THE JERSEY LAW COMMISSION

CONSULTATION PAPER

VOISINAGE

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CONSULTATION PAPER No. 2/2010/CP

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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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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 commentated 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."

[Woisinage' 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 proprietaire 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... Il 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 Rockhampton 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),

which injured them in the occupation of their property. The Court in that case referred exclusively to English law on private nuisance which, as can be seen from the quotation below, resonates with Pothier's commentary outlined above:-

> *"It follows that of the three types of private nuisance described in para. 1393 of Clerk and Lindsell on Torts (13th Edition), the plaintiff bases his action on the third type, namely-*
>
> > *"... unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land"*
>
> *And described by Lord Westbury L.C. in St Helens Smelting Co v Tipping (1865) 11 H.L.C. 642 at p. 650 as:-*
>
> > *"the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves."*

32. Why the Court in *De Feu* did not refer to the concept of *voisinage* is unclear. Perhaps it was not pleaded. Those advising the plaintiffs may have taken the view that the lack of contiguity presented a risk that the Court might not consider the relationship between the parties to be that of neighbours. Perhaps there was concern inasmuch as the case did not involve actual damage to property. In any event, it is noteworthy that counsel for both parties cited authorities exclusive to the English law of nuisance which, without more, appear to have been taken to apply to Jersey law.

33. It is interesting to note that, some six months prior to the decision in *Du Feu* the Deputy Bailiff (Ereaut) (who presided over *Du Feu)* decided the case of *Macrae (nee Tudhope) v Jersey Golf Hotels* 1973 JJ 2313. One of the issues in that case concerned the different standards of liability of a hotel owner towards his guests in tort and contract. The Royal Court held that in Jersey, as in England, it was necessary to plead all the material facts but not the branch

of law upon which the action was based. The Court made specific reference to *Searley* and observed that, albeit that the action had been founded in negligence, the judgment made a clear finding that the obligation between neighbours arose *quasi ex-contractu:*

> *"We think it is clear, both from the ratio decidendi and from the remainder of the judgment, that the conclusion of the Court was based, not on negligence, but in an obligation arising quasi ex-contractu, notwithstanding that such an obligation, and therefore the breach of it, had not been pleaded. Thus, as it seems to us, the Court adopted the practiced in force in England, to which we have already referred, under which, where all material facts are disclosed in the action, the Court will supply the "legal label".*

34. As observed by the Court of Appeal in *Rockhapmton v Gale:*

> *"Whilst the correctness or otherwise of the decision in Searley v Dawson would not have been an issue before the Royal Court in the case of Macrae (nee Tudhope), the learned Deputy Bailiff must have considered the ratio decendi and conclusion sufficiently sound to be one of the foundations for the decision in the case before his court."*

35. The aforesaid notwithstanding, it is curious why the Deputy Bailiff (Ereaut), having made his observations in *Macrae* concerning the case of *Searley,* did not consider in *Du Feu* the application of the doctrine of *voisinage.* Again perhaps this was because it was not a case concerning physical damage to property.

36. In the later case of *Browne v Premier Builders (Jersey) Ltd* 1980 JJ 95, there were neighbouring properties which shared a common gable. One of the houses was demolished in order to permit redevelopment and damage was sustained by the gable as a result of underpinning works to enable the existing foundations to be used for the new building. The Deputy Bailiff (Crill) stated as follows:

"The plaintifffounds his action on the failure by the company to fulfil its duty of care. This duty of care was laid down in Searley v Dawson.

There the Court said 'Each (neighbour) 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 presupposes a right'. But that type of obligation is we take it, akin to the duty imposed in tort. Did the company adopt a reasonable method therefore of carrying out its work and at the same time fulfilling its duty to the plaintiff?"

37. The Deputy Bailiff then turned to passages from *Charlesworth on Negligence* and determined that *"the company failed in its duty to its neighbour."* It is curious why the Court, having acknowledged the dicta to the contrary in *Searley,* viewed the obligation in that case as being *"akin to the duty in tort."* Perhaps one explanation, prescription not being an issue in the case, was that the nature of the obligation in question was immaterial as the facts which were required to be established in either case were the same.

38. A further example of private nuisance being cited (again somewhat confusingly) arises in the case of *Magyer and Magyer (nee Autumn) v Jersey Strawberry Nurseries* (1982) JJ 147. In that case the plaintiff brought an action for nuisance in respect of glass blowing activities by the defendant. The Royal Court referred to the above-mentioned case of *Du Feu v Granite Products* and relied exclusively on the English law of nuisance.

39. Interestingly, the Court of Appeal in *Reg's Skips Ltd v Yates* (2008) JCA077B referred to both the cases of *Key* and *Magyer* cited above. Jones JA, delivering the judgment of the Court, said:

"In Magver, a complaint by a householder of excessive noise emanating from a neighbour's property was upheld by the Royal Court and an injunction was granted against the defendant. No

reference is made in the Judgment in Key to the law of nuisance or to the doctrine of voisinage. In Magyar, the noise complained of was described as constituting a "nuisance" .... Whether the rights and obligations of the parties to this action can be said to fall within the law of voisinage or are to be determined by application of the principles which can be drawn from the decisions in Key and Magyar, in our opinion the essential facts which the respondents had to establish in order to succeed were the same in either case...."

40. The above passage appears at first blush to be at variance with the dicta of the Royal Court which preceded it in *Gale & Clarke* outlined above, namely 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".* However, the passage highlights the similarities which exist between *voisinage* and nuisance and that, whichever label is attributed, the facts which need to be established in either respect will most likely be the same.

41. A final example of private nuisance (and indeed trespass) having been applied by the Jersey courts is the decision in *Cornick v Le Gac* 2003 JLR N-[43]. The case was an action based upon the intrusive nature of scaffolding erected for the purpose of building work on the property adjoining that owned by the plaintiff. Counsel for the plaintiff submitted that the leading case was *Du Feu v Granite Products.* Commissioner Le Cras stated that:

"It is clear from the precedents that an owner is entitled to do what he wishes with his property but on condition of not unreasonably causing his neighbour a real inconvenience as to comfort (du Feu v Granite Products)"

42. In presenting the Royal Court's conclusions as to nuisance, the Commissioner stated:

"Although the nuisance was perhaps not as severe as is claimed by the plaintiff ... the actions of the defendant did cross the border line, and the plaintiff is entitled to damages for nuisance as well as trespass."

43. It is perhaps understandable, given the degree of similarity between *voisinage* and the private law of nuisance, that the Courts appear to have confused the application of both principles. Indeed, Halsbury's Laws of England (Vol 34, 4th edition) at paragraph 307 defines a private nuisance as:

"...one *which interferes with a person's use or enjoyment of land or of some right connected with land... The ground of the responsibility is ordinarily the possession and control of land from which the nuisance proceeds."*

44. The principal difference however between the two concepts is that the neighbours' duty in *voisinage* arises out of quasi-contract, whereas private nuisance at English law is a tort. An important practical implication of the distinction in Jersey is that the limitation period in respect of an action based on *voisinage* is ten years, whereas that in respect of an action based on tort is only three.

45. The blurring of the two principles which has occurred since the case of *Searley* (and arguably before then) came under close scrutiny by the Court of Appeal in *Rockhampton Apts v Gale* 2007 JLR 332. In that case the plaintiffs claimed that construction works on the first defendant's property had caused substantial damage to their neighbouring properties. They brought proceedings against the defendants in both negligence and *voisinage,* but the negligence action was prescribed, having been brought more than three years after the cause of action arose. The Master sought the determination by the Royal Court of the applicable prescription period for an action in *voisinage.*

46. It was argued by the plaintiffs before the Royal Court that *Searley v Dawson* should not be followed because *voisinage* was not part of Jersey law, and that:

46.1 the importation of *voisinage* into Jersey law had been unnecessary, as the tort of nuisance already existed;

46.2 *voisinage* was a foreign doctrine drawn from the jurisdiction of Orleans and inconsistent with Jersey law; alternatively,

46.3 even if *voisinage* was found to exist under Jersey law, the prescription period was three years and the respondents' action was prescribed.

47. The Royal Court held that the quasi-contractual doctrine of *voisinage* formed part of Jersey law and that the prescription period for such an action was ten years, it being classified as an *action personelle mobliere.* More specifically, the Royal Court held that (as taken from the headnote):

47.1 The quasi-contractual doctrine of *voisinage,* namely the obligation not to use one's property so as to damage neighbouring property, was part of Jersey law. The 1971 case *(Searley),* in which *voisinage* had been applied, had stood unchallenged for over 30 years. It was not plainly contrary to earlier authority or wrong and would therefore be followed. There was insufficient evidence to support the defendants' submission that when *Searley* was decided the English tort of nuisance had already been assimilated into Jersey law and that the importation of the doctrine of *voisinage* had been unnecessary.

47.2 Furthermore, as quasi-contract was recognized in Jersey and Norman law, it could not be said that the decision should not be followed on the basis that *voisinage* was a foreign doctrine from Orleans and inconsistent with existing Jersey law. Since there had been no explanation of *voisinage* in Jersey or Norman law sources, the Royal Court had been entitled to look to Pothier's *Coutumes d'Orleans* for guidance as to the meaning and extent of the doctrine. In certain circumstances, commentaries on the customary law of neighbouring provinces such as Orleans, Paris and Brittany, to which commentators

in Norman law have referred from time to time, could be regarded as authority in Jersey, to explain the meaning and extent of an area of Jersey law for which there was no explanation in the customary law of Normandy. Pothier was an especially appropriate source, as his works on Norman law and contract law were considered highly authoritative in Jersey. While certain aspects of the doctrine of *voisinage* conflicted with principles of Jersey law, such clashes were an almost inevitable consequence of assimilating principles of law from other legal systems, which had to be adapted to conform with Jersey law. The 1971 decision of the Royal Court had been plainly right and would be followed.

47.3 Although the essential elements of an action in tort—namely duty, breach of duty and damage—were substantially the same in Jersey law and English law, the only legal duties that would give rise to tortious liability in Jersey were those arising otherwise than by virtue of contract, trust, quasi-contract or land law. The duty of a landowner not to use his land in such a manner as to cause harm or injury to his neighbour was not founded in tort but in *voisinage* or quasi-contract. While there were many similarities between *voisinage* and the English tort of nuisance, and between an *action possessoire* and trespass, those English torts did not apply in Jersey. A cause of action arising in quasi-contract or land law should be pleaded accordingly and the court should insist on the correct nomenclature. The use of English technical words to describe a cause of action in Jersey law would be apt to mislead and to give the false impression that the relevant body of English law had been incorporated into Jersey law.

48. The defendants appealed, arguing that:-

48.1 the Royal Court had erred in holding that the law of nuisance did not form part of Jersey law, and it should have been used instead of the quasi-contractual doctrine of *voisinage;*

48.2 the Royal Court had erred in holding that the appropriate prescription period for an action in *voisinage* was ten years and the action should be recognised as a tort with a prescription period of three years; and

48.3 quasi-contract was an outmoded concept in Jersey law and *voisinage* should be treated as a tort;

49. The Court of Appeal, in a long and detailed judgment (reported at 2007 JLR 332) dismissed the appeal on all counts, holding that the Royal Court had correctly held that the quasi-contractual doctrine of *voisinage* formed part of Jersey law. The *ratio* of the decision is as follows:-

49.1 *Searley v Dawson* had stood unchallenged for 35 years, had been referred to in subsequent cases and legal textbooks and had formed part of the Jersey Advocate's exam syllabus. The concept must, therefore, have been relied on by professionals when advising on the relationships between owners of contiguous properties. As *Searley* was not contrary to earlier authority, not incompatible with any other rule of law or the cause of some practical injustice, the Royal Court had been correct to follow it.

49.2 Furthermore, the court in *Searley* and the Royal Court in *Rockhampton* had been entitled to look to Pothier's *Coutumes d 'Orleans* for guidance as to the meaning and extent of *voisinage,* as there had been no explanation in Jersey or Norman sources, and Pothier was already a well-respected writer in Jersey (albeit in respect of different areas of law). In addition, it could not be said that the court in *Searley v Dawson* and the Royal Court in *Rockhampton* should have applied the Jersey law of nuisance rather than the quasi-contractual doctrine of *voisinage.* The Royal Court had correctly found that there was no persuasive evidence that the English tort of nuisance had been assimilated into Jersey law and that the adoption of *voisinage* had therefore been unnecessary.

49.3 The Court of Appeal expressed itself unable to accede to the submission of counsel for the Appellants that quasi-contract was an outmoded concept. Contiguous neighbours could not necessarily be expected to enter into individual contracts to deal with such matters as structural support, but the nature of their relationship produced actual obligations as if there were a contract. With respect, at least, to a neighbour's obligation in *voisinage* not to interfere with support, it was logical and consistent with the nature of the relationship that the obligation should be absolute, arising *quasi ex-contractu.*

50. The year 2007 also saw the Royal Court considering another case involving *voisinage,* that of *Yates v Reg's Skips Ltd* (2007) JRC237 (a first instance decision which was upheld on appeal). This has served to clarify this area of the law very usefully. The facts of the case were as follows. In 2005 the defendant had moved its operations to a property called 'Heatherbrae Farm', neighbouring the plaintiffs' residence. Prior thereto, Heatherbrae Farm had been operated as a dairy farm. The defendant's business involved the sorting of mixed loads of rubbish, i.e. skips filled with material which could not be dumped together or which required recycling. The plaintiffs complained of general *"high levels of noise"* caused by the operation of the business and in particular the *"incredible noise"* caused by a mechanical digger that was used in the sorting process. The Court held on the evidence that the operation by the defendant of its business on the neighbouring property had caused, "...the *enjoyment of the [plaintiffs] property [to have] been adversely affected to a material degree."*

51. Sir Philip Bailhache, Bailiff, having cited from Pothier, stated:

> *"It is a question, therefore, whether the arrival of the skip business conducted by the defendant* ***company*** *has given rise, by reason of the nature of that business, to a breach of the quasi-contractual duty in Voisinage. We shall deliberately not use the word "nuisance"; not because it is not a convenient shorthand to characterise the conduct*

which breaches the duty in Voisinage, but because it is apt to mislead in being confused with the English technical concept of that name.

We shall instead examine the evidence against the background of the duty not to use one's property in such a way as to cause harm to one's neighbour. There is, as counsel for the plaintiffs has submitted, an evidential threshold to overcome, so as to demonstrate a breach of the duty and to justify the grant of a remedy for that breach.

We live in an increasingly crowded Island, and standards of tolerance of noise and disturbance must move with the times. Before the invention of the internal combustion engine farming was a relatively quiet industry. Apart from the occasional lowing of cattle and grunting of pigs, little would have disturbed the peace of the countryside. Nowadays farming involves tractors, threshers, potato harvesting machines and many other forms of mechanical equipment which cause noise and disturbance to a greater or lesser extent. Neighbours must in general put up with that. The principle in relation to odours is similar. The spreading of manure on agricultural land, for example, can cause temporary offensive smells which, in general, must be tolerated. Sometimes, however, the barrier is surmounted and a breach of the duty not to cause harm to one's neighbour will be held to have arisen. One example was Curry v Horman (1889) 213 EX 511 where the deposit of refuse on land 70 feet away caused an overpowering stench to permeate the plaintiff's house. Another example was Mercer v Bower [1973] JJ 2453 where the Court held that the operation of a piggery in close proximity to residential properties could not be undertaken without adversely affecting to a substantial degree (harming) the interests of those neighbours.

In the context of noise a breach of duty was found in Magyar v Jersey Strawberry Nurseries Limited [1982] JJ 147 where the glass blowing activity in a craft centre was held to cross the threshold of reasonableness."

52. It is particularly helpful, and conducive to a clear understanding of the concept of *voisinage,* that the Court should have expressly declined to use the word 'nuisance' in the course of its judgment, even though such would have been, *"a convenient shorthand to characterise the conduct which breaches the duty in Voisinage...".*

53. The Court was at pains to emphasise that *voisinage* and nuisance are separate and distinct concepts — even, it must be added, if some of the Jersey authorities to which it adverted had not been as clear on the point as they might have been. To use the word 'nuisance' in the context of *voisinage* was inappropriate, *"because it is apt to mislead in being confused with the English technical concept of that name."*

54. The Court held that, *"the activities of the defendant company at Heatherbrae Farm constitute a breach of the duty of voisinage which is owed to the plaintiffs."* An injunction was granted to the plaintiffs restraining the defendant from operating its skip business at or in the immediate vicinity of Heatherbrae Farm, such injunction to come into force some four months following the date of the judgment.

55. On appeal, Jones JA observed that the appellant had *"conceded that the law of* voisinage *applied in the circumstances of this case"* and added (at paragraph 14 of the judgment):

> *"We pause to observe that Gale and Clarke v Rockhampton Apartments Limited and Antler [2007] JLR 27 was a loss of support case, in which the plaintiffs alleged a breach by the defendants of the duty of voisinage. One of the questions which the court had to determine was whether Searley v Dawson, also a loss of support case in which the defendant was found liable to the plaintiff in voisinage, was correctly decided. In Gale and Clarke, the Royal Court held that it was, and the Court of Appeal agreed. It was neither necessary nor*

appropriate for either court to attempt exhaustively to define the limits of the doctrine of voisinage, and neither court did so."

56. In the event, the appellant sought to withdraw its concession in this regard and introduce a further ground of appeal, namely the *voisinage* did not apply to cases where non-physical damage to property had been occasioned. The Court of Appeal declined to deal with this issue on the basis that the material facts which were required to be proved were the same in either case.

57. The appellant sought also to persuade the Court of Appeal that the Royal Court had wrongly held the defendant liable because *voisinage* did not impose any obligation on an occupier, as opposed to an owner of immovable property. In dismissing this ground of appeal, Jones JA said:

"In our judgment, this ground of appeal must fail. The duty of voisinage is an obligation incumbent on neighbours owed quasi ex-contractu. It arises from equity. The statement of principle enunciated by Pothier and adopted by the Royal Court in Searley is to the effect that both owners and occupiers owe duties in voisinage. That is entirely consistent with the proposition that the quasi contractual relationship which exists between neighbours arises out of contiguity. There is nothing in principle or precedent to suggest that the nature of an occupier 's right to occupy is relevant to the question whether he owes a duty in voisinage. Nor is there anything in principle or precedent to suggest that the existence of a non-delegable duty in voisinage owed by a landlord to a neighbour precludes the existence of such a duty owed by his tenant to the same neighbour."

58. In other words, *voisinage* is a duty that arises as between neighbours, not necessarily or solely as between neighbouring property owners. For this and other reasons that are not relevant to the scope of this report, the Court dismissed the appeal.

59. Is it right to say, as the appellants appear to have submitted in *Reg's Skips,* that *"the English concept of the tort of nuisance has not yet been assimilated into this jurisdiction"?* At one stage, as we have seen, the answer would almost certainly have been that it was not right at all. Recent judicial developments, however, have served clearly to distinguish the English tort of nuisance from the principle of *voisinage.* The learned Bailiff in *Yates v Reg's Skips* at first instance put the word "nuisance" as a matter of Jersey law entirely into its correct context, namely that the term is merely and simply *"a convenient shorthand to characterise the conduct which breaches the duty in Voisinage"* and nothing more. Nevertheless, it seems reasonably clear from the cases of *Du Feu, Magyer, Mitchell* and *Cornick* that nuisance has in fact been assimilated into this jurisdiction and there is nothing to suggest that any of these aforesaid cases were decided incorrectly (see *post).* Perhaps counsel in making this concession confused the issue with which the court in *Gale and Clarke* were concerned, namely whether the law of tort or nuisance has been assimilated into the jurisdiction at the time of the decision in *Searley* such that it was unnecessary to apply the doctrine of ***voisinage.***

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

60. In the context of the above cases, the following issues arise:-

60.1 Is there anything to suggest that any of the above cases were decided incorrectly?

60.2 What is the extent of the doctrine of *voisinage?*

60.3 Are there any potential gaps as regards the application of the doctrine which might present future difficulties?

61. Each of these points is dealt with in turn as follows.

62. Firstly, albeit that there exists evidence of some rather muddled judicial thinking as regards the application of the quasi-contractual cause of action of

voisinage and the tortious actions of negligence and/or nuisance, there is nothing to suggest that any of the above cases were incorrectly decided on the particular facts of each case. As stated above, and recognised by the Court of Appeal in *Gale and Clarke: "Whether the rights and obligations of the parties to this action can be said to fall within the law of voisinage or are to be determined by application of the principles which can be drawn from the decisions in Kev and Magvar, in our opinion* ***the essential facts which the respondents had to establish in order to succeed were the same in either case...."*** (my emphasis in bold).

63. Indeed, it was only in the case of *Gale and Clarke* that the distinction became an important one since, depending on which cause of action applied, the plaintiffs' case would have been time-barred. Otherwise, in all the other cases, the distinction was not important since the facts which were required to be established were the same, whichever label was applied. This is not surprising given the similarities which exist between the two causes of action.

64. In any event, as the Royal Court made clear in *Macrae: "where all material facts are disclosed in the action, the Court will supply the "legal label".* Despite that the Royal Court made clear in *Gale and Clake* 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"* it is clear that this is a duty incumbent upon the Court rather than upon a potential litigant.

65. Indeed, the issue with which the Court of Appeal was concerned in *Gale and Clarke* (and indeed the Royal Court below it) was whether the tort of nuisance had been assimilated into Jersey law at the time of the decision in *Searley.* As explained above, many of the judgments involving nuisance/negligence were decided after the case of *Searley.* As such, there is little merit in the argument that the tort of nuisance has not been incorporated into Jersey law based on the cases described above, i.e. *Du Feu, Magyer, Mitchell* and *Cornick.*

66. Furthermore, the above cases were the subject of close scrutiny by the Court of Appeal in *Gale and Clarke* (and, to a lesser extent, in *Reg's Skips)* and no mention is made in its judgment to any of the cases discussed above as having been decided incorrectly.

67. Secondly, as regards how far the doctrine of *voisinage* has been applied by the courts, it is worthy of note that only three of the above cases were expressly decided in accordance with the doctrine, namely: *Searley, Gale and Clarke* and *Reg's Skips.* The latter case is not of such importance in this context given that counsel for both parties in that case agreed the application of the doctrine to the facts of the case in any event and, although the appellants sought to withdraw this concession before the Court of Appeal, the question was otiose, as the Court observed (see *post).*

68. It is also worthy of note that, with the exception of *Cornick, du Feu, Magyer* and *Reg's Skips,* there is a unifying theme at play in that the other cases concerned physical damage to land or building through a neighbouring use causing or alleged to have caused loss of support. The following points therefore arise.

69. The cases of *Searley, Browne* and *Gale and Clarke* were cases concerning the right of support. Can it therefore be said that the doctrine is to be restricted to the right of support? There is nothing in either the case law referred to above or in the commentaries of Pothier (upon whose writings the doctrine has been founded) to suggest that this should be the case. However, in reality, the strict application of the doctrine has been limited to cases concerning the right of support. Reference is made to the table attached to this report at Appendix 1 from which it can be seen that the only cases in which the doctrine has been expressly applied are seemingly so limited.

70. However, in *Reg's Skips* counsel for both parties took the view, before the Royal Court, that the doctrine was not so restricted. Before the Court of Appeal, after noting the appellant's concession in this regard, the Court stated (at paragraph 14 of the judgment):

"We pause to observe that Gale and Clarke v Rockhampton Apartments Limited and Antler 120071 JLR 27 was a loss of support case, in which the plaintiffs alleged a breach by the defendants of the duty of voisinage. One of the questions which the court had to determine was whether Searley v Dawson, also a loss of support case in which the defendant was found liable to the plaintiff' in voisinage, was correctly decided. In Gale and Clarke, the Royal Court held that it was, and the Court of Appeal agreed. It was neither necessary nor appropriate for either court to attempt exhaustively to define the limits of the doctrine of voisinage, and neither court did so."

71. The evening before the appeal hearing, however, the appellant sought to withdraw its concession in this regard and to introduce a new ground of appeal, namely that: *"in the correct construction of voisinage as it currently stands in Jersey law, there is to be a restriction of its application to damage to land or buildings which is not the case here."* Counsel argued that there existed no authority for the proposition that the creation of noise which is such as to be intolerable to neighbours is actionable under the law of *voisinage.* By reference to Pothier, counsel for the appellants argued that the doctrine was not wide enough to provide a remedy to a person whose enjoyment of his property is interfered with by the generation of excessive noise by his neighbour. Counsel for the respondents argued that Pothier's writings indicated that the contrary position was correct. The Court of Appeal held (at paragraph 29 of the judgment):

"In Gale and Clarke, at paragraph 157, this court considered that the limits of the doctrine of voisinage in Jersey might be set at a point which excludes ***"merely personal harm or inconvenience".*** *The scope of the doctrine was regarded as being further restricted by the fact that the principal obligation to which it gives rise concerns the marking out of boundaries —* ***"bornage".*** *Consequently, concluded the court,* ***"whilst some of the rights and obligations set out by Pothier may now be***

covered by other areas of Jersey Law, where there are contiguous properties and where there is substantial damage to land or buildings, these should be covered by voisinage."

72. Counsel for the appellants did not seek to argue that a householder exposed to excessive noise created by his neighbour has no right of action. Indeed, such argument would have been difficult given the judgments in *Key* and *Magyer*. It was as a result of this that the Court of Appeal made its statement (cited above) that: *"Whether the rights and obligations of the parties to this action can be said to fall within the law of voisinage or are to be determined by application of the principles which can be drawn from the decisions in Key and Magvar, in our opinion the essential facts which the respondents had to establish in order to succeed were the same in either case."*

73. The Court of Appeal went on to state that, in the event it was required to identify the precise jurisprudential basis *"on which the undoubted right of action under discussion in this case rests"* that it would have had two difficulties in so doing. Firstly, because it did not have the benefit of the Bailiffs views on the matter in the Royal Court. Secondly because:-

> "..a *determination that the issues in this case fall to be decided according to the principles of the law of voisinage would be likely to have implications, which have not been explored in argument, for other cases. If a right of action in a noise case arises under voisinage, for example, that right endures for ten, rather than three years. (Gale and Clarke* cit. sup., *at paragraphs 72 and 157) We have not been addressed on what the practical consequences, if any, of that might be. Further, as noted in paragraph 29 above, the doctrine of voisinage has strong links with bornage. It may be open to argument, therefore, that, even if occupiers of contiguous properties have a right of relieffrom excessive noise, based on the quasi contractual obligations of voisinage, any right of relief enjoyed by remoter neighbours, who are close enough to be adversely affected by extreme noise, rests on different legal principles. If that were so, where the plaintiffseeks damages, as happened in Magyar, different prescriptive*

periods might apply as between contiguous occupiers and more remote neighbours."

74. There are therefore two issues arising from this (which answer the third question, namely whether the application of the doctrine by the courts thus far presents any future difficulties). First, the question of whether the doctrine of *voisinage* applies to excessive noise appears to remain open. Second, does the doctrine apply only to contiguous neighbours? Both questions apply equally to potential cases, for example, involving excessive smell, dust, smoke and other such, for want of a better word, "nuisances" not involving physical damage to property. In addition, depending on the answer to the first question (i.e. whether the doctrine applies to cases of excessive noise and the like) there arises the question of what prescription period is applicable. What is not at issue is that there is a cause of action available in any event.

75. The question then arises: under what circumstances would a potential litigant proceed in nuisance or *voisinage?* There are three considerations in this regard. First, whether or not neighbours are contiguous. It appears that *voisinage* has no application to non-contiguous neighbours whereas nuisance would have such application. Second, does the action concern loss of support/physical damage to property? If so, a cause of action would almost certainly lie in *voisinage* though, for the reasons explained below (and as expressed *obiter* in *Rockhampton* and *Reg's Skips),* this may be more dubious in cases of non-physical damage to property. Third, would the potential claimant be within the time limit of three years for nuisance? If not a potential claim may rest on *voisinage* albeit subject to the two aforesaid considerations.

Do any of these issues need to be addressed?

76. The latter questions, namely:-

74.1 Does the doctrine of *voisinage* apply to cases of excessive noise and suchlike? (i.e. cases not concerning physical damage to property); and

74.2 Assuming that it does, is this restricted to contiguous neighbours or those more remote?

are not easily discernable from the face of the authorities, for the reasons explained below.

77. As was noted by both the Royal Court and the Court of Appeal in *Clarke and Gale,* there is scant authority dealing with the doctrine of *voisinage.* Indeed, it was for want of authority that the appellants in that case argued that the doctrine, should it be proved to exist, was outmoded and had been replaced by the law of nuisance. Based on the commentaries of Pothier alone, the court was inclined to disagree with this argument. However, the fact remains that the doctrine is far from evolved.

78. Pothier's commentaries can be summarised thus:-

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

78.2 *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; and

78.3 *Voisinage* obliges each neighbour to use his land in a way that will not prejudice his neighbour;

79. From the above it is evident that Pothier's commentaries (upon which the doctrine of *voisinage* as described in *Searley* and *Clake and* Gale has clearly been based) states nothing expressly about the range of possible acts or omissions which might breach the obligation of *voisinage.* His definition requires that "damage" has been occasioned to a neighbour's property, yet at the same time the use of the word "prejudice" suggests something wider than physical damage. He does however appear to be clear that the doctrine

applies only to contiguous neighbours, that is those whose properties are adjacent to one another.

80. In the latter regard, one can discern a hiatus in the principle. Where smell, noise or dust are involved, why should it be that only the contiguous neighbours are afforded a cause of action in *voisinage* (thereby gaining the advantage of a much longer prescriptive period than the remoter neighbours) whereas the more remote neighbours, equally as affected by the "nuisance" are not? The more distant neighbour may have a cause of action in the tort of nuisance, but would face the far more restricted limitation period of three years.

81. As a final point, Jersey has the Statutory Nuisances (Jersey) Law 1999 (the "Law") which provides a remedy for an aggrieved person affected by any of the statutory nuisances listed therein. The remedy is concerned with abating the nuisance and not with the award of damages. Matters constituting a "statutory nuisance" are defined in broad terms by Article 2 of the Law as follows:-

(a) any premises in such a state as to be prejudicial to health or a nuisance;

(b) smoke emitted from premises so as to be prejudicial to health or a nuisance;

(c) fumes or gas emitted from premises so as to be prejudicial to health or a nuisance;

(d) light energy emitted from premises so as to be prejudicial to health or a nuisance;

(e) any dust, steam, smell, or other effluvia arising on or emanating from industrial, agricultural, trade or business premises or resulting from processes conducted on such premises and being prejudicial to health or a nuisance;

(f) any accumulation or deposit which is prejudicial to health or a nuisance;

(g) any animal, bird, insect, reptile or fish kept in such a place or manner as to be prejudicial to health or a nuisance;

(h) noise emitted from premises so as to be prejudicial to health or a nuisance;

(i) noise emitted from or caused by a vehicle, machinery or equipment in a street so as to be prejudicial to health or a nuisance;

(j) any well, tank, cistern, water-butt or other water supply howsoever constructed which is used for the supply of water for domestic purposes which is so placed, constructed or kept or maintained as to render the water therein liable to contamination prejudicial to health;

(k) any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance;

(l) any tent, van, shed or similar structure used for human habitation which is in such a state, or so overcrowded, as to be prejudicial to the health of the inmates, or the use of which, by reason of the absence of proper sanitary accommodation or otherwise, gives rise, whether on the site or on other land, to a nuisance or to conditions prejudicial to health;

(m) any other matter constituting a statutory nuisance by virtue of Regulations made under Article 3.

82. Whilst the Law affords a potential litigant a further remedy for matters which may constitute a nuisance, it does not affect any of the matters outlined above. In particular, it is worthy of note that the Law does not deal with a right of support or physical damage to property as between neighbours, which, as stated above, is directly relevant to the doctrine of *voisinage.*

83. As identified at the outset of this report, its aim is to identify whether the Jersey law of *voisinage* is adequate. That, of course, is dependent on what we take to be the purpose of *voisinage.* Its origin, as we have seen, show that it is

a mutual duty that the customary law of Jersey imposes on contiguous neighbours not to use their properties in such a way as to cause damage to each other. Is the law of *voisinage* therefore adequate to protect against an infringement of that duty?

84. It is fair to say that the law of *voisinage* in Jersey is still in a state of infancy and its evolution has been confused, not least because of an overlap in practice with the law of nuisance.

85. Whilst one can with some certainty define the elements of *voisinage* and of nuisance, the full extent of the application of both is unclear. This in part derives from the fact that the Court's themselves have not been consistent in describing the remedy they have deliberated upon. What we can say is that remedies have been granted for physical damage, and prejudice caused by noise, smell and dust. Whilst *voisinage* appears to have been granted as a remedy only where the parties owned or occupied contiguous properties, the remedy of nuisance does not appear to be so restricted: see *Mercer.* As the Courts have observed, the two remedies overlap. A key difference is the limitation period available: ten years for *voisinage,* three years for nuisance.

86. Whilst in an ideal world, all law would be codified and its exact application clear and beyond doubt, we do not live in an ideal world. In the view of this author, this is not an area of law screaming out for clarity by legislation. In recent years, and in spite of rather shaky beginnings, one can reasonably conclude that the Jersey courts have done a good job of evolving *voisinage* as a concept. It can thus reasonably be anticipated that it will continue to do. In addition, there is clearly a role for the tort of nuisance to play, even if there is overlap between nuisance and *voisinage.* The key point is that the law affords a remedy to someone whose property or life is blighted by the use made of neighbouring or nearby land. As the Royal Court noted in *Reg's Skips,* the nature and degree of what it is acceptable for a neighbour to do on his land before it causes an actionable prejudice to those living nearby evolves with changes in society. The Courts are well placed to adopt remedies in those circumstances to meet the changing needs of society.

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Responses to this Consultation Paper should be made in writing by 30 June 2010 to:

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