STATES OF JERSEY

VOISINAGE AND CUSTOMARY LAW: REVIEW

Lodged au Greffe on 5th January 2009
by Senator B.E. Shenton

STATES GREFFE

PROPOSITION

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

to request the Chief Minister to –

(a) bring forward for approval the necessary legislation to enable the abolition of the customary law of *voisinage* in Jersey;

(b) review and investigate possible overlaps between customary law and statutory provisions in this area and make recommendations as appropriate;

(c) examine the cost of legal representation in Jersey in civil cases involving customary law and examine whether the cost of defending cases involving customary law is excessive and unjust.

SENATOR B.E. SHENTON

REPORT

Higher standards are expected and required

Law in Jersey should be about justice for the people of Jersey at a reasonable price – not based on the subjective views of a small group. Furthermore, justice must be the primary motive, not the ability to make substantial money out of the misfortune of others. Where modern definitive laws have been introduced, ancient vague laws which can be used by the minority against the majority must be removed.

The cost and the ability to defend oneself in a Court action are just as important as the law itself. If defence is beyond the remit of the average man, or the consequences of defeat to be so financially severe as to be life-destroying, then the justice system and all that feed on it are without merit.

In my opinion, customary law is subjective with an element of luck. It is open to abuse both consciously and sub-consciously should any of the involved parties be influenced by external circumstances. It is not definitive, it is not rational, and the cost is beyond the reach of the average man.

Voisinage is a foreign doctrine from Orleans and inconsistent with Jersey law

I first became aware of the law of *voisinage* whilst I was Minister for Health and Social Services. My Department had been dealing with a case and we were working towards a solution under the Statutory Nuisances (Jersey) Law 1999. Unfortunately, the subjective views of Courts coupled with a, in my opinion, misapplied ancient law, led to a rather perverse result which could – if taken to a logical conclusion – lead to the closure of the incinerator, the sewage farm, the airport, and most industrial activities on the Island.

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 Edition (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.

Some observers 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 the tort of negligence – and perhaps the tort of nuisance.

In the Searly -v- Dawson case it was argued that –

1. The importation of the quasi-contractual doctrine of voisinage was unnecessary because the tort of nuisance was already in existence in the Island; and

2. Voisinage was a foreign doctrine from Orleans and inconsistent with Jersey law.

With regard to the latter point it is interesting to note that there is no reference in the customary law of Normandy to voisinage and that there is no evidence that such a concept was ever adopted in Normandy or Jersey. In fact it is difficult to find any case in voisinage where another avenue was not available to pursue a claim through the Courts.

Recent developments in the Jersey law of *Voisinage*

The case that brought the law to my attention was the case of *Reg's Skips -v- Yates*, which was before the Court of Appeal in May.

The respondents to the appeal were Mr. and Mrs. Yates who live next door to "Heatherbrae Farm" from where Reg's Skips (the appellant) conducted its business. When Mr. and Mrs. Yates moved into their property in 1999 Heatherbrae Farm was operating as a dairy farm. Reg's Skips, the appellant, took up occupation of the property as tenant in July 2005. In the winter of 2005, Mrs. Yates became aware of "*high levels of noise"* emanating from Heatherbrae Farm and subsequently discovered that the skip hire business was being operated from the premises. Complaints were made to the Planning Department which served an enforcement notice on Reg's Skips requiring it to cease using the mechanical digger, which was the source of the noise, for the sorting of waste on site. That notice was subsequently withdrawn by the Planning Department, on the basis of legal advice received, and use of the digger resumed and both Planning and Health were attempting to work towards a satisfactory solution.

In April 2007 proceedings were issued against Reg's Skips under *inter alia* the law of *voisinage*. On appeal, the appellant submitted that *voisinage* applied only to damage to land or to buildings (as was the case in *Gale & Clarke*) and not to excess of noise. The question the Court of Appeal had to ask itself was whether the creation of excessive noise is actionable under the law of *voisinage*?

The Court of Appeal found that whether or not such a cause of action existed under the law of *voisinage* was a moot point, given that the case had to be measured against principles established in 2 earlier Jersey cases on excessive noise, which made no mention to the law of *voisinage* and which the appellant did not seek to argue were incorrect. The test that the court had to apply was whether the appellant's activities were productive of noise which, on an objective view, exceeded that which the *"average"* or *"ordinary"* or *"normal"* person would find excessive.

The Court of Appeal went on to state that had it had to determine whether excessive noise fell within the realms of *voisinage* it would have had a number of concerns given that the issue had not been before the Royal Court and therefore the Court of Appeal (made up of a panel of English and Scottish judges) did not have the benefit of a judge *"well versed in the customary laws"* of the Island. In addition, the court stated that it had not been addressed on a number of practical consequences such as the fact that, 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.

The other issue that fell to be determined by the Court of Appeal was who could be held liable for damages for a breach of duty under the law of *voisinage*?

The appellant submitted that it was the incorrect defendant in the action because it was only the *tenant* of Heatherbrae Farm and not the *landowner*. The appellant referred to the judgment of the Royal Court where reference was made to the earlier case of *Searley -v- Dawson* where it was stated that the duty in *voisinage "is a duty that cannot be delegated or avoided by an owner"*. The Court of Appeal found against the appellant on this point, holding that having found the tenant (Reg's Skips) in breach of its obligation in *voisinage*, the Royal Court was simply pointing out that an action may also have lain against the landlord/owner of Heatherbrae Farm.

In conclusion, whilst the Court of Appeal declined to make a decision as to whether relief from excessive noise was a cause of action under the law of *voisinage*, it confirmed that such an action did in any event exist, and it went on to state the test that should be applied in determining whether that duty had been breached. The Court of Appeal also 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. Reg's Skips were served with a notice to quit Heatherbrae Farm together with bills totalling almost £300,000. As it was Planning that approached them to move to Heatherbrae Farm this conclusion – a £300,000 bill as tenant coupled with a notice to quit – hardly seems fair and equitable.

As previously stated, 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 Edition (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.

By contrast, the Statutory Nuisances Law was approved by the States Assembly in 1999 and is therefore a relatively new law for Jersey. The has been crafted in a manner suitable for Jersey, is derived from UK law where there has been more than a hundred years of implementation, and case law from judgements handed down from the courts over that time period. The health protection officers use these findings to help them implement the Jersey law.

A review of the law has taken place through the summer of 2008 on the aspects of Best Practicable Means (BPM) [1]. The main purpose of this review was to examine the dilemma whereby the Minister for Health and Social Services (the Minister) would be required to undertake action through the law even where professional officers were of the opinion that a business was achieving BPM. In the past, the Minister has been required to serve legal notices which could result in a costly legal action that the Department would lose and receive costs against it. This is clearly an inappropriate loss of much-needed states financial resources. An amendment to the law to deal with this anomaly will be lodged with the States Assembly.

Several members of the States Assembly have raised concerns about the apparent inequity of activity between the public and private sector. There will always be some differences between activities in the private sector and those which occur within the public sector. The prime example of this is that the State is responsible for the provision and maintenance of the Island's significant infrastructure. At the time of the approval of the nuisance law, the States accepted the need to safeguard the legitimate interests of business. After all, we would not want the law to permit the closure of businesses that ensured the Island's life-blood, such as the Airport or the Harbour, or to stop necessary public health infrastructure such as the sewage works or power supply, all of which at times result in activity affecting neighbouring property. Without such essential infrastructure the Island could cease to function.

If the States had to close down these important activities, one nuisance would be abated but other nuisances and threats to public health would be likely as a consequence of such a decision. For example, if the Island's sewage works were to be closed, the impact of raw sewage disposal to sea and the implications for health, the environment and tourism would be considerable. To close the composting site would mean an increase in solid waste for Bellozanne and a setback for recycling.

The law reflects the need to ensure that the Minister should not deny businesses from being able to reasonably undertake their operations. To that end there is under the law an opportunity for industrial, agricultural, trade or business premises to plead the defence 'that the best practicable means were used to prevent or to counteract the effects of, the nuisance'. This approach is consistent with other jurisdictions' operation of nuisance legislation, such as England.

The Island's infrastructure is coming to the end of its life. It is often sited close to residential accommodation, an aspect not considered at the time of commissioning. Its processes are out of date; it does not meet what would now be considered as current best technology for new plant; it gives rise to odours or dust; it may be polluting, but it is often the only means of dealing with an aspect of the Island's waste until new replacement plant is put in place.

Nevertheless, the law does not discriminate between nuisance caused by private and public companies or individuals. The burden of proof in determining a nuisance remains the same. The due process to be followed for

both is also the same. To ensure fairness and consistency, The Health Protection Service has a policy document on how it regulates through legislation, the document is titled 'Investing for Improvement' and is available to members and the public on the States of Jersey website. In all cases of complaint and investigation this policy is followed and all decisions on action follow due process of law to ensure that there is fair, equitable and proportionate treatment of all islanders' complaints, and business interests are served through the process of delivering best practice.

The Service recognises that most businesses and individuals want to comply with the law and therefore works to help businesses and others meet their obligations without unnecessary expense. However, action is taken against those who do not comply and continue to act irresponsibly through not implementing BPM.

It would appear that this 'common sense' approach does not apply to *voisinage* and the judgment of the Royal Court in the Reg's Skips -v- Yates case was, in my opinion, seriously flawed and unjust.

Conclusion

There seems little point in painstakingly implementing new legislation designed for the modern world if it can be bypassed by the subjective view of individuals capitalising on ancient laws that should have been revoked. Furthermore, these vague ancient laws, which appear to move the goalposts at every judgement, put too much power into the hands of the over-opinionated minority and could be subject to abuse.

Historically the law of *voisinage* could not be used for curtailment of noise, historically it could not be served on a tenant, but a recent ruling did not uphold this. In short the public don't know where they stand. They are potentially left with large legal bills because they have been caught up in a legal minefield. This is not justice – albeit it may be intellectually entertaining for those involved. Perhaps they should look into their hearts and examine the cost of this 'entertainment.'

When it comes to justice in Jersey, higher standards are expected and required. These ancient laws are open to abuse and must be repealed.

I do not believe that there are any additional financial or manpower implications for the States as the reviews and any necessary law drafting can be undertaken within existing resources.

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[1] Best Practicable Means (BPM)

- Available only for businesses
- reasonably practicable having regard to:
  - local conditions
  - current state of technical knowledge
  - financial implications
- includes design, installation, maintenance of plant and machinery
- includes design, construction, maintenance of buildings and structures.