STATES OF JERSEY

VOISINAGE AND CUSTOMARY LAW: REVIEW (P.1/2009) – COMMENTS

Presented to the States on 6th March 2009
by the Council of Ministers

STATES GREFFE

COMMENTS

This proposition unusually and surprisingly asks Members, most of whom are not lawyers, to consider a technical legal matter and come to the conclusion that the law in this area should be changed by the abolition of legal principles enshrined in the Island's customary law. The Report makes a number of statements about the law, many of which the Council of Ministers believes to be incorrect, but does not rely on any objective analysis as to what the law is, or quote any learned authors expressing dissatisfaction as to the current state of the law.

Voisinage is a legal concept that places an obligation on neighbours of adjoining properties not to use their own property in such a way so as to cause damage to their neighbour's property. Whether a neighbour has used his or her property in such a way will depend on the facts of the particular case. Sometimes there can be dispute about what the facts are. In those circumstances, the Royal Court, which would hear a claim in *voisinage*, would determine the facts objectively by hearing and assessing evidence in the usual way, and then determine whether the facts it considered were established put the neighbour in breach of the obligation referred to above.

The Council of Ministers takes the view that the law of *voisinage* is an important aspect of Jersey law which should not be abolished lightly. Consequently, the Council of Ministers does not support P.1/2009 and firmly recommends States Members to reject this proposition. In any event, whether this proposition is or is not adopted, the Council of Ministers proposes to invite the Law Commission to consider whether it should examine this area of law and make any recommendations on it.

The proposition contains 3 elements. The first is that the customary law of *voisinage* should be abolished. The second is that a review should be undertaken to investigate possible overlaps between the customary law and statutory provisions in this area. We understand this to be a reference to the customary law of *voisinage* and the statutory provisions contained in the Statutory Nuisances (Jersey) Law 1999. The third is that the cost of legal representation in cases involving customary law should be examined to see whether the cost of defending cases is excessive or unjust.

The proposition seems to rest heavily on the decision in one case, decided by the Royal Court and confirmed in the Court of Appeal. That case is Yates -v- Reg's Skips Limited. Accordingly, it is right to draw the attention of Members to these matters in relation to that case –

(a) The action was brought by the plaintiffs claiming damages and an injunction against the defendant company, the legal basis for which was the law of *voisinage.* The defendant company conceded in the Royal Court that the law of *voisinage* applied in the circumstances of the case.

(b) The issue for the Court was therefore whether the activities of the defendant company in starting its skip business on the premises adjacent to the plaintiff's home constituted a breach of duty.

(c) The court decided it did. It heard evidence from the parties and other witnesses including experts in acoustics, noise and vibration. As is the function of the Court, it weighed the evidence and reached a conclusion. This was not an exercise involving customary law which is "subjective with an element of luck" as the proposer claims. It was the Court applying the law, which was agreed by the parties to be operative, with the Jurats assessing the evidence objectively, which is their function.

(d) The defendant company lost and appealed to the Court of Appeal. Although in that court, the company changed its position on the law and asserted that there was no legal precedent or authority for the view that the creation of noise was not actionable as an element of *voisinage,* their Counsel "did not seek to argue that a householder who complains of being subject to excessive noise created by his neighbour has no right of action. Indeed, he expressly accepted that such a householder has such a right."

In summary, the Council of Ministers is of the opinion that –

(i) The law of *voisinage* provides an important civil remedy. To abolish it would be likely create a gap in Jersey's legal framework.

(ii) The legal position governed by *voisinage* is not fully covered by any other area of law. The law of *voisinage* is distinct from both the public law remedy available for statutory nuisances and the law of tort.

(iii) There is no evidence that legal fees are any higher in customary law cases, than in any other cases.

The law of *voisinage* provides an important civil remedy

The law of *voisinage* provides an important private civil remedy for owners of property in Jersey.

Voisinage puts neighbours of adjoining properties under a quasi-contractual obligation not to use their own property in such a way so as to cause damage to their neighbour's property. If such damage occurs and is not rectified, an action for damages can be brought in *voisinage*.

It is a question of fact as to whether the neighbour's use of his property has caused damage so as to tender him liable in *voisinage*, and, like all questions of fact, it is determined by the Jurats after hearing the evidence. There is nothing vague about the law. When these actions are brought, a judgment call has to be made on the facts, just as it does in negligence cases or other types of action. The doctrine of *voisinage* is not, as the proposer claims, an ancient law used by the minority against the majority.

The first reference to *voisinage* in recent Jersey jurisprudence appeared in 1971 in the case of Searley -v- Dawson. That case concerned 2 neighbours, Mr. Searley and Mr. Dawson. Mr. Dawson demolished his house and d significant excavations with a view to erecting a new property on his land. As a result of the works carried out, damage was caused to Mr. Searley's neighbouring property. The Royal Court found that Mr. Searley and Mr. Dawson, as neighbours, were *"under an obligation to the other arising ex-quasi contractu not so to use [their] property so as to cause damage to the property of the other."* Mr. Dawson was ordered to pay Mr. Searle damages.

The leading authority on *voisinage* in Jersey is the case of Gale & Clarke -v- Rockhampton Apartments, which was heard by the Royal Court in 2006 and the Court of Appeal in 2007. The judgments in that case clearly set out the law in this area. In particular there is a detailed review in the Court of Appeal decision of relevant previous cases.

In Gale, the plaintiffs owned a number of properties on La Grande Route de St. Aubin. The first defendant was the owner of a block of flats known as Rockhampton Apartments. The second and third defendants were responsible for developing and carrying out construction works on the flats. During the works the actions of the defendants caused the plaintiffs' properties to crack and to subside, resulting in substantial damage to them.

It is quite remarkable that there is no more than a passing mention of Gale and Clarke -v- Rockhampton in the report that accompanies the proposition, even though it is the leading authority on the area of law P.1/2009 seeks to abolish.

On the second page of the proposition, the proposer alludes to 2 arguments which, he says, were made in the case of Searley -v- Dawson. This is at the paragraph which begins *"In the Searley and Dawson case it was argued that..."*. In fact, the arguments alluded to were not made in Searley -v- Dawson at all. They are instead arguments which were put on behalf of the defendants in Gale & Clarke -v- Rockhampton Apartments & Others and they were arguments which were rejected, by both the Royal Court and Court of Appeal

The legal position governed by voisinage is not fully covered by any other area of law

P.1/2009 takes the stance that the legal position currently covered by *voisinage* can be governed by the Statutory Nuisances (Jersey) Law 1999 ("1999 Law") or by other areas of law, without the need for *voisinage*.

The 1999 Law is designed to protect against public nuisances such as smoke or gas being emitted from private premises in a manner which is prejudicial to health or which causes a nuisance. The remedy arises through action

taken by the Minister, unlike *voisinage*, where the remedy arises through direct action taken by the complainant who is suffering the nuisance.

The reality is that the law of *voisinage* provides a private law remedy which is quite distinct from the public law remedies of statutory nuisance. This is acutely clear when one looks for the mechanism by which a person could require their neighbour to rectify damage caused to their property under the 1999 Law. It does not exist. The removal of a right of support, which gives rise to a claim in *voisinage*, gives rise to no remedy under the 1999 Law.

The proposer states in his proposition that –

> *"Some observers [have] made the accusation that the abolition of the law would prevent property owners taking action against their neighbours if they cause damage to their property. However there are other avenues available – such as tort of negligence – and perhaps the tort of nuisance."*

This is an incorrect statement of the law, as is evident from the following passage of the judgment of the Royal Court in Gale and Clarke -v- Rockhampton Apartments –

> *"The duty of a landowner not to use his land in such a manner as to cause harm or injury to his neighbour is not founded in tort. It is founded in voisinage or quasi-contract".*

It is clear from the foregoing that if *voisinage* were to simply be abolished, a gap would be left in Jersey's legal infrastructure to the detriment of owners of property in the Island.

Reliance on *voisinage*

The concept of *voisinage* has presumably been relied upon by lawyers and owners of property since at least 1971. For that reason, it is difficult to be certain what ramifications would arise if the doctrine were to be abolished. The following is a passage from the judgment of Jersey's Court of Appeal in the case of Gale and Clarke -v- Rockhampton Apartments –

> *"As Searley v. Dawson has stood undisputed for 35 years, has been the subject of specific reference in subsequent textbooks and has formed part of the syllabus of the Advocates' Examination for almost 10 years as part of the law of property, it seems inconceivable, even though the issue has not reached the courts, that the concept has not been relied on by some professional advisers in considering relationships between contiguous properties."*

The cost of cases involving customary law is not considered any more excessive or unjust, than other cases

No evidence has been provided by the proposer to suggest that legal fees are any higher in customary law cases, than in other cases.

The proposer makes reference to the case of Yates -v- Reg's Skips and the cost involved for the defendant company in that case. This case was heard by the Royal Court in 2007 and the Court of Appeal in 2008. By this time the detailed judgments in Gale and Clarke -v- Rockhampton were freely available to both parties and their counsel.

It is well known that litigation can be expensive, and it is essential that those facing lawsuits do obtain good legal advice at an early stage so as to contain the risk. It hardly seems rational to take one case as an argument for saying customary law cases lead to higher costs than others.

Conclusion

For the full reasons outlined above, the Council of Ministers invites States Members to reject this proposition. However, as indicated, the Council does propose to draw the judgments in Yates -v- Reg's Skips and the other cases referred to in these comments to the attention of the Jersey Law Commission in order that consideration can be given to whether any improvement or changes in the law of *voisinage* would be desirable.