible to anyone drafting a contract involving rights in land and destined to be sworn by the parties on "*passation*" before the Royal Court. In preparing the contract, the conveyancer should accordingly have determined, in relation to maritime fiefs, whether they were in the possession of the Crown or

the subject of private titles and, if the former, the root of title. He could easily have established whether the particular fief and its foreshore was part of the Ancient Domain or held by the Crown in virtue of a feudal accident such as escheat or confiscation. A significant example of the latter would be the properties of the Alien Priors, whose foreshores have been held by the Crown and administered separately from those of the Ancient Domain since their seizure in the 15th century.

9. All the evidence shows that the Crown had never, until recently, claimed title to the foreshores of private fiefs. It is a matter, therefore, of particular concern that foreshores to which the Crown had no proprietary claim should have been included in a purported gift to the public.

10. While the Queen can do no wrong, she can nonetheless be wrongly advised. Many of the affected titles are based, not only upon customary law, but upon ancient Crown grants, confirmatory Royal Letters Patent and/or supported by judgments of the Royal Court and the Privy Council. Those titles comprise much of the foreshore surrounding this Island. It must therefore be supposed that Her Majesty's advisers will have passed the contract in her name in the mistaken belief that a simple contract could lawfully override such ancient titles and even override solemn reservations in earlier laws enacted by the States and confirmed by Order in Council.

11. The Crown is not above the law and will therefore recognize and be bound by established principle, in this case one forcibly expressed in the *dictum* of Lord Mansfield in *Goodtitle d Edwards v Bailey*[4]—

> "It shall never lie in the [grantor's] mouth to dispute the title of the party to whom he has so undertaken . . . No man shall be allowed to dispute his own solemn deed."

The *dictum* is not dusty. It was cited with approval by Lord Millett in *First National Bank plc v Thompson*.[5]

12. Perhaps it is in obedience to this or a like principle that it is generally understood that the Crown will not derogate from a grant made by Royal Letters Patent. It is difficult however to square that understanding with this particular contract where, if derogation was its intended effect, it would provide a remarkable example of indifference

[4] [1777] 2 Cowp 597, at 600–601.
[5] [1996] 1 All ER 149.

to Royal Charters, Royal Letters Patent, ancient Crown grants, and titles based upon immemorial possession.

13. Challenged, the parties might point to the reservation of private rights made in para 2 of the contract.

"It being further agreed and understood—

. . .

2. That any right of access or of exploitation exercised as a matter of long-standing habitual and recognized custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer."

This is a feeble form of words. What we have here are not mere "rights of access or of exploitation" but rights of property in land which are not dependent upon recognition by the general public. This clause is calculated not to preserve but to disparage existing titles to land. It should be contrasted with the unambiguous reservation of rights and titles made in 19th-century laws confirmed by Order in Council, two of which remained law in Jersey throughout the 20th century. They include—

(a) Three laws governing the harvesting of *vraic* (seaweed): 1829 (art 11), 1866 (art 12) and finally, art 13 of the *Loi [1894] sur la Coupe et la Peche des Vraics* all contain this statement—

"*Il n'est pas entendu deroger, par cette Loi, aux droits qui peuvent exister à l'egard de quelques pecheries particulières, ni aux droits des Seigneurs de Fiefs particuliers.*"

[It is not intended by this law to derogate from the rights which may exist in relation to certain private fisheries, nor to the rights of Seigneurs of private Fiefs.]

(b) *Loi [1882] sur les Parcs à Huitres*. Article 3 provides, *inter alia*, that applicants for a concession to establish an oyster bed must in their supporting documentation—

"*donner les noms et adresses des propriétaires ou prétendus propriétaires du fonds ou de partie du fonds ou des personnes qui occupent le fonds ou partie du fonds qu'on propose d'approprier ainsi que la nature de leurs titres.*"

[give the names and addresses of the proprietors or intended proprietors of the sub-soil or part of the sub-soil or of the persons who occupy the sub-soil or part of the sub-soil which it is proposed to appropriate, as well as the nature of their titles.]

Article 4 requires the authorities to give publicity to any application for a concession—

> "*afin que tous ceux qui pourraient avoir ou prétendre avoir des droits particuliers ou antérieurs à telle partie du bord et rivage de la mer qui sera désignée . . . puissent en avoir connaissance*."
>
> [in order that all those who might have or pretend to have private or precedent rights to that part of the foreshore . . . may have knowledge of it.]

Article 18 of the 1882 Law provides—

> "*Il n'est entendu déroger par la présente Loi aux droits qui pourraient avoir les particuliers à certaines parties du bord et rivage de la mer en vertu de Chartres, Lettres Patentes ou usage immemorial*."
>
> [It is not intended to derogate by this present Law from the rights which particular persons might have to certain parts of the foreshore in virtue of Charters, Letters Patent or immemorial usage.]

14. It is noteworthy that art 1 of the 1894 law mentioned above, before amendment in 1928, defined the extent of the foreshore by reference to the boundaries of fiefs—

> "*La coupe du vraic sur la côte de l'Est . . . sera permise . . . depuis les rochers du château Elizabeth allant Est jusqu'au courant d'eau qui sépare le Fief de la Reine en la Paroisse de St Martin d'avec le Fief de Rozel*."
>
> [The cutting of *vraic* on the east coast shall be permitted . . . from the rocks of Elizabeth Castle [repeatedly confirmed by the Royal Court as the western extent of the Fief de la Fosse] going east as far as the stream which separates the Queen's Fief in the Parish of St Martin from the Fief of Rozel.]

This last provision unambiguously amounts to statutory recognition of legal boundaries between the Crown and private fiefs extending over the foreshore, boundaries which would have been familiar to the large number of people who, like their ancestors before them, had for centuries been involved in the harvesting of *vraic*.

15. The express saving of "fisheries" in the vraicing laws was made to protect the lawful enjoyment of such private titles on the foreshore. One example is the fishery appurtenant to the *Manoir des Prés* in the parish of Grouville which the owner holds in virtue of an ancient grant from the Crown confirmed by judgment of the Royal Court following a title dispute in the 1740s. The fishery extends over a significant area of foreshore north of Seymour Tower, its boundaries marked with a

large "P" [for the family Payn] cut into the rocks pursuant to that judgment.

16. Any response to these objections by those advising the Department of Infrastructure would in my opinion have to address the relevance of two ancient maxims "*Nemo dat quod non habet*" and "*Res inter alios acta alteri nocere non debet*". The first, although a statement of the obvious, is nonetheless, evergreen. Where the Crown lacks title it cannot dispose of the rights of others. The second embodies another fundamental legal principle: a transaction between others will not prejudice anyone who is not a party to it.

17. To some, this argument may appear arcane. For the reasons advanced above, I take a different view. But apart from those whose seigneurial titles are threatened by the contract, the ownership of the *solum* of the foreshore is of immediate practical concern to a large number of persons with properties on the edge of the sea. Given the matters to which I refer in my opening paragraph, and in the light of the above generally, some might reasonably argue that on a proper construction of the contract, the words of conveyance in terms limit the title passing to the public to those foreshores of which "Her Majesty has been possessed from time immemorial". It is a construction which, if agreed, would surely offer the parties to the contract a dignified withdrawal from what would seem to be an untenable position.

18. Unfortunately, settlement of the long running claim of Les Pas Holdings Ltd against the Crown and the States of Jersey some years ago in relation to the foreshore of the Fief de la Fosse meant there would be no definitive judgement on the law governing foreshore titles. Two long articles in this *Review* by Advocate John Kelleher and me, written following that settlement, preserve some of the evidence and rehearse the arguments. Yet despite what was a largely unanswered claim, the parties to the contract have on one construction, attempted without lawful authority to appropriate private titles in land. In doing so they have in my view done violence to the principle of private property upon which our society is substantially based. It is surely an exceedingly bad precedent.

Yours faithfully,

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Foreshore Encroachment Policy Review

Email to the Chair of the Environment, Housing and Infrastructure Panel

My object in writing that letter was to explain how the 2015 gift to the Public of this Island could pass title only to those foreshores which had been in the immemorial possession of the Crown and accordingly necessarily excluded all those foreshores not so possessed. It is not in issue that the Public has no legal title in the soil of the foreshores except in relation to what it has acquired by purchase, gift or other lawful process there. Any claim therefore based upon the 2015 contract must by definition be limited to what passed in virtue of that contract.
It follows that there can be no legal basis for the Minister for Infrastructure to advance proprietary claims to much of the foreshore surrounding this Island and any policy based upon such claims, equally groundless. Accordingly in those instances where proprietors with land on the littoral have suffered loss as a result of the implementation of this policy it is clear that the Minister is under a legal obligation to compensate such persons for that loss.

I repeat my apology for making of this late contribution to your enquiry.

Yours sincerely,

Richard Falle
Advocate