# Gale and Clarke v Rockhamtpon Apart and Anor

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| **Jurisdiction:** | Jersey |
| **Judge:** | The Deputy Bailiff |
| **Judgment Date:** | 13 December 2006 |
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**Text**

[2006] JRC 189A

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, **Kt**., Bailiff**sitting alone**

Between
Martin Gale
First Plaintiff

and

Anthony Gabriel Webber Clarke
Second Plaintiff
and
Rockhampton Apartments Limited

First Defendant

and

Antler Property CI Limited
second Defendant

**Advocate** D. Gilbert **for the First and Second Plaintiffs**.

**Advocate** K. J. Lawrence **for the First and Second Defendants**.

**Authorities**

*Searley v Dawson* [1971] JJ 1687 .

Poingdestre, *Remarques et Animadversions sur la Coutume Reformée de Normandie.*

Pothier, Vol V Second Appendix *Traité du Contrat de Société* at p 240, paragraph 230.

*Official Solicitor v Clore* [1983] JJ 43 .

*Curry v Horman* (1889) 213 Ex 511 .

*Keough v Farley* [1937] 12 CR 373 .

*Guernsey States Insurance Authority v Ernest Farley & Son Limited* [1953] JJ 47 .

*La Cloche v La Cloche* (1870) VI Moo.N.S. 383 at 401.

Pothier, *Traité du Contrat de Société*, Vol 4 – article 247.

Houard, *Dictionnaire de Droit Normand*, 1782 edition, volume 4, page 3,

*Re Barker* [1985–86] JLR 186 at 191.

*State of Qatar v Al Thani* [1999] JLR 118 .

*Gibaut v Le Rossignol* [1900] 11 CR 188 .

*Le Sueur v Bois* (1889) 10 CR 419 .

*Hanbury v Smith* (1898) 219 Ex 94 .

*Jersey Financial Services Commission v Black* [2002] JLR 294 .

*Jersey Financial Services Commission v Black CA [2002/168]* .

Le Geyt, *Privilèges, Loix et Coutumes, Titre VIII, Du Possessoire*, Article 2.

*Attorney General v Williams* [1968] JJ 991

*Attorney General v De Carteret* [1987–88] JLR 626 .

*Parish of St Helier v Manning* [1982] JJ 183 .

Le Gros, *Droit Coutumier* de Jersey p 173.

*Mitchell v Dido Investments Limited* [1987–88] JLR 293 .

*Re the Esteem Settlement* [2002] JLR 53 at 141 p.252.

*Albright v Wailes* [1952] JJ 31 .

The Deputy Bailiff
**Introduction**

1 This is a summons brought in the context of a claim by the plaintiffs alleging that the actions of the defendants have caused damage to their properties. Originally the action was framed in both negligence and *voisinage*. It has been accepted, however, that the cause of action in negligence is prescribed, the Order of Justice having been served more than three years after the cause of action arose. On 3rd August 2006 the Master certified as a preliminary question pursuant to rule 7/8 of the Royal Court Rules 2004 what was the applicable prescription period for a claim in *voisinage* as set out in the Order of Justice.

2 The factual background may be very shortly stated for the purposes of this judgment. The plaintiffs own a number of properties on La Grande Route de St Aubin. The first defendant is the owner of a block of flats known as Rockhampton Apartments which were developed by the second defendant on the site of the former Rockhampton Hotel. The third defendant was the main contractor carrying out the works of construction. During those works it is alleged that the actions of the defendants caused the plaintiffs' properties to crack and to subside resulting in substantial damage to them.

3 The plaintiffs contend that the relevant prescription period for a claim in *voisinage* is ten years. The defendants contend that, if there is a cause of action in *voisinage*, it is prescribed by the lapse of three years by analogy with tortious causes of action. Miss Lawrence's principal argument however was that this court erred in *Searley v Dawson* [1971] JJ 1687, and that *voisinage* is not part of the law of Jersey. *Searley v Dawson* was, in counsel's submission, wrongly decided and ought not to be followed. If that contention were to be upheld, the plaintiffs' claim would be prescribed.

**Searley v Dawson**

4 The facts in *Searley v Dawson* were not too dissimilar to the facts alleged in this case. The defendant had caused his property, which adjoined the plaintiff's property at Gorey, to be demolished and replaced by a much larger house. Those works of demolition and

reconstruction caused serious cracking to the front and rear elevations of the plaintiff's house and internal cracks to rooms on the ground and first floors. The ceiling on the first floor landing became dangerously unstable. The court found that this damage was caused essentially by a negligent failure to underpin the western gable wall of the plaintiff's house during the course of the building works.

5 The plaintiff sued in negligence, which the court found to have been established. In determining whether the defendant owed a duty of care to the plaintiff and, if he did, whether the performance of that duty could be delegated to another, the court turned not, however, to the tort of negligence but to the concept of *voisinage*. Le Masurier, Bailiff, explained that the law of England would arrive at an answer in this way

> ***"I. In the natural state of land, one part of it receives support from another – upper from lower strata, and soil from adjacent soil. That support is a natural right annexed to ownership.***
>
> ***II. A similar right becomes annexed to the ownership of building, by prescription after twenty years.***
>
> ***III. Those rights of support are classed as easements and, accordingly, the owner of the servient tenement interferes with them at his peril and cannot transfer that peril to an independent contractor".***

6 This process of reasoning could not be applied in Jersey, however, because of the maxim " *nulle servitude sans titre"* about which Poingdestre wrote in his *Remarques et Animadversions sur la Coutume Reformée de Normandie* -

> ***"Les Servitudes tant urbanes que prédiales ont été obmises par le Coutumier.*** Et la Glose ny le style de procéder, ny même Terrien, qui les a suivis de bien loin n'en ont presque rien dit. De ce silence nous conjecturons que lesdites servitudes étaient peu en usage, et que chacun possedait son héritage libre de telles subjections, ou à tout le moins il fallait montrer titre pour telles choses, et n'y faisait rien l'allégation de quarante ans, parce qu'en telles choses il arrive le plus souvent que par amitié, voisinage familiarité courtoisie ou semblables causes, les voisins et amis s'entre supportent mutuellement et permettent de passer et repasser par leurs terres, de puiser de l'eau aux puits et fontaines l'un de l'autre, y abreuver leur bétail et choses semblables; sur lesquels offices d'amitié et de familiarité ce serait la plus injuste chose du monde de pouvoir fonder un droit, et tourner la courtoisie de son voisin à sa perte et sa franchise en servitude. Et partant notre Coûtume ne recoit aucne allegation de possession tant ancienne soit elle, mais requiert qu'on montre titre par lequel la servitude ait été constituée."

I translate this passage as follows –

> ***"Servitudes, not only urban but also those relating to the countryside, have been omitted by the writers on custom.*** Neither the Glose nor the Style

de Proceder, nor even Terrien who has followed them from afar have said much about them. From his silence we surmise that the said servitudes were little used and that everyone possessed his property free of such burdens or at the very least that it was necessary to show title for such things, and the allegation of forty years' enjoyment did not make a servitude because in such matters it most often happens that out of friendship, neighbourliness, familiarity, courtesy or similar causes neighbours and friends support each other mutually and permit each other to pass and re-pass over their land, to draw water from each other's wells and fountains, to water their cattle and similar things; on the basis of such friendship and familiarity it would be the most unjust thing in the world to be able to found a legal right and to convert the courtesy of one's neighbour to his detriment and his indulgence into a servitude. And consequently our custom does not allow any allegation of possession however longstanding it may be to found a servitude, but requires one to show the title by which the servitude has been constituted."

7 Le Masurier, Bailiff, then turns to Pothier's writing on " *servitudes réelles"* and states, (my translations of the passages in French appearing in square brackets) –

> ***"Despite the fact the he asserts that a servitude cannot be acquired by possession nevertheless he goes on to say in Article 1 of the same title in paragraph 22 at page 170 –***
>
> ***'Il est traité, sous ce titre, non-seulement des servitudes qu'un héritage peut devoir à l'héritage voisin, mais de plusieurs autres matières qui concernent le voisinage ….'*** [Under this title are dealt with not only the servitudes that one property can owe to a neighbouring property, but several other matters concerning 'voisinage'.]

And in paragraph 24 he goes on –

> ***'Il est aussi traité, sous ce titre, des obligation que forme le voisinage entre les voisins.'*** [Obligations formed by 'voisinage' between neighbours are also dealt with under this title.]

That is immediately followed by his first rule which is he says –

> ***'Chacun des voisins peut faire ce que bon lui semble sur son héritage, de manière néan-moins qu'il n'endommage pas l'héritage voisin.'*** [Each neighbour can do as he thinks fit on his property, so long as he does not cause damage to the neighbouring property.]

That he qualifies by a second rule –

> ***'Je puis faire sur mon héritage quelque chose qui prive mon voisin de la commodité qu'il en retiroit, par exemple, des jours qu'il en retiroit.'*** [I can do on my property something which deprives my neighbour of the convenience that he derives from it, for example light that he was enjoying from it.]

***and of which from the authorities quoted to us can be added the example of water not in a natural and defined watercourse*** .

***On what principle then is founded the rule cited by*** *Pothier* ? ***The answer is to be found in Volume V in the Second Appendix to his "Traité du Contrat de Société" at page 240, paragraph 230 –***

'Du voisinage

***Le voisinage est un quasi-contrat qui forme des obligations réciproques entre les voisins, c'est-à-dire, entre les propriétaires ou possesseurs d'héritages contigues les uns aux autres.'*** ['Voisinage' is a quasi-contract formed by the reciprocal obligations between neighbours, that is to say, between the owners or persons in possession of properties adjacent to one another.]

In paragraph 235 of the Second Article of the Appendix, at page 245, he goes on –

' ***Le voisinage oblige les voisins à user chacun de son héritage, de manière qu'il ne nuise pas à son voisin.***'" ['Voisinage' obliges each neighbour to use his property in such a way that he does not cause damage to his neighbour.]

8 Le Masurier, Bailiff, concluded –

***"Our judgement may therefore be summarised thus –***

***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."***

**The Defendants' submissions**

9 Miss Lawrence submitted that *Searley v Dawson* was wrongly decided and should not be followed. She contended that the doctrine of *voisinage* had not been mentioned in any previous decided case and moreover that it was not to be found in any of the works on Norman customary law nor in the works of the local commentators save one. Counsel

conceded that Poingdestre had referred to *voisinage* in his *Remarques et Animadversions sur la Coutume Reformée de Normandie* in the passage quoted above, but she submitted that this was only a passing reference and that the word was used in a non-technical sense of neighbourliness. Counsel contended that there were two reasons why the court should feel able to depart from *Searley v Dawson*.

I shall take each of those reasons in turn.

(i) The importation of the quasi-contractual doctrine of *voisinage* was unnecessary because the tort of nuisance was already in existence.

(ii) *Voisinage* was a foreign doctrine from Orléans and inconsistent with existing Jersey law.

10 Counsel cited a passage from *Official Solicitor v Clore* [1983] JJ 43 where the court stated –

***"The Royal Court has consistently said that its duty in considering the law applicable to any particular case before it is first of all to see if there is any established Jersey law which should be applied".***

Counsel submitted that there was such established law, namely the tort of nuisance which, she said, had existed since 1889.

11 That submission related to the case of *Curry v Horman* (1889) 213 Ex 511 where the defendant had piled cartloads of refuse on his land causing a nauseating stench which affected the plaintiffs in their house 70 feet away. The defendant pleaded that he was entitled to manure his land in the usual way, but by the time the action came on for trial the offending refuse had been spread on the land and covered with earth. The translation of the case placed before me by counsel records that –

***"But, considering that the defendant has covered the said pile of sweepings with earth even before the notification of the Order of Justice in the way which is accepted by the plaintiff and this with the object of diminishing as much as possible the nuisance in question, the court has confined itself to sentencing the defendant to the costs of the present action".***

If however one looks at the original French text of the court record, one sees that the plaintiff's claim concluded with a prayer that the defendant should remove the refuse – "*affin qu'il lui soit intimé par la Cour d'exploiter ladite pièce de terre de façon à ne pas nuire [the plaintiff]*". The phraseology employed by the plaintiff's lawyers has a distant echo of the duty of *voisinage* contained in Pothier – "à user chacun de son héritage de manière qu'il ne nuise pas à son voisin". It is true that the order of the court concluded with a recognition that the defendant has mitigated as far as possible *"la nuisance dont s'agit"*, but "nuisance" is the noun from the verb "nuire", and does not in context necessarily have any technical

meaning, such as the tort of nuisance.

12 In *Keough v Farley* [1937] 12 CR 373 the plaintiffs complained of the excessive noise resulting from the operation of the defendant's sawmill and machinery associated with his building enterprise. The court found that the noise and oscillation caused by the machines had been excessive but that the defendant had remedied the nuisance which had been prejudicial not only to the health of the plaintiffs but also to the enjoyment of their proprietary rights. The defendant was ordered to pay damages of £200. It is true, as submitted for counsel for the defendants, that no reference was made in the record of the proceedings to *voisinage* or to quasi-contractual rights. But equally there was no reference to *"le tort de nuisance"* or the tort of nuisance. As was customary in the court records of those times, the pleadings were set out *in extenso* and the decision of the court was only briefly given.

13 These were *jugements motivés*, and no reasoned explanation was given for the judgment of the court. I do not find any persuasive evidence in these two cases that the English tort of nuisance had at that time been assimilated into the law of Jersey. On the contrary, the phraseology employed indicates to me that the conduct complained of was regarded as an interference with a proprietary right and a breach of the obligation to use one's property in such a way as not to harm or cause damage to one's neighbour. It may be that the elements of the quasi-contractual duty of *voisinage* have much in common with the ingredients of the English tort of nuisance, but that is not evidence that the English tort has been incorporated into our law. Indeed the comments of Le Quesne, Lieutenant Bailiff, in *Guernsey States Insurance Authority v Ernest Farley & Son Limited* [1953] JJ 47 tend to suggest that in the early 1950s it was certainly not the case. The judge stated at 48 –

> ***"Can this claim, which arises out of the accident and is not brought by Mr Le Cras but by the Insurance Authority, be enforced in this Court in Jersey, or does the law of Jersey prevent it from being enforced here because it is based on the assignment of a right of action arising from a tort?*** The word 'tort' is used here in the sense in which it is commonly used by English lawyers when they speak of the law of torts as opposed to the law of contracts. On grounds of convenience this may be permitted provided that it is done without losing sight of the fact that this is a Jersey court administering Jersey law, whether it be the internal domestic law of Jersey or the principles of private international law as they are applied by Jersey courts."

I do not find the first reason advanced by counsel for the defendants to be persuasive.

14 I turn now to the second reason, namely that *voisinage* was a foreign doctrine from Orléans and inconsistent with existing Jersey law. Counsel submitted, quite correctly, that the extracts from Pothier's works cited in *Searley v Dawson* were from his writings on the customary law of Orléans. While Pothier's writing on the Roman law and civil law have been accepted in Jersey as highly authoritative in relation to the law of contract, counsel contended that the custom of a province other than Normandy was not so regarded, was not necessarily relevant, and could be misleading. In my judgment this submission goes a little too far. The writings on the custom of Orléans, Paris and Brittany, to name but some of

the provinces to which commentators on the customary law of Normandy have referred from time to time, can be regarded as authority in certain circumstances. In *La Cloche v La Cloche* (1870) VI Moo.N.S. 383 at 401 the Privy Council stated –

> ***"The Coutume d'Orléans and the Coutume de Paris (although they differed in this, that the Coutume d'Orléans included heritable property, and did not confine the rule to moveables), appear to have contained the same Law or custom with regard to the saisine of Executors as that stated in the passage cited from Terrien, and embodied in the Article of the Coutume Reformée, as cited from Godefroy and Basnage.*** These Coutumes may be legitimately referred to for the purpose of testing the interpretation we have put on the custom as stated by Terrien, and also for the purpose of explaining the force and effect of particular expressions."

15 It is true that there appears to be no reference in the writings on the customary law of Normandy to *voisinage*, and one cannot therefore test the interpretation placed on the custom as stated by Terrien. Counsel submitted that the doctrine of *voisinage*, and its quasi-contractual basis, was derived from the civil law and incorporated into the customs of Paris and Orléans. She contended that there was no evidence that this approach to relations between neighbours was ever adopted in Normandy or in Jersey. There is no doubt, however, that quasi-contract was known to the customary law of Normandy. There is a short definition to be found in Houard's *Dictionnaire de Droit Normand*, 1782 edition, volume 4, page 3, in the following terms –

> " **On donne le nom [quasi-contrat] à une obligation qui naît de l'équité, sans que la convention des parties y intervienne.** Ainsi il se forme un quasi-contrat**entre l'absent et celui qui, durant son absence, fait pour lui quelquechose d'utile; car l'absent, par seule équité, est tenu de la restitution des dépenses nécessaires et utiles faites pour lui".**

I translate that passage as follows –

> **"The name [quasi-contract] is given to the obligation which arises from equity, without the need for any agreement between the parties.** Thus, for instance, a quasi-contract is formed between an absent person and one who, during his absence, does some necessary thing for him; for the absent person, by reason only of equity, will be bound to reimburse any necessary and appropriate expenditure made on his behalf".

16 Quasi-contract is part of our law, but the customary law of Normandy is silent, or brief on the meaning and extent of the term. In my judgment it is legitimate in such circumstances to look at other customs, including the *Coutume d'Orléans*, to explain the force and effect of the expression. The custom of Orléans is indeed a particularly appropriate source to explore in this context, for the author of this commentary is the author upon whom very great reliance is placed in the context of the law of contract.

17 The word " *équité"* in the context of quasi-contract is interesting. The pleadings in the two cases cited at paragraphs 11 and 12 above seem to me to import the concept of reasonableness. In other words, the duty not to cause damage to one's neighbour is not absolute, but is qualified by notions of what is reasonable in the context of neighbourly relations. All that is entirely consistent with the equitable foundation of duties arising in quasi-contract.

18 Counsel for the defendants submitted that there were aspects of the law of *voisinage* in Orléans which are incompatible with established principles of Jersey law. As an example she cited at article 247 of Pothier's *Traité du Contrat de Société*, Tome 4 –

> ***"C'est encore une obligation que forme le voisinage, que, quoique régulièrement personne ne soit obligé de vendre, soit pour le tout, soit pour partie, une chose qui lui appartient, néanmoins le propriétaire d'un mur contigu à l'héritage de son voisin, est tenu, si ce voisin souhaite bâtir contre ce mur, de lui en vendre la communauté, suivant l'estimation qui en sera faite."***

I would translate that passage as follows –

> ***"It is again an obligation formed by voisinage that, although generally no-one can be compelled to sell, whether in its entirety or in part, something which belongs to him, nevertheless the owner of a wall adjacent to his neighbour's land is bound, if this neighbour wishes to build against this wall, to sell him the co-ownership of the wall for the value to be assessed".***

19 Counsel submitted that this principle clearly offended against the maxim *nulle promesse à héritage ne vaut* which recognises the fact that no-one can be compelled to pass an hereditary contract against his will. This is true, but clashes of this kind are an almost inevitable consequence of assimilating principles of law from other legal systems. Those principles must be adapted so as to conform with the *corpus juris* of the receiving country. There are myriad examples of the adaptation of principles of English law which have been incorporated into the law of Jersey.

20 Counsel for the defendants conceded that *Searley v Dawson* had stood unchallenged for over thirty years. That in itself creates a major hurdle to be surmounted. As Hoffman JA (as he then was) stated in *Re Barker* [1985–86] JLR 186 at 191 –

> ***"Mr Falle was therefore obliged to argue on this point, in*** *Re Bonn* ***was wrongly decided.*** It is a decision by a judge well-versed in the customary laws of this Island which has stood without criticism for fourteen years and, being a decision on title to land, may well have been relied upon by persons advising on title. I therefore say at once that, although it is not binding upon this Court, I would be reluctant to overrule it unless we were satisfied that it was plainly contrary to earlier authority or that it was the cause of some practical injustice".

21 I am also reminded that this Court has a duty to follow a previous Royal Court decision unless I am convinced that that decision was wrong. That principle appears from *State of Qatar v Al Thani* [1999] JLR 118 and many other decided cases.

22 In my judgment *Searley v Dawson* was not "plainly contrary to earlier authority" nor indeed wrong. It seems to me that the judgment of Le Masurier, Bailiff, was plainly right and that it set in their proper jurisprudential context a number of other provisions of the law relating to immoveable property with which practitioners would be familiar. One instance is the law relating to *éboulements*, that is the rule which requires the owner of lower land to accept anything falling or descending naturally from higher ground. Another instance is the law relating to water. In *Gibaut v Le Rossignol* [1900] 11 CR 188 the court held that owner of lower land was obliged to receive water flowing naturally from higher ground, and could not require the owner of the higher ground to retain the water on his land or to deflect it from its natural course. Other instances are the law relating to banks whereby an owner of a bank separating his land from that of his neighbour must maintain it as an enclosure *Le Sueur v Bois* (1889) 10 CR 419; and the law relating to trees of which an example was the rule that a landowner is bound to cut back branches overhanging his neighbour's land ( *Hanbury v Smith* (1898) 219 Ex 94). None of these obligations is founded in contract. All of them could perhaps be characterised as natural servitudes ( *servitudes naturelles)* but can equally well be analysed as obligations arising in quasi-contract to be a good neighbour and not to use one's land in such a manner as to injure that of the adjoining owner —obligations arising from the law of *voisinage*. I accordingly reject the submission of the defendants that *Searley v Dawson* was wrongly decided and that the doctrine of *voisinage* is not part of the law of Jersey.

**Voisinage and the law of torts**

23 That conclusion is sufficient to dispose of the first limb of the defendants' argument but, in deference to the erudite submissions that I have received from counsel, it seems to me that I should add a few words on the relationship between *voisinage* and the tort of nuisance and indeed other torts. In her book "The Origin and Development of Jersey Law – an outline guide", Stéphanie Nicolle referred to the passage from the judgment of Le Quesne, Lieutenant Bailiff, in *Guernsey States Insurance Authority v Ernest Farley & Son Limited* cited at paragraph 12 above and continued –

> ***"15.24 Though English influence may have come late to the law of tort, when it came it came in an overpowering wave.*** Guernsey States *Insurance Authority v Farley* ***was probably almost the last, if not the last, occasion for over forty years upon which a court was to advert, explicitly or implicitly, to the difference between a "tort" and a tort.*** By the time the distinction was recognised again [in *Arya Holdings Limited v Minories Finance Limited* ***(unreported 93/135)] it was only to acknowledge that over the years Jersey law had moved ever closer to the English concept of tort, and that from the 1970s onward, the English concept of tort governs Jersey legal thinking.***

> ***15.25 By and large this creates no particular problems.*** It does however run into conceptual difficulties in that area of law where neighbouring property owners dispute over an alleged injury which in the English system is classified as a tort (whether negligence, nuisance or trespass to property), but in Jersey sits more comfortably as part of that area of law relating to property known as "voisinage" which deals with the reciprocal rights and obligations of neighbouring property owners."

24 These conceptual difficulties have led to the submission that *Searley v Dawson was* wrongly decided, a submission which I have just rejected. But where then is the line to be drawn? If the "overpowering wave" of English influence has carried the English law of torts far ashore, at what point should it be stopped? If there is no clarity as to the line between the law of torts and the law of land there will be great uncertainty, and that is not in the public interest. I have not heard detailed submissions and it would therefore be wrong to be too prescriptive, but the following general observations may be of assistance.

25 In *Jersey Financial Services Commission v Black* [2002] JLR 294 I outlined my views on the genesis of the law of torts in Jersey. My conclusion as to the period of prescription for an action under article 20(7) of the Collective Investment Funds (Jersey) Law 1988, and its characterisation as an action in tort, were found to be wrong by the Court of Appeal. That court did not however dissent from the analysis of the origin of the Jersey law of torts, and I stand by it. When *Jersey Financial Services Commission v Black CA [2002/168]* came before the Court of Appeal, Southwell JA stated –

> ***"20. The essentials of a right of action in tort, and therefore of an action 'founded on tort' for the purposes of article 2(1) of the 1960 Law, were considered by me when delivering the judgment of the Court of Appeal in*** *Arya Holdings Limited v Minories Finance Limited* ***. Those essentials include a duty owed to the plaintiff by the defendant otherwise than by virtue of a contract or trust, whether pursuant to Jersey common law or statute, a breach of this duty by the defendant, and actual or threatened damage caused by and flowing from the breach (which in some torts may be assumed), giving rise, accordingly, to a right of action which the plaintiff can require the court to uphold.***
>
> ***21. Arguments have been advanced as to the extent to which tort (in French) as part of Jersey common law may differ from tort (in English) as part of English common law. One example of a difference between Jersey law and English law in this regard can been seen in Arya where a Jersey right of action described as a "D'Allain" claim, unknown to English law, was held to be a right of action in tort in Jersey law. What is significant for the present case is that a "D'Allain" right of action involves, just as much as other rights of action in tort in Jersey law, the three essentials of duty, breach of duty and damage. Whatever differences there may be between Jersey law and English law as to the range of torts on which reliance may be placed under either legal system, torts under each system involve the***

***existence of those three essentials".***

26 Accepting that these three essential elements of tort (duty, breach of duty and damage) are substantially the same in Jersey law and English law, the question arises as to which legal duties give rise to tortious liability. Southwell JA stated in the passage cited above that a breach of legal duties arising "otherwise than by virtue of a contract or trust" could give rise to tortious liability. I would add "or 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 is not founded in tort. It is founded in *voisinage* or quasi-contract. The remedy of a person whose land is invaded by "travellers" or a tramp is not an action in tort for trespass; it is an *action possessoire*, or possessory action. The person who seeks an immediate remedy for the invasion of a right to land does not seek an injunction to prevent a trespass; he raises the *Clameur de Haro* (see, for example, Le Geyt, *Privilèges, Loix et Coutumes, Titre VIII, Du Possessoire*, Article 2, *Attorney General v Williams* [1968] JJ 991, and *Attorney General v De Carteret* [1987–88] JLR 626).

27 It is true that many of the elements of *voisinage* are to be found in the English concept of "nuisance" and the possessory action is similar to the action in trespass. It is also true that in some cases since 1960 the court has appeared to embrace concepts such as nuisance and trespass as if they were part of the law of Jersey. In *Parish of St Helier v Manning* [1982] JJ 183 the judgment records allegations of trespass against the defendant who kept a coach converted into a mobile home parked on a public road. The essence of the action however concerned the legal nature of a parish, the nature of its title to or rights over a public road, and the rights of an inhabitant over a public road. The court found that the parish has exclusive ownership and possession of a public road, and that "the Parish can maintain an action in trespass against the defendant". This was, however, a classic possessory action. No submissions appear to have been addressed to the court as to whether a new form of action was being created and one must therefore assume that the words "action in trespass" were being used loosely and descriptively for the possessory action that in law it undoubtedly was. An action for trespass is in some respects similar to the possessory action, but in many respects different. Crucially, if a new tortious action of trespass has been created by a side-wind (which I think it has not) the prescription period would be three years. The prescription period for a possessory action is a year and a day (see Le Gros, *"Droit Coutumier de Jersey"*, page 173). Thereafter a plaintiff can only bring an *action pour exhiber titre.*

28 In *Mitchell v Dido Investments Limited* [1987–88] JLR 293 the court concluded that –

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

Extraordinarily, bearing in mind that one of the counsel in *Mitchell v Dido Investments Limited* had appeared seven years before as counsel in *Searley v Dawson*, the latter case was not cited, and it was left to the court itself to research the principles set out in Pothier. Happily the professionalism and competence of the Bar are now such that the court can generally rely upon the relevant materials being placed before it and upon submissions as to where the law of Jersey is to be found. 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*.

29 In my view causes of action arising in the law of land or quasi-contract should be pleaded accordingly. It is not appropriate to plead trespass or nuisance for the reason presciently given by Le Quesne, Lieutenant Bailiff, in the *Guernsey Insurance Authority* case. 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.

**The prescription period for *voisinage***

30 I turn now to the secondary argument advanced by counsel for the defendants in the event that the court were to hold, as it has done, that *Searley v Dawson* was correctly decided. The defendants contend that the prescription period for an action in *voisinage* is, by analogy with the tort of nuisance, three years. The plaintiffs contend that the prescription period is ten years. There is no authority directly in point.

31 Counsel for the defendants contended that there were three reasons for preferring a prescription period of three years. She characterised these reasons as the quasi-contractual or fiduciary argument, the tort argument, and the public policy argument.

32 The quasi-contractual argument amounts to a submission that, on analysis, what was regarded in the eighteenth century as a quasi-contractual relationship would today be regarded as a tortious or fiduciary relationship. For example, the duties owed by heirs to legatees, or tutors to minors, or curators to interdicts, would today be regarded as fiduciary rather than quasi-contractual. Similarly, counsel submitted, money paid under a mistake would be regarded as recoverable not on the basis of quasi-contract but on the basis of a constructive trust. I do not accept those submissions but there does appear to me to be an overlapping between fiduciary duties and quasi-contractual duties. However, in any event I do not find that the argument leads to any particular conclusion. Some causes of action for breach of a fiduciary duty are prescribed after three years, but others are arguably not. But I have found that the duties arising in *voisinage* are founded in quasi-contract, and not in tort

or the law of trusts.

33 The tort argument is in essence that *voisinage* is indistinguishable from the English tort of nuisance, and that it should by analogy attract a prescription period of three years. While I accept that many of the elements of the duties arising in *voisinage* are similar to those in nuisance, I have found that *voisinage* gives rise to a separate and distinct cause of action in quasi-contract and the similar elements are in my view irrelevant.

34 The public policy argument is that efforts are being made to render justice more speedy and cost-effective, and that ten years is too long. I accept the force of the public policy argument, but it seems to me that the reduction of certain prescription periods is now a matter for the legislature.

35 Counsel for the plaintiffs drew attention to a passage from the judgment of Birt, Deputy Bailiff, in *Re the Esteem Settlement* [2002] JLR 53 at 141 where the judge stated at paragraph 252 –

> ***"The Jersey law of prescription is, by and large, based upon judicial precedent and it is hard to find a consistent theme or principle which underlies the various prescriptive periods.*** But where there is no precedent, it is helpful to have regard to the nature of the action".

On this basis one might regard a quasi-contractual right of action as being close to a right of action in contract, where the prescription period is, in general, ten years.

36 Counsel also referred to *Albright v Wailes* [1952] JJ 31 where the court held that the prescription period for an *action personnelle mobilière* is one of ten years.

37 The second passage from *Re the Esteem Settlement* cited by counsel is at paragraph 257 where the judge stated –

> ***"We think that the time has come to hold that the ten-year period referred to by Le Geyt is a general period which should be taken to apply to all personal actions and all actions concerning moveables, save to the extent that they have already been held to be subject to a different period, e.g. tort, actions concerning estates etc., or that some other period is, by analogy, clearly more applicable".***

38 I conclude that the prescription period for an action in *voisinage* is one of ten years. I so conclude for two reasons. First, in my judgment, this is an *action personnelle mobilière* and, no other statutory period being applicable to it, it is prescribed on the authority of *Albright v Wailes*, by the lapse of ten years. Secondly, I agree with Birt, Deputy Bailiff, that the sensible default period of prescription is one of ten years. It is clear that the law of prescription cries out for reform, but in the meantime I hold that an action in *voisinage* is

prescribed only after the lapse of ten years. I would answer the preliminary question accordingly.