STATES OF JERSEY

EX GRATIA COMPENSATION PAYMENT: MR. AND MRS. R. PINEL

Lodged au Greffe on 4th March 2009
by Senator B.E. Shenton

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to approve the making of an *ex gratia* payment of £297,469.59 to Mr. and Mrs. R. Pinel (Reg's Skips Limited) as compensation for costs incurred in defending the *voisinage* action brought against them as set out in the Appendix;

(b) to request the Chief Minister, in consultation with the Minister for Treasury and Resources, to make provision in the draft Annual Business Plan 2010 to meet the cost of the payment.

SENATOR B.E. SHENTON

REPORT

Most of us stood for election to represent the people – unfortunately many, when elected, represent only the Government.

It does not bring me any pleasure to bring this proposition but I feel that I have no choice. I was asked to assist a local family, running a local business, and this is the only actual solution that is available.

The problem lies in the fact that, in my opinion, both the Government and the Judiciary have failed them – indeed they are the cause of the problem. Neither has offered a solution and so I find myself lodging this proposition. There is no political agenda behind it – just one of fairness, accountability, and the quest for higher standards.

In researching this case the legal profession have, in my opinion, acted in a manner that would not be deemed acceptable behaviour in any other walk of life. They have displayed a bullying thuggishness of an East-End villain, and I ask the Law Society to review this matter as I shall be interested in their appraisal. If they believe that the actions demonstrated in this proposition are of an acceptable standard I shall be very surprised.

Reg's Skips Limited

Reg's Skips Limited is a Skip business owned and operated by Mr. & Mrs. Pinel (Reg and Rita). They have built the business from scratch, operate 5 lorries (one lorry is a spare), and employ 4 drivers (all locally qualified) Their children, Corina and Aaron, live in Jersey. Unfortunately their youngest, Martin, needed a heart transplant aged 5 and died aged 11 from cancer. Corina has been ill since her early years and is registered disabled by Social Security. She is dependent on family support. Aaron works in Jersey.

Background

Heatherbrae Farm, St. John, was a diary farm established by Mr. Christopher Taylor in 1980/81. Due to economi conditions and, some would argue, mismanagement, the dairy industry was forced into a restructuring; and in 2002 the Island's herd was reduced by over 1,000 cows. During this period it is Mr. Taylor's contention that the Agricultural Department did not consult with the Planning Department concerning the ramifications of this policy. Mr. Taylor took the option to leave the agricultural industry and turn the farm into dry storage.

In 2005 Mr. Taylor was visited by Miss E, a Planning Officer, together with Mr. Pinel of Reg's Skips. Miss E explained that Reg's Skips occupied a site in St. Peter that was beside the main road and was unsightly. Indeed I remember the site well – it was near the roundabout at the top of Beaumont Hill. Reg's Skips were legally operating from the site and there appeared no way that they could be forced to move.

Mr. Taylor and Miss E walked the site and Miss E asked Mr. Taylor if he would be willing to take Reg's Skips as a tenant as it was an ideal site. Mr. Taylor was requested to make an application for a change of use from "Dry Storage" to "Commercial".

Mr. Taylor was instructed by Planning to make a "Personnel Application" not indicating that the change was for the benefit of Reg's Skips – an unusual request but one that Mr. Taylor complied with. The apparent reason for this request would become clearer at a later stage.

In May/June 2006 Heatherbrae Farm was visited by an Environmental Health Officer, Mr. F. Mr. F explained tha the Planning Department was obliged to seek the consent of the Environmental Health Department prior to granting permission for "Change of Use" to "Commercial Use" as this could involve noise, dust, and other nuisances. It would appear that the Planning Department deliberately attempted to bypass the Environmental Health obligations in their desire to move Reg's Skips from a site that they were legally operating from near the airport. Mr. F stated that he was unaware that Reg's Skips were behind the application.

Mr. Taylor has produced a statement stating that the Planning Application in 2005 was a "Personal" application and that all correspondence to him was headed "Change of Use (Reg's Skips Limited)". It is difficult to understand why Planning deliberately failed to disclose that Reg's Skips were behind the application when

consulting with the Environmental Health Department.

As a result of Mr. and Mrs. Pine's kindly nature and their wish to work with Government they ended up occupying a site that may not be satisfactory. Mr. Taylor believes that the Planning Department acted with malice by withholding vital information from Environmental Health despite their requests to know the identity of the tenant.

At this point in the proposition I would like to draw Members' attention to a family connection between the neighbours (?) of Reg's Skips and the Bailiff.

The XXXXXX

The XXXXXX is a 4 piece band consisting of–

Member A	Son of Mr. and Mrs. A
Member B	Son of Sir Philip and Lady Bailhache (The Bailiff)
Member C	
Member D	

The BBC Website dated 31st August 2006 wrote –

> Making The XXXXXX
> by Andy de Castro
>
> 'With such a wealth of musical talent in the Island, one of my favourite bands to catch live is The XXXXXX. I met up with them recently, and found out what makes The XXXXXX tick.
>
> The XXXXXX was initially formed by Member C and Member B in the late 90s, playing mainly classica rock covers ranging from Dire Straits to Queen. Having known each other since birth, Member B and Member C work remarkably well together and produce some of the group's best work.
>
> The XXXXXX emerged officially in September 2004 with Member B, Member C, Member A ar Member D at its element.'

The BBC Website dated 21st November 2006 wrote –

> Jersey band could be Next Big Thing
> by Claire Peters
>
> 'The XXXXXX, a young Jersey band, has made the shortlist of BBC World Service's 'Next Big Thing Competition'. A local band has made the semi-final of the BBC World Service's search for 'The World's Best Young Band'.
>
> The XXXXXX, a group of Jersey based musicians, have beaten over 1,000 other acts to make it into the top 20 of the competition.'

Error of Judgement

You will have noted the dates above and the fact that Member B has played in the same band as Member A sinc 2004. I understand that they practised at various family houses/barns during this time.

Before: Sir Philip Bailhache, Bailiff sitting alone

Between	(1)	Mr. A	Applicants
	(2)	Mrs. A	
And		Minister for Planning and the Environment	Respondent
		Advocate M. St. J. O'Connell for the Applicants S.C. Nicolle Q.C. Solicitor General, for the Respondent	

In the case of Mr. and Mrs. A versus the Minister for Planning and Environment I question whether it was in order for the Bailiff to hear the case – due to the close family connection – and to recommend to Mr. and Mrs. A that rather than sue the Minister for Planning and Environment that they would be better off taking action against a third party – namely Mr. and Mrs. Pinel, who own Reg's Skips. Until this point Mr. and Mrs. Pinel had been outside any legal actions.

If I were a judge, and my daughter played in a band for a number of years with the son of one set of parents standing before me, I would have deemed myself to be severely conflicted. I believe the majority would do the same.

The Court document clearly states –

Royal Court
17th November 2006
Before: Sir Philip Bailhache – Bailiff sitting alone.

> "In all the circumstances of this case it seems to me that the appropriate remedy for the applicants to pursue is a private action in *voisinage*."

Here the Bailiff is advising Mr. and Mrs. A that they would be better off suing Reg's Skips rather than the Minister for Planning and Environment, and advising him of the law under which an action should be taken. Furthermore the Bailiff makes no order for costs against Mr. and Mrs. A, even though the case was lost and the Respondent would have incurred legal costs. Indeed the taxpayer ultimately bore the costs of defending the action by Mr. and Mrs. A.

In accordance with advice received from the Bailiff Mr. and Mrs. A sued Reg's Skips Limited under the ancient and subjective law of *voisinage*. The judge was, once again, the "conflicted" Sir Philip Bailhache. It is surprising that no-one appears to have raised any objection to this.

Not only was the Bailiff conflicted in my opinion due to family connections, he was also conflicted because he had knowledge of information presented in the previous case.

[2007]JRC237

royal court

(Samedi Division)

11th December 2007

Before: Sir Philip Bailhache Kt., Bailiff, and Jurats Tibbo and Morgan.

Between	Mr. A	
And	Mrs. A	Plaintiffs
And	Reg's Skips Limited	Defendant

Advocate M. St. J. O'Connell for the Plaintiffs.
Advocate A. J. Clarke for the Defendant.

JUDGMENT

THE BAILIFF:

1. The plaintiffs (to whom we refer individually as "Mr. A" and "Mrs. A") purchased a large granite 18th century property called "Les Ormes" (to which we shall refer as "the property") in 1995. They undertook works to renovate and improve the property, taking considerable care to retain the traditional features and characteristics of a house of that period. They moved into occupation in 1999, and both plaintiffs devoted much time and effort to the creation of a substantial and attractive garden. At the time when the plaintiffs moved into occupation, the neighbouring property to the south was a working dairy farm called "Heatherbrae Farm".

2. Until about 2002 Heatherbrae Farm continued to be used for agricultural purposes. At about that time, however, the dairy herd was sold and it ceased to be used as a farm. A number of agricultural buildings were let for storage purposes, the Planning and Environment Committee of the day having consented to the relevant change or changes of use. The beneficial owner of Heatherbrae Farm, Mr. Christopher Taylor, at some stage came to see Mr. A to explain that one of the tenants was to be a scaffolding firm, but that all noisy activities would take place inside one of the buildings.

3. In July 2005 the defendant company, which is owned by Mr. and Mrs. Pinel, became a tenant at Heatherbrae Farm. Mr. and Mrs. Pinel had started their business in 2000 and incorporated the defendant company in 2001. It began trading at premises in St. Peter, but in 2004 it moved temporarily to occupy other land known as La Prairie in the Route de Beaumont, before relocating to Heatherbrae Farm. The defendant company's business involves the sorting of mixed loads (i.e. skips filled with material which cannot be dumped together or which requires recycling). The sorted materials are thereafter transported to appropriate dumps or recycling sites. In addition it stores a number of skips at the site when they are not out with customers. The use of the site at Heatherbrae Farm by the defendant company was sanctioned by the Planning Department but we shall deal with that in more detail below.

4. During the winter of 2005 –2006 the plaintiffs started to become aware of increased noise coming from Heatherbrae Farm. At first they thought it related to the activities of the scaffolding company whose tenancy had in fact come to an end at about the time when the defendant company took up occupation. Mrs. A mentioned her concerns to her husband on several occasions during this period, but for a number of reasons he did nothing about it. It was only in the spring of 2006 that, under pressure from Mrs. A, Mr. A made enquiries and ascertained that skip business was now being operated at Heatherbrae Farm. In April 2006, Mr. A went to Heatherbrae Farm and noted what he described as "incredible" noise coming from a mechanical digger which was being used to sort rubbish. Mr. A made enquiries of the Planning Department and ascertained that an application for change of use had been advertised at a time when the plaintiffs were away on holiday. An official from the Public Health Department visited the property at the request of Mr. A and told the plaintiffs that he was unaware of the permission granted to the defendant company to operate at Heatherbrae Farm. On inspecting the Planning Department's files, Mr. A noted that the other commercial tenants at Heatherbrae Farm were subject to conditions in terms of noise pollution, but that no such conditions attached to the permit relating to the defendant company's operations.

5. Mr. A complained to the Planning Department which visited Heatherbrae Farm in May 2006. Enforcement officers directed that the mechanical sorting by digger should cease until the appropriate amendment of the planning permit had been sanctioned by the Minister. In June 2006 the plaintiffs conducted an exercise of counting the number of vehicles arriving at and leaving Heatherbrae Farm. The average daily vehicle movements amounted to 300, of which about 40 were lorries belonging to or associated with the defendant company.

6. In September 2006 the plaintiffs were becoming frustrated at the perceived failure of the Planning Department to remedy the situation. On 12th October 2006 the plaintiffs' legal advisers sent a letter before action to the defendant company setting out the plaintiffs' complaints and asking that the company should desist from using the mechanical digger and within a period of three months desist from sorting refuse on the site. They invited proposals as to how the business could be conducted without adversely affecting the plaintiffs' enjoyment of the property. The Minister had in the meantime allowed limited mechanical sorting to take place between 10 a.m. and 12.30 p.m., and had deferred for 3 months a decision on whether to grant the defendant company's application to amend its permit while acoustic advice was sought by the defendant company. That decision prompted the plaintiffs to seek to institute proceedings against the Minister by way of judicial review, but leave was refused. In January 2007 the Minister refused the application of the defendant company to expand its activities and caused a notice to be served on the defendant company requiring it to cease the use of a mechanical digger and to cease intensification of the use which had been permitted. The defendant company appealed, and after taking legal advice the Minister withdrew the notice. The defendant company resumed the use of its mechanical digger.

7. On 23rd April 2007 the plaintiffs began proceedings by Order of Justice against the defendant company alleging a breach of its duty in *voisinage* and seeking damages and an injunction preventing the defendant company from operating its skip business at Heatherbrae Farm or within one mile of the property. The defendant company has denied any such breach.

The law

8. The duty of an owner or occupier of land in *voisinage* was first laid down in a judgment of Le Masurier Bailiff in Searley v Dawson [1971] JJ 1687. The Court held that there existed a mutual duty in quasi –contract which obliged each neighbour not to use his property in such a way as to cause damage to the other. As expressed in the second appendix of Poitier's *Traité du Contrat du Société* volume 5 page 245 paragraph 235:

> ***"Le voisinage oblige les voisins à user chacun de son héritage, de manière qu'il ne nuise pas à son voisin".***

The principles of *voisinage* were considered exhaustively in judgments both of this Court and of the Court of Appeal in Gale and another v Rockhampton Apartments Limited and another [2007] JLR 27 and [2007] JCA 117B respectively, and we shall not repeat them here. Both counsel agreed that they were the principles to be applied in this case.

9. 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.

10. 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.

11. 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.

The evidence

12. We turn therefore to consider the evidence as to the operation of the defendant company's business. We observe first of all that the plaintiffs were, as it were, first on the scene. This is not a case of constructing residential property in the vicinity of an industrial enterprise. It is a case of the establishment of a commercial operation in a quiet rural area.

13. The evidence of the plaintiffs was that the noise was intolerable. Mr. A stated that the noise of the engine of the mechanical digger, the clanking of caterpillar tracks, mechanical arm and bucket of the digger, as well as the impact noise of the rubbish being lifted, sorted and dropped was considerable. Whenever skips were emptied or put into or out of storage a loud booming noise was made. Mr. A also complained of significant numbers of lorries arriving at and leaving Heatherbrae Farm with skips or rubbish. On 3rd October 2007 he stated that there were 29 such movements and on 4th October 2007, 31 such movements, which related to the defendant company's business.

14. Mrs. A stated that she had become aware of the noise coming from Heatherbrae Farm during the winter of 2005/2006 and had asked her husband to do something about it. In February 2006 they had erected a fence on the boundary to try to mitigate the noise. As time went on she had found that the noise seriously affected her enjoyment of her home. She could no longer take an interest in the garden and rarely ventured into it because it was so distressing. The noise invaded her home and her thoughts. Periods of quiet were interrupted by loud bangs and crashes throughout the day. The swimming pool had been used only twice during the summer of 2007. She said that the noise of the defendant company's operation was violent and brutal. On occasions when she had been ill in bed during the day, she had been awoken by the sudden crashing noises. In cross examination she said that she was a tolerant person and that in general she would put up with things rather than make a fuss. She denied that she had exaggerated the problem.

15. Evidence was also given by Mrs. Victoria Yates, the sister-in-law of Mr. A and Mrs. A, who often visited the property, and Mrs. Dorothy Van Neste, the mother of Mrs. A who also spent time at the property. In general they corroborated the evidence of the plaintiffs although in cross examination they were both uncertain about the times when they had first noticed the noise.

16. The plaintiffs called Mr. David Watkins, a private detective, who arranged for a video camera to film the frequency of movements of the lorries. In cross examination he conceded that he had not remained on the site very long. He was challenged about his evidence that some skips had been seen suspended on their cradles as the lorries were driven in to and from Heatherbrae Farm. Mrs. Pinel, a director of the defendant company, gave contrary evidence.

17. The plaintiffs were permitted to call evidence from Mr. Peter Le Gresley, an Assistant Director of Planning. Mr. Le Gresley stated that at the time when planning permission was given for the defendant company to move to Heatherbrae Farm it was considered a suitable site on the basis of the level of activity which had occurred at La Prairie, i.e. skip storage with some sorting from time to time. The actual effect of the defendant company's activities on the plaintiffs had not been anticipated; it appeared that the operations at Heatherbrae Farm were significantly more intense than those conducted at La Prairie. If they had been anticipated, it was likely that the application for planning permission would have been refused, or more precise conditions attached to the permit.

18. Both parties called expert evidence. The plaintiffs called Mr. Steven Gosling who holds an honours degree in engineering acoustics from the Institute of Sound and Vibration Research at the University of Southampton. He has been a member of that Institute for 12 years and is Director of 24 Acoustics, a consultancy firm specialising in the assessment of acoustics, noise and vibration. The defendant company called Mr. Robert Whiteman who is a chartered civil engineer with a Diploma in Acoustics. He is the Principal Acoustic Consultant

with Southdowns Environmental Consultants Limited. We find that both men are eminently qualified to give expert evidence. Regrettably there was no joint report, nor any assessment of the points of difference between them.

19. Mr. Gosling had visited the property in February and October 2007 and made noise measurements between 1st and 8th February and between 3rd and 4th October. The instrument was installed in the garden of the property at a height of 1.5 metres. The purpose was to achieve objective background noise data, (i.e. from th adjacent road, bird song, tree rustling etc) and to assess the impact of skip movements and sorting. Mr. Gosling found that the background noise level in October was between 35 to 40 decibels. This was consistent with the measurements taken in February which had yielded a background of noise level of 35.5 dB. Mr. Gosling found that the rating level of noise from skip movements using BS 4142 was 54.8 dB. Having deducted the background noise level, the difference was 19.3 dB. Similar calculations on the operating noise from the yard yielded a BS4142 rating of 55.7 db and a difference of 20.2 dB.

20. Mr. Gosling stated that the threshold for actionable nuisance in the UK according to BS 4142 wa + 10 dB and that the noise levels at the plaintiffs' property resulting from the operations of which complaint is made were significantly in excess of that level. He added that skip operations were always noisy and that he had been involved in advising in relation to the siting of such an operation in Southampton. In that case the site had been 250 metres away from residential property and situated in a bowl which caused additional attenuation. There had been no complaints. By comparison, the defendant company's site was 50 metres away from the boundary and 110 metres away from the plaintiffs' house.

21. Mr. Whiteman agreed on the basis of Mr. Gosling's data that the background noise level in the garden of the property was between 35 to 40 dB. He assessed it at 38 dB. Thereafter, however, there was more disagreemen than agreement between the two experts. Mr. Whiteman took measurements from 3 sites within Heatherbrae Farm during September 2007, although the data from one of those sites was regarded as unreliable. He took no measurements in the garden or elsewhere at the plaintiffs' property. He agreed that as a matter of principle it would have been preferable to get data from the position at which complaint was made, but he had not thought it appropriate to approach the plaintiffs to seek their permission. He had therefore estimated the effect on the basis of his measurements at Heatherbrae Farm. He disagreed with Mr. Gosling that BS 4142 was the appropriat guide. He stated that local authorities would use it to assess the likelihood of complaints, but that exceeding the limits laid down in BS 4142 did not necessarily imply a nuisance. BS 4142 was just one method of assessmen He quoted a Noise Advisory Council Report which stated of BS 4142:-

> ***"there can be no absolute quantitative standard by which to determine whether a given noise was a nuisance; and BS 4142 does not purport to provide such a standard".***

22. Mr. Whiteman referred to WHO Guides for community noise which indicated that noise levels below 50 dB were generally acceptable. Basing his opinion from the data from one of his monitoring sites within Heatherbrae Farm, (which was much closer to the source of noise than the plaintiffs' property) which showed that noise levels within a five minute period rarely exceeded 55dB, he concluded that not even moderate annoyance would be caused at the property. He referred to BS 8223 which gives similar guidance on external noise levels for gardens and balcony areas. He also referred to PPG24 which states that noise levels below 55dB need not be considered as a determining factor in granting planning permission for a new dwelling where ambient noise levels are made up of mixed sources. He conceded, however, that this was not strictly applicable to the situation in dispute.

23. Mr. Gosling's response to these arguments was that BS4142 was unquestionably the appropriate standard in this case. He stated that it was disingenuous to suggest that all proposed housing sites that experience a day time noise level of less than 55dB were "generally acceptable". He asserted that guidance from both the WHO and BS 8233 applied to anonymous sources of noise, such as traffic, and not to specific industrial noise of a variable nature.

24. Prior to trial the parties agreed, under directions from the Bailiff, that a demonstration of noise levels on the site would be conducted under the supervision of the two experts on 18th October 2007, the first day of the hearing. Four skips would be taken to and from Heatherbrae Farm, two fully loaded and two empty. They would

be stacked and then the loaded skips would be sorted by the mechanical digger assisted by hand-sorting if necessary. Acoustic measurements from the garden of the property would be taken. The Court duly attended on the site and the demonstration took place over more than an hour. From the perspective of the plaintiffs the demonstration was hardly a success. Mrs. A said that she was embarrassed and that if the noise had always been at the level experienced on that day, she would not have troubled the Court or anyone else. The experts, unusually, did agree that during the demonstration the noise level associated with the mechanical digger was 40.2dB. Applying the BS 4142 method (and Mr. Gosling's data) the resulting rating was 0.8dB which was of less than marginal significance. Mr. Gosling's evidence was that he was told by a driver of a lorry that he was going to drive very slowly. Mr. Gosling had registered his concern during the demonstration that much of the material was soft and was being placed in the skips with great care. There was a substantial amount of earth in the loaded skips which would have cushioned the noise. Blocks of concrete being dropped more hastily into an empty skip would have created a very different impact. Additionally, he thought that the manoeuvres of the drivers of the skip lorries were unusually careful. The drivers would reverse and advance after inspecting their position so as to ensure that the skip was placed precisely on top of the one below. In his experience, skips were more usually dropped with less care. Even Mr. Whiteman had reservations about the effectiveness of the demonstration.

25. Mrs. Pinel also gave evidence for the defendant company of which she and her husband are the beneficial owners. Her husband has experienced health problems in recent years, and she is fully engaged in the business, not only with book-keeping, payment of wages and collating of customers' orders, but also in distributing work to the drivers. The defendant company's business involved the delivery and collection of skips, the dumping of the contents, sometimes after sorting, and the delivery of building materials such as sand, chippings and granite dust to customers. It was the sorting of mixed loads which was the predominant activity at Heatherbrae Farm, to which they had moved in July 2005. The defendant company owned a small mechanical digger but had access to a larger machine if the load was too heavy. They had started with one skip lorry and about fifty skips or bins. Now they had five skip lorries and about three hundred and fifty bins, and a Ford transit pickup truck. She agreed that the company now had a lot more customers and was going from strength to strength. She asserted that she did not think that the activities of her company were affecting the plaintiffs unduly and causing any kind of nuisance. She had never been to the property, and had never been invited to do so.

Conclusions on the evidence

26. In broad terms we accept the evidence of the plaintiffs. We were particularly impressed by the evidence of Mrs. A, who spends more time at the property than anyone else. It was clear that she was not a person given to complaining. We think that the slowness of the plaintiffs to react to the arrival of the defendant company at Heatherbrae Farm was due principally to her nature and only secondarily to the fact that Mr. A was dilatory in responding to his wife's concerns. We accept that Mrs. A no longer finds her garden to be a pleasure and that her enjoyment of the property has been adversely affected to a material degree. We also accept that the evidence of Mrs. Victoria Yates and of Mrs. Van Neste was given honestly and fairly, even if it added little to the evidence of the plaintiffs. We derived little assistance from the evidence of Mr. Watkins.

27. We also accept that the evidence of Mrs. Pinel was given honestly. She could not, of course, comment upon the effect of the defendant company's activities upon the plaintiffs because she had never been at the property and experienced the noise levels from that situation.

28. As to the evidence of the experts, we must state first of all that it is highly regrettable that no consultation took place between them in relation to their reports. It is true that Mr. Whiteman was only instructed at a relatively late stage in early September 2007, but he or the defendant company must bear some responsibility for this state of affairs. The report of Mr. Gosling had been in the hands of the defendant company for many months but no consultation with Mr. Gosling took place before Mr. Whiteman filed his report on 26th September.

29. Be all that as it may, we prefer the evidence of Mr. Gosling where it conflicts with that of Mr. Whiteman for the following reasons.

(i) Mr. Gosling's calculations were based upon monitoring of the noise from the garden of the plaintiffs' property whereas those of Mr. Whiteman were based in part upon calculations drawn from noise measurements taken at Heatherbrae Farm. It seems to us that calculations drawn from measurements

taken at the *locus in quo* are inherently more reliable than calculations which were to a certain extent predicted rather than measured.

(ii) It seems to us, upon an analysis of the different guides or standards which have been placed before us, that BS 4142 is the appropriate and relevant standard for the particular circumstances of this case. We are not persuaded that BS 8233, PPG 24 or the WHO guides for community noise are helpful in the context of this case.

(iii) Taken in the round, we found the evidence of Mr. Gosling to be more fluent and persuasive than that of Mr. Whiteman. We did not find, for example, Mr. Whiteman's explanation of his failure to seek to place his equipment in the garden of the plaintiffs' property to be particularly cogent.

30. We accept the evidence of Mr. Gosling that the difference between the background noise and the noise caused by the defendant company's activities was of the order of 18-20dB. That technical evidence is consistent with the evidence of the plaintiffs, and in particular Mrs. A, which we have already stated that we accept.

31. We find it significant that the plaintiffs did not notice the noise generated by the operation of Heatherbrae Farm for agricultural purposes. Even when the user of the farm changed to various users associated with a small industrial estate, no complaints were forthcoming from the plaintiffs. It is the case that a certain amount of noise is generated by the other tenants at Heatherbrae Farm. It is clear, however, that it was only when the defendant company transferred its activities to Heatherbrae Farm that the level of noise and disturbance breached the barrier, or surmounted the evidential threshold to which we referred in paragraph 10 above.

Decision

32. It follows that, in our judgement, the activities of the defendant company at Heatherbrae Farm constitute a breach of the duty of *voisinage* which is owed to the plaintiffs. We reached this conclusion not without considerable sympathy for Mr. and Mrs. Pinel. They were permitted, if not encouraged, by the Planning Department, to establish their business at Heatherbrae Farm which they did in good faith. The difficulty is that any skip operating business is inherently noisy.

33. We note, *en passant*, that the duty in *voisinage* is a duty which cannot be delegated or avoided by an owner. See the remarks of Le Masurier, Bailiff, in Searley v Dawson [1973] JJ 1687 at 1702. If, therefore, a landowner lets his land to a tenant who conducts a business which the landowner knows, or ought to have known, is harmful to the interests or reasonable expectations of a neighbour, he too will be in breach of the duty of *voisinage*. In this case, the plaintiffs have chosen to pursue their action against the tenant rather than the landowner. We obviously make no findings in so far as the landowner is concerned. The plaintiffs seek an injunction preventing the defendant company from conducting its skip business at Heatherbrae Farm, although in the Order of Justice the prayer is expressed in rather wider terms.

34. Counsel for the defendant company did not, and we think realistically, suggest any way in which the effects of the operations of the skip business might be mitigated or avoided in the event that we were to find a breach of the duty of *voisinage*. We think that a reasonable opportunity must be afforded to the defendant company to find another location for its operations. Furthermore, the months in question are mainly winter months when only limited use of the garden would be made by the plaintiffs. We accordingly grant an injunction preventing the defendant company from operating its skip business at or in the immediate vicinity of Heatherbrae Farm, such injunction to come into force on 1st May 2008.

35. By way of postscript, we direct that any application for the costs of these proceedings should be pursued only after a directions hearing before the Bailiff at which consideration can be given to the question whether any other party or parties should be convened.

Authorities

Searley v Dawson [1971] JJ 1687.
Traité du Contrat du Société.

Gale and Clarke v Rockhampton Apartments Limited and Antler [2007] JLR 27
Gale and Clarke v Rockhampton Apartments Limited and Antler [2007] JCA 117B.
Curry v Horman (1889) 213 EX 511.
Mercer v Bower [1973] JJ 2453.
Magyar v Jersey Strawberry Nurseries Limited [1982] JJ 147.
Noise Advisory Council Report.

In the above judgment of 11th December, 2007 the Bailiff states –

> "In broad terms we accept the evidence of the plaintiffs. We were particularly impressed by the evidence of Mrs. A, who spends more time at the property than anyone else. **It was clear that she was not a person given to complaining."**

It is difficult to ascertain how such a sweeping statement – she is not a person given to complaining – could be made without knowing that person quite well. Never before had *voisinage* been used to sue a tenant, never before had *voisinage* been used to address a complaint of noise solely. However with subjective laws this does not seem to matter.

It should be noted that Mr. and Mrs. A's lawyer has requested that I confirm that "Mrs. A has not socialised with the Bailiff". I am happy to include this statement for clarification as requested.

Paragraph 35 is interesting as it, once again, demonstrates a failing by the Bailiff–

> "35. By way of postscript, we direct that any application for the costs of these proceedings should be pursued only after a directions hearing before the Bailiff at which consideration can be given to the question whether any other party or parties should be convened."

What this means, in layman's terms, is the Bailiff is effectively showing some sympathy for the predicament that Reg's Skips find themselves in and is requesting the Planning and Environment Department to contribute to costs as their 'negligence' caused the problem.

The request for costs was vigorously defended by Planning on the basis that they were not a party involved in the case, after all it was Mr. and Mrs. A-v- Reg's Skips.

At the time of the case there was some consternation amongst the legal community as it could have set a precedent that would have numerous implications. Members of the public, for example, could have been asked to pay costs in respect of cases that they were not directly involved with. Lawyers could not believe that the Bailiff could have made such a direction without full consideration of the potential consequences.

My opinion is that the action for Planning to contribute costs was lost on the basis that a dangerous precedent would be set rather than on the merits of the individual case.

Voisinage

The law of *voisinage* – like the ancient Les Pas laws that cost the Island millions of pounds – have no place in modern society and I would argue have no relevance to modern justice. When one looks at Fournel's 19th Century *Traité du Voisinage* 3rd Ed (1812) we see that *voisinage* is stated to be a *vague, generic term* that regulates the proper relationship (*rapprochement*) between things, places and people. It is, I believe, far too vague and subjective to be a true instrument of justice.

The law itself, as applied, is seriously flawed. For example if it were accepted that the right of relief from excessive noise was owed to neighbouring property owners under the law of *voisinage*, only the *adjacent* property owner would be able to bring a claim, whereas, the owner of a property down the road, also seeking relief from the same noise, would not be able to do so, as *voisinage* applies only to neighbours whose properties are touching. An efficient method to get around this obsolete and ancient law would be to sell a strip of land between your own

property and a disputing neighbour – thus negating any *voisinage* judgments.

Furthermore, the Court of Appeal confirmed that where a landlord lets his land to a tenant who conducts business which the landowner knows, *or ought to have known*, is harmful to the interests or reasonable expectations of a neighbour, not only the tenant who has caused the noise, but also the landlord will be in breach of his duty of *voisinage* and a claim may be made against him for damages. So the public will have to employ a lawyer to determine what ought to have been known and then rely on the subjective view of the Courts as there is no clear direction under the law.

Now bear in mind that *voisinage* is a local peculiarity with no place in Norman or English law. The Court of Appeal was heard by experts in English law – Dame Heather Steel, M.S. Jones QC, and J.W. McNeill QC. No had a specific background in the Jersey law of *voisinage*.

As a direct result of the above case, which was unsuccessfully appealed, Mr. and Mrs. Pinel have received legal bills in excess of £280,000 which includes over £125,000 costs claimed by Mr. and Mrs. As lawyer. Bear in mind that no costs were claimed from Mr. and Mrs. A when they lost their initial action against the Minister for Planning and Environment.

In the case bought by Mr. and Mrs. A versus Planning the action was thrown out and lost by Mr. and Mrs. A and the Bailiff awarded no costs against Mr. and Mrs. A in favour of Planning. However, when Mr. and Mrs. A successfully sued Reg's Skips they were awarded costs, and bills in excess of £125,000 were received by Mr. and Mrs. Pinel.

It appears difficult to justify the discrepancy whereby when Mr. and Mrs. A lost their case against the Planning Department no costs were awarded to Planning. These are actually costs ultimately due to the taxpayer. If this has been common policy the loss to the taxpayer could amount to millions of pounds.

As previously stated, Reg's Skips moved to the St. Johns site (Heatherbrae Farm) from a site legally occupied near the airport at the specific request of Planning who located and identified the site for them. It would appear that Planning failed to obtain the correct approval from Environmental Health. This information may have deemed the site unsuitable – thereby saving Mr. and Mrs. Pinel over a quarter of a million pounds.

Another twist was the fact that the Bailiff took the unusual step of requesting Planning and Environment to contribute to the costs in a case that they were neither plaintiff or defendant there appears to have been an admission of responsibility placed on this States Department, and a belief are to blame for the predicament that Mr. and Mrs. Pinel find themselves in.

In the judgement of the case the Bailiff states –

> "We reached this conclusion not without considerable sympathy for Mr. and Mrs. Pinel. They were permitted, if not encouraged, by the Planning Department, to establish their business at Heatherbrae Farm which they did in good faith."

Can the Minister for Planning and Environment honestly state that his Department has absolutely no responsibility for the predicament that Mr. and Mrs. Pinel now find themselves in?

Bullying and unprofessional actions

In addition to the failure of the Planning Department detailed above, and my considered opinion that the Bailiff was conflicted when overseeing any case involving Mr. and Mrs. A, I would like to close by asking the Law Commission to examine correspondence that I have received on the subject which was, in my opinion, bullying, thuggish, and extremely unprofessional.

In an attempt to clarify the facts in order that this proposition would contain no inaccuracies, I received correspondence written in a highly aggressive tone. This included statements such as –

> "If you make your anticipated proposition to the States you may feel that you are protected by some form of parliamentary privilege in relation to statements that you make on the floor of the house."
>
> "Having published your original letter in the terms that you did it is our view that you are not protected by any such privilege and you have exposed yourself and will continue to do so to the risk of proceedings if you continue to make statements which are defamatory to our clients."

and a warning that I may be subject to action if Mr. and Mrs. A are–

> "exposed unacceptably to unfair and unreasonable public scrutiny by means of reference directly or indirectly to them in your planned proposition or otherwise".

The letters in question were of limited circulation requesting the clarification of facts. Indeed it also requested a solution to the problem which did not provoke a response.

Disparities of definition

Contrast the Bailiff's assertion that his family's relationship with Mr. and Mrs. A did not make him conflicted with the decision of the Minister for Planning and Environment when he withdrew from determining the Heatherbrae Farm application in the name of Mr. Chris Taylor.

When I requested his explanation as to why he withdrew, the Minister for Planning and Environment wrote –

> "Dear Ben,
>
> I have known Chris since prep-school. I served for many years in the St. John's honorary police with him. I therefore decided when things became complicated that it would be better if I did not deal with the matter."

The Minister for Planning and Environment felt conflicted because he went to the same school over 30 years ago and happened to serve in the honorary police at the same time. They were not "friends" at school and their relationship could be described at best as acquaintances. The Bailiff, in his position to make a subjective *voisinage* decision, had a much different relationship with those before him in Court. I do not believe that objectivity was possible in this situation – consciously would be difficult, sub-consciously impossible. In addition he was aware of facts disclosed in the previous case on the same subject matter which may have affected his judgement.

However, the Minister for Planning and Environment is not exactly blameless in this saga. He encouraged the landlord to apply for a covered facility to be used by Reg's Skips – saying that it would be passed – and after the landlord spent £35,000 on plans and acoustic research the application was rejected.

There are two types of person in this world – those that put their hand up and take responsibility for their actions and those that hide behind excuses, precedents, and procedures. Should we defend the Government at all costs even when the Government lets the public down?

There will be many members of the population that will have sympathy for Mr. and Mrs. Pinel but will be against payment because it is taxpayers' money and/or it may set a precedent. Yet what is Government if it cannot take responsibility for its actions. Why is it the public that has to suffer for the failures of the Government?

There will also be those that consider this an unacceptable attack on the Bailiff and to be embarrassing internationally at a delicate time. Yet perhaps those critics should look at the weakness of their argument. If they want to lay blame at my door they should perhaps re-examine their own standards of responsibility, ethics and accountability and ask themselves whether the behaviour detailed above is acceptable.

With regard to the law of *voisinage* and other ancient laws it is perhaps worth remembering that Sir Philip Bailhache has a reputation to be a great protector of tradition – even when it is well past its sell-by date.

Many members of the legal profession may also remember the fight that my father, former Senator Dick Shenton, undertook on their behalf regarding the ancient tradition of studying at Caen University. A tradition stoutly defended by the elders but deemed outdated by the modern. I remind Members of this by taking an excerpt from the States Minutes dated 10th November, 1992 –

> Law students attending Caen University.
> Questions and answers (Tape No. 158)
>
> Senator Richard Joseph Shenton asked Deputy Robin Ernest Richard Rumboll of St. Helier President of the Legislation Committee the following questions –
>
> "1. Will the President inform the House of the progress made by the Working Party established after I agreed to defer consideration of my Projet (P.62/92) regarding the requirement for trainee advocates to attend Caen University; in particular will the President confirm what measures the Working Party has taken to consult among the profession and among those most affected by the legislation – the students?
>
> 2. Will the President confirm, in view of the fact that students are now registering for the course at Caen, what prospects there are for a speedy resolution to this matter?"
>
> The President of the Legislation Committee replied as follows –
>
> "The Working Party on Caen was established by the Legislation Committee in June 1992 to –
>
> 'investigate the desirability of amending the Advocates (Jersey) Law 1968, as amended, to remove from the qualifications for becoming an advocate of the Royal Court the requirement to obtain a 'Certificat d'Etudes Jurisdiques Française et Normandes' at the University of Caen'.
>
> This is a Joint Working Party composed of three advocates nominated by the Law Society of Jersey and two members of my Committee assisted by the Attorney General.
>
> It was constituted following an Extraordinary General Meeting of the Law Society on 19th May 1992 at which a proposal put forward on behalf of my Committee was adopted.
>
> That proposal was that –
>
> (a) the Legislation Committee would defer the debate on its amendment of the Advocates (Jersey) Law 1968 so as to allow the continuation for the time being of the 'loophole' whereby students could qualify as solicitors of the Royal Court and subsequently apply for transfer to the Bar without the requirement of studying at Caen University;
>
> (b) the Caen requirement, subject to concessions negotiated with the University of Caen, would continue in force for those who wished to study in Caen and to take advantage of the restricted (and published) syllabus under the Advocates (Examinations) (Jersey) Rules 1989;
>
> (c) in the meantime the Legislation Committee and the Law Society would jointly examine the practicabilities of arranging tuition and examinations in Jersey on the civilian aspects of Jersey law. Such examination would also bear in mind the importance of securing that aspiring advocates would have a reasonable command of the French language.

Unfortunately, because of the illness of the late President who wished to participate fully in the discussions, the Working Party has only met twice, but these have been extremely fruitful meetings and have resulted in a proposal being agreed, in principle, which it is felt could be generally acceptable. I think that it would be premature for me to outline the proposal which is now subject to detailed study. I anticipate that the proposal must first be put to the Law Society for its approval prior to my returning to the House with the revised amendment to the relevant legislation.

The Members of the Working Party have been made fully aware of the views of the students, from written submissions and the report of the meeting between the Legislation Committee and representatives of the students on 11th May 1992 and have taken regard of these comments in their deliberations. I should perhaps, add that I do not agree that students are 'Those most affected by the legislation'. Those most affected are the people of the Island who are entitled to know that those qualifying to practise as advocates are reasonably competent to advise them on the law of the Island.

I can assure the House that every effort is being taken by my Committee to resolve this situation with the greatest possible despatch. Until the recommendations of the Working Party have been finalised and agreed by all concerned the status quo will remain."

The point of this inclusion is that I have been approached by lawyers that disagree with the stance taken by the Bailiff regarding ancient laws yet do not want to speak out. It took political intervention to sort out the Caen laws and it will take political intervention to solve this issue.

This proposition seeks to redress the balance – to put Mr. and Mrs. Pinel back in the financial position that they were in before Planning decided to ask them to move premises. By trying to help out they have found themselves in a desperate financial position – with legal bills approaching £300,000. The stress and worry during the past few years has been immense.

I list below some precedents that allow this proposition to be lodged.

On 1st November 1977, the Public Health Committee lodged a proposition to seek the payment of compensation to an individual who had been unfairly treated by the actions of the States of Jersey. The proposition was approved and payment was made following a States debate. The payment was made on the basis that the Government failed "to act judicially and to consider the evidence in a proper manner".

There was a further proposition in relation to the same case that was debated on 5th December 1978. Again, this proposition was approved.

On 10th August 1999, Senator John Rothwell bought a proposition to the States requesting compensation to be paid to an individual. By accepting these propositions for debate, I believe that a precedent was set.

The sum payable will not exceed £300,000 as will be reduced in line with any concessions received on the legal bills. The cost of defending *voisinage* was –

Southdowns Consultants	£16,667.67	
Le Gallais & Luce (1st hearing)	£40,873.73	Advocate Clark
Appleby (Mr. and Mrs. A costs 1st hearing)	£87,600.00	Advocate O'Connell
Sinels (Appeal)	£114,533.19	Advocate Lakeman
Appleby (Appeal)	£37,795.00	Advocate O'Connell
TOTAL	**£297,469.59**	

I ask Members to redress the balance, to give back Mr. and Mrs. Pinel their financial security, and to act in a

decent way for the benefit of decent people.

Given the nature of the proposition, and the threats of legal action, I shall not be giving media interviews in respect of this proposition. The debate will take place within the States Assembly.

Financial/manpower implications

There is obviously a financial cost to this proposition and as can be seen from paragraph (b) I am proposing that an entry should be made in the estimates in the next Annual Business Plan to meet the cost.

APPENDIX

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