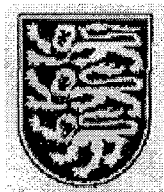


THE JERSEY LAW COMMISSION



CONSULTATION PAPER

VOISINAGE

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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CONSULTATION PAPER

VOISINAGE

1. The purpose of this report is to identify whether the Jersey law of *voisinage* as it has thus far been identified and established by the Jersey courts is adequate, by which we mean clear and fit for purpose.
2. This report addresses the following:

2.1 What is *voisinage*?

2.2 How has the doctrine evolved and been applied by the Jersey courts?

2.3 What are the issues arising from the application or interpretation of the doctrine?

2.4 Do any of these issues need to be addressed?

What is voisinage?

3. *Voisinage* may simply be defined as a mutual duty that the customary law of Jersey imposes on neighbours not to use their properties in such a way as to cause damage to each other: *Searley v Dawson* 1971 JJ 1687.
4. In modern French, the word "*voisinage*" can mean "neighbourhood", a district or area and "neighbourly feeling or conduct" (NOED 1998 edition). In the latter sense, it is akin to "neighbourliness", i.e. the characteristic of being a good neighbour.

5. *Voisinage* is an obligation imposed on neighbouring property owners quasi ex-
contractu. It arises from a duty imposed in equity. It is a doctrine peculiar to
Jersey law (its origins being found in the law of Orleans as commented on by
Pothier) which is distinct from, though similar to, the English tort of
nuisance which itself has, on occasion been applied by the Jersey courts,
albeit, as explained below, in a somewhat confusing way.
6. Both owners and occupiers of immovable property owe duties in *voisinage*:
Yates v Reg's Skips 2008 JCA 077B. The obligation arises out of the
relationship of neighbours and not from the ownership of land. The quasi
contractual relationship arises out of contiguity.

How has the doctrine evolved and been applied by the Jersey courts?

7. The Court of Appeal observed in *Rockhampton Apts v Gale* 2007 JLR 332
"*(t)he first direct reference in Jersey jurisprudence to what has, in this
litigation, been referred to as 'the doctrine of voisinage' appears in the
decision of the Royal Court in Searley v Dawson...*". It was in *Searley* that the
Royal Court, in holding that the doctrine of *voisinage* applied to the facts of
the case before it and that, therefore, the defendant owed a non-delegable
quasi contractual duty to the plaintiff not so to use his property as to damage his
neighbour's property, adopted the French eighteenth century jurist
Pothier's statement of principle as underpinning the doctrine:

"Du voisinage

*"Le voisinage est un quasi-contrat qui forme des obligations reciproques
entre les voisins, c 'est-a-dire, entre les proprietaires ou possesseurs
d'heritages contigues les uns aux autres."*

[*Voisinage*' is a quasi-contract formed by the reciprocal obligations between
neighbours, that is to say, between the owners or persons in possession of
properties adjacent to one another.]

8. In *Searley*, the parties were neighbours. Building works carried out on the defendant's property had damaged the plaintiffs house; the Court found as a fact that insufficient care had been taken to prevent the gable of the plaintiffs house from moving.

9. The judgment is not a paradigm of clarity. Its conclusion — based solely as it was, in the event, upon *voisinage* — did not necessitate the rendition of a lengthy and laborious thought-process based upon legal considerations that ultimately formed no part of its conclusion. That said, however, a slightly more detailed examination of the judgment than a simple rehearsal of its summary is indicated for the purpose of this Report, with a view both to distinguishing *voisinage* from other legal remedies considered by the Court and to explaining the concept of *voisinage* somewhat more fully.

10. The plaintiff in *Searley* pleaded his claim in negligence. At first sight he appears to have succeeded on that ground for the judgment reads at page 1698:

"We have found that there was negligence in this case, but that does not dispose of the question as to whether [the Defendant] owed a duty of care to [the Plainti] ..."

11. Why the Court found it necessary to examine the case in the context of terms applicable to the tort of negligence is unclear. Perhaps this was no more than because the plaintiff had pleaded his case in this way. As will be seen further below, the courts have, until recently, seemingly muddled the doctrine of *voisinage* with the tortious actions of negligence and nuisance.

12. The Court in *Searley* also considered the position under the English law of easements in the context of the right of support, and quoted the following from the English case of *Dalton v Angus & Co* 1881 6 A.C. 740 :

"Another approach might be to cite the maxim, "Sic utere tuo ut alienum non laedas"... "So use your own property in such a manner as

not to injure that of another" ..." [hereinafter referred to as the "*Sic utere maxim*"]

13. The Court however noted that: "*The difficulty of adopting the same reasoning in relation to the law of this Island lies in the maxim "nul servitude sans titre" [no servitude without title'] about which Poingdestre in his "Remarques et Animadversions sur la Coutume Reformee de Normandie" writes...*". The passage then quoted from the seventeenth century Jersey jurist Poingdestre, in essence, records that the subject of servitudes was omitted from the *Coutume* and sparsely commented on in *La Glos, le style de proceder*, or even by Terrien. Given that the Court then went on to consider the works of Pothier, who made clear that the concept of *voisinage* formed no part of the law of servitudes, it is not clear why the Court felt it necessary to consider servitudes at all.

14. Nevertheless, the Court went on to consider the *Sic utere maxim* in the context of the writings of the eighteenth century French jurist Domat:

"Quoiqu'un propriétaire puisse faire dans son fonds ce que bon lui semble, in ne peut y faire d'ouvrage qui 'cite a son voisin la liberte de jouir du sien, ou qui lui cause dommage.'

[Although a land owner may do on his land as he wishes, he may not carry out any work which would take away his neighbour's freedom to enjoy his land, or which may cause him damage.]

This passage occurs in his Treatise, "Des Servitudes", but then of course under the civil law a servitude could be acquired by prescription."

15. The Court next considered Pothier, citing from the Le Trosne edition of 1844. It is in this citation, at page 1700 of the judgment, that we see the first mention of *voisinage*; and although the extract (from Volume 16, Titre XIII) is taken

from a section headed, "*Des servitudes reales*", it is to be noted that Pothier distinguishes servitudes from a non-servitude-based neighbourly duty:

"Il est traite, sous ce titre, non-seulement des servitudes qu'un heritage peut devoir a l'heritage voisin, mais de plusieurs autres matieres qui concernent le voisinage... II est aussi traite, sous ce titre, des obligations que forme le voisinage entre les voisins." (Emphasis added).

[This chapter deals not only with the servitudes that a plot of land may owe a neighbouring plot of land, but it deals with many other matters/issues concerning *voisinage* too... It also deals with the duties resulting from *voisinage* between neighbours.]

16. The Court then recited Pothier's "first rule":

"Chacun des voisins peut faire ce que bon lui semble sur son heritage, de maniere neanmoins qu'il n'endommage pas l'heritage voisin."

[Each neighbour may do as he wishes on his land, but in a way as not to cause damage to his neighbour's land.]

17. It appears from the judgment that the Court was endeavouring to grapple with the problem before it in the context of servitude-based obligations. However, Pothier's commentary outlined above is a relatively clear articulation of *voisinage* and, as noted, he distinguished *voisinage* from a servitude-based obligation.
18. The Court then moved on to consider Volume 5 in the second appendix of Pothier's *Traite du Contrat du Societe*, page 240, paragraph 230:

"Du voisinage.

Le voisinage est un quasi-contrat qui forme des obligation reciproques entre les voisins, c'est-a-dire, entre les proprietaires ou possesseurs d'heritages contigus les uns aux autres."

[Voisinage is a quasi contract formed by the reciprocal obligations between neighbours, that is to say, between the land owners or persons in possession of properties adjacent to one another.]

19. The Court next called in aid paragraph 235 of the Second Appendix at page 245:

"Le voisinage oblige les voisins a user chacun de son heritage, de maniere qu'il ne nuise pas a son voisin."

[Voisinage obliges each neighbour to use his land in a way that will not prejudice his neighbour.]

20. At page 1702 the Court helpfully summarises its judgment as follows:

1. *Mr. Searley and Mr. Dawson are neighbours.*
2. *Each is under an obligation to the other arising quasi ex- contractu not so to use his property as to cause damage to the property of the other, and an obligation pre-supposes a right.*
3. *Mr. Dawson cannot divest himself of that obligation by transferring it to another.*
4. *Resulting from the use made by Mr. Dawson of his property that of his neighbour sustained damage.*

Therefore judgement enters for the Plaintiff"

21. *Searley v Dawson* is of importance in the instant context in that it held in terms that there exists at Jersey law a mutual duty that obliges each neighbour not to use his property in such a way as to cause damage to the other. Though the Court did not expressly state it in terms, that duty is called "*voisinage*". Whilst the judgment could have been much clearer, it is evident from the case that:

21.1 No negligence need be established in order to found liability against a defendant to a claim based in *voisinage* (indeed, on the basis that the Court held that there existed a quasi-contractual liability, the successful cause of action was not a tortious one);

21.2 ~~The concept of *voisinage* forms no part of the law of servitudes; it is, to use a modern idiom, a free-standing legal obligation between neighbours.~~

22. It is curious that the Court in *Searley* did not have regard to the earlier case of *Shaw, widow Key v Regal* 1962 JJ 189. This is not least because the judge presiding over both cases was the same (Sir Robert Le Masurier). The plaintiffs complaint in that case primarily concerned the level of noise generated by the defendant's building works carried out on the neighbouring property. It is not clear from the judgment what authorities or cases were referred to by counsel, although the Court held at page 192 of the judgment that:

"Counsel for both parties cited to a number of authorities and cases, and, although each one appeared to turn on the facts relevant to itself; the following principles did emerge.

(1) The occupier of land is entitled to the quiet and unimpeded enjoyment of that land.

(2) *The owner of land is entitled to do as he pleases with that land.*

It is obvious that in many cases, as has happened here, these two principles can give rise to a direct conflict of interest and, accordingly, both are subject to some limitation."

23. It is worthy of note that the Court in *Key* went no further than the above statement in its exploration of the applicable law, save to say that:

"The limitation to which the first [principle] is subject is that the quiet and freedom from impediment must be related to the needs of the average person in the particular neighbourhood and furthermore that those needs must be average needs and subordinated at times to the particular needs of others. The limitation to which the second principle is subject is that the occupier of land can do with that land only that which is lawful, a great limitation at the present day, and, within that which is lawful, that which will not give rise to emanations which might unreasonably interfere with his neighbours."

24. In the event, the Court decided the matter on the basis of fact, namely that the plaintiff was overly sensitive to the noise, being *"a lady of few distractions given perhaps to dwelling unduly on the operations so near at hand and so finding them a constant source of irritation."* Despite the fact that the headnote to the reported judgment refers to 'nuisance', nowhere in the case itself is the term mentioned. As such, and given that its summary as to the law accords closely with the commentary of Pothier, it is peculiar that the Court in *Searley* did not refer to *Key*. One possible explanation is that the Court in *Searley* considered the application of *voisinage* to be restricted to circumstances where physical damage had been occasioned to a property as a result of activities undertaken on a neighbouring property.

25. *Searley v Dawson* is not the only example of some rather muddled judicial thinking in this area. For example, *Mitchell v Dido Investments Ltd* (1987-88)

JLR 312 (an unsuccessful action between neighbours for the removal of soil to prevent drainage problems and damp) contains the following *dictum*:

"It appears to the court that whether the action lies in nuisance or in negligence and whether the action lies in nuisance or in removal of support, the overriding principle is the same. It is that neighbours must behave to each other as good neighbours." (The Deputy Bailiff then cited the last passage from Pothier set out above, and continued): "The court is content, therefore, to decide this matter on those principles of the law of nuisance which we have cited earlier from Halsbury's Laws of England."

26. Sir Philip Bailhache, Bailiff commented on this passage some twenty years later in *Gale and Clarke v Roekhampton Apartments Limited and Antler Properties C.I. Limited* (2007) JLR 27 in this way:

"I would respectfully differ from Tomes, Deputy Bailiff in thinking it appropriate to apply principles relating to the English tort of nuisance when the cause of action actually lies in voisinage. For my part, even if the principles are similar, I would hold that the court should insist that the correct nomenclature is applied and that the court should apply those common principles in developing and explaining the law of voisinage... In my view, causes of action arising in the law of land or quasi-contract should be pleaded accordingly... If English technical words are used to describe a cause of action in Jersey law, they are apt to mislead and to give the false impression that the relevant body of English law has been incorporated into Jersey law."

27. It is indeed odd that, *voisinage* having been recognised as forming part of the law in *Searley*, several cases brought subsequent to it purported to be founded upon private nuisance.
28. A striking example is that provided by *Mercer and others v Bower* (1973) JJ 2453. The plaintiffs comprised a group of residents of a recently-constructed

residential estate which neighboured a pig-farm operated by the defendants. In the words of the judgment:

"The plaintiffs complain that the piggery has made it impossible for them reasonably to enjoy their properties and this, they say, by reason of noise, smell, flies, vermin and the presence from time to time of dozens, if not hundreds, of scavenging birds. The noise is made, they allege, by the pigs themselves squealing and screaming at all hours of the day and night, and the running of a tractor engine and the steam sterilizing plant, the loading and unloading of bins and the playing of loud music in the fattening shed, all done in and outside normal working hours."

29. The Court noted in its conclusions that one of the defendants had sold land to the plaintiffs, *"for the purpose of building expensive houses thereon"*, and added:

"That sale for that express purpose imposed upon Mr. Arthur Bower the obligation to refrain from exploiting the adjoining property which he retained in such a way as to defeat that purpose, because it is a well-established rule that a grantor cannot be permitted to derogate from his grant "

30. Sir Robert le Masurier, who had also presided over the Court in *Searley* and in *Key*, departed from the law of private nuisance, upon which the plaintiffs purported to rely, in order partially to found his conclusion upon the concept of derogation from grant (without, incidentally, dealing with it in any way in the *ratio decidendi*). Not a single word appears in this judgment about *voisinage*, perhaps because it was considered that *voisinage* applies only to cases concerning damage to property.
31. Another such example is *Du Feu v Granite Products Limited* (1973 JJ 2441). In that case the plaintiff complained of excessive dust emanating from the defendant's quarry (which was some 100 yards from the plaintiffs house),

