185,

2nd November, 1987.

87/69

IN THE ROYAL COURT OF JERSEY
(Samedi Division)

Before Mr. V.A. Tomes, Deputy Bailiff
Jurat the Hon. J.A.G. Coutanche
Jurat D.E. Le Boutillier

Between	Beatrice Wilberforce Mitchell, (née Bird) widow of William Hamish Mitchell,	Plaintiff
And	Dido Investments Limited	Defendant

Advocate C.M.B. Thacker for Plaintiff
Advocate M.M.G. Voisin for Defendant

By contract passed before the Royal Court on the 28th June, 1985, the Plaintiff purchased from Mr. Nigel Lonsdale Harris the property known as 'Port Rest', situated at Anneport, in the Parish of St. Martin. The relevant parts of the description contained in the contract are as follows (in translation):-

"Certain house or cottage called 'Port Rest', with the garage and the land depending therefrom....the wall and "relief" on the North towards the public road called "Les Charrières d'Anneport" and the party ownership of the boundary stones on the West, South, South-West and North....towards the property belonging to the limited liability company called "Dido Investments Limited" (the Defendant); the whole joining....by the West, by the remainder of the South, by the South-West and in part by the North to the property belonging to "Dido Investments Limited" (having title by hereditary purchase by contract dated the twenty-fourth August, one thousand nine hundred and seventy-three, from Mr. Rolfe Allen Taylor) and bordering by the remainder of the North on the said public road called "Les Charrières d'Anneport".

"The said property hereby sold is separated and delimited on the said West, South, South-West and North sides thereof from the said property belonging to the said company called "Dido Investments Limited" by six boundary stones planted as follows, namely:- the first of the said stones is at one foot six inches to the West of the West face of the said house forming part

of the said property hereby sold and at six feet eight inches to the South of the said public road; the second of the said stones is at twenty-one feet three inches to the South of the said first stone; the third of the said stones is at four feet five inches to the East or thereabouts of the said second stone; the fourth of the said stones is at sixty-six feet six inches to the South of the said third stone;..... All the said measurements are in royal feet and the said boundary stones are and shall remain party owned to be maintained and upkept as such between the said neighbouring proprietors and their respective heirs, successors or assigns in perpetuity".

The defendant was a party to the said contract in order to agree as follows (in translation):-

"That the demarcation line separating the said property hereby sold by the West and part of the South sides thereof, from the said property of the said Company "Dido Investments Limited" is an imaginary straight line drawn through the centres of the said six party boundary stones on the West and on part of the South of the said property hereby sold and extended....towards the North, from the centre of the said first boundary stone, up to the said public road called "Les Charrières d'Anneport".

"And that it shall be permissible as much to one as to the other of the said parties to cause a good wall to be erected on the said demarcation line and this half on the land of one and half on the land of the other of the said parties, and at the cost of the party undertaking such work, which said wall shall never exceed a maximum height of six royal feet above the normal level of the soil, and once erected shall be and remain party owned between the said parties to be maintained and upkept as such".

The property of the defendant is known as 'Port Selah'.

The plaintiff's Order of Justice alleges that the West wall of the house 'Port Rest' runs parallel with the boundary with 'Port Selah' at a distance of some sixteen inches to the East of the said boundary. The reference to "some sixteen inches" is confusing. The first boundary stone is described as being at eighteen inches to the West of the West face of the house forming part of 'Port Rest' and if the demarcation line does follow a parallel line, then, the second stone which is merely described as being at twenty-one feet three inches to the South of the first must also be at a distance of eighteen inches from the line of the West face of the house 'Port Rest'. Because the measurements are taken in royal feet and not in Jersey feet, and correcting paragraph 4 of the Order of Justice, the West wall of the house 'Port Rest' runs parallel with the boundary with 'Port Selah' at a distance of eighteen inches and not "some sixteen inches" to the East of the boundary.

The plaintiff alleges that the defendant or his predecessors in title have caused to be placed on its property in the North-East part thereof and extending over the boundary up to the West wall of 'Port Rest' a quantity of soil; that soil and earth have encroached on to the Plaintiff's land and rest against the West wall of 'Port Rest'; that the encroachment has had the effect of interfering with the natural drainage of the plaintiff's land, causing amounts of water to be retained in the soil against the West wall of the plaintiff's house; that by reason of the water retention in the soil against the West wall, damp has been caused to enter the structure of the wall which the plaintiff has dealt with at considerable expense but which will return unless the encroachment is removed; and that the plaintiff has requested the defendant to remove the encroachment so that she can take measures to prevent recurrance of the damp by constructing a gulley and retaining wall barrier but that the defendant has neglected or refused to do so.

Wherefore the plaintiff seeks an order (1) requiring the defendant to remove the soil and earth which are allegedly encroaching upon the land of the plaintiff; (2) requiring the defendant to allow the plaintiff to construct a gulley

on her land to carry water away from the West wall of her house; and (3) requiring the defendant to allow the plaintiff to construct a retaining wall or barrier along the boundary line to prevent further incursion of water from the defendant's property.

The defendant denies the allegations made against it and says that at no time since its purchase of 'Port Selah' has the defendant caused or permitted a quantity of soil to be placed on the North-East part of 'Port Selah' and extending over the boundary between 'Port Rest' and 'Port Selah' up to the West wall of 'Port Rest'; that save and except for any disturbance of the soil which may have been caused by turning the soil over in the course of cultivating the land owned by the defendant the level of the soil in the North-East part of 'Port Selah' is the same now as it was in 1958 or thereabouts; and that at the request of the plaintiff the defendant was a party to her contract whereby it was agreed (as we have already described) that either party could erect a wall on the demarcation line separating 'Port Selah' and 'Port Rest' not exceeding six feet above normal ground level, being by implication the level of the soil at the date of passing contract; that the parties thus agreed the level of the soil in the North-East part of 'Port Selah' on the 28th June, 1985, since which date, apart from minor disturbance in the course of cultivation, the level of the soil has remained unchanged; thus the defendant denies that any encroachment has occurred as alleged or at all.

The defendant pleads further that if, which is denied, any soil and earth has encroached upon the land of the plaintiff, then the plaintiff is entitled to remove the soil and earth encroaching on her land without the need for the Court to order the defendant to do so; that the plaintiff is entitled to construct a gulley on her land to carry water away from the West wall of 'Port Rest' without the need for the court to order the defendant to allow her to do so; and that the plaintiff is entitled to construct a retaining wall along the boundary line between 'Port Rest' and 'Port Selah' without the need for the Court to order the defendant to allow her to do so, provided always that such wall does not exceed six feet above normal ground level.

Accordingly, the defendant asks that the complaint of the plaintiff be dismissed.

Between the 19th August, 1927, and the 10th June, 1933, both properties were in the common ownership of Mr. Gilbert Stratford Travers who, on the latter date, sold 'Port Rest' to Mr. Richard Ormonde Stead, predecessor in title of the plaintiff. On the 22nd July, 1933, Mr. Travers sold the remainder of his property ('Port Selah') to Mr. Walter Denis Scott, predecessor in title of the defendant.

We have examined the contracts of the 10th June, 1933, and 22nd July, 1933, which were substantially in the same terms. The first of six boundary stones was at one foot six inches to the West of the West face of the house 'Port Rest' and at six feet eight inches to the South of the public road; from the first to the second boundary stones going in a Southerly direction there was a distance of twenty-one feet three inches, and from the second to the third boundary stones in an Easterly direction or thereabouts there was a distance of four feet five inches . Accordingly, the measurements relating to the boundary stones that are relevant to the present action were identical. The measurements were in royal feet and the stones were declared to be party boundary stones ("mitoyennes") to be maintained as such in perpetuity. No demarcation line was described and there was no provision for the erection of a party wall.

The principal allegation of the plaintiff in her Order of Justice is that the defendant or its predecessors in title have caused a quantity of soil to be placed in the North-East part of its property extending over the boundary up to the West wall of 'Port Rest'. Hence, the level of the soil in that part of the properties from the 10th June, 1933, when they ceased to be in common ownership should be of vital importance. We observe that apart from Mr. Raymond Griffiths, a Chartered Engineer who was called by the plaintiff as an expert witness, who gave opinion evidence as to what might have happened

fifty or sixty years ago, no evidence was called by the plaintiff to show the situation which existed then and how it allegedly altered since. The only direct evidence of the position in the past was adduced by the defendant - that of Mr. John William Michael Boulstridge Bailey who occupied 'Port Selah' between May, 1952 and 1958, and photographs taken for Mr. Bailey in 1952. The burden of proving the matters alleged in her Order of Justice lies on the plaintiff and she has to do so on the balance of probabilities. This might even have been an appropriate case for proof "par commune renommée" (v. C.S. Le Gros' Traité du Droit Coutumier de l'Ile de Jersey P.442) In default of evidence as to the past the Court has to decide the issues on the evidence which was adduced.

Pleadings

Although the Order of Justice alleged only one form of nuisance, i.e. the placing of soil in the North-East corner of 'Port Selah' extending over the boundary, with the consequent interference with the natural drainage causing water to be retained against the West wall of the plaintiff's house, in its turn causing damp to enter the structure of the wall, evidence was adduced to try to show that the building by the defendant of an additional wall on the defendant's property, more or less parallel with the West wall of 'Port Rest', and acting as a retaining wall between the defendant's excavated car-parking area and its garden and the back-fill behind that wall, had caused further water retention and, consequently, the percolation of water through the soil to the West wall of 'Port Rest'. Mr. Thacker described this as the "second strand" of the plaintiff's case, although it had been omitted from the pleadings.

Similarly, Mr. Voisin sought to introduce a line of defence which had not been contained in the defendant's Answer. It is that an easement exists by implication of law because both properties had been in common ownership and the easement consists of a reciprocal right of support of the land of one party by the land of the other.

Not only was this line of defence not pleaded but it appears to be in direct conflict with that part of the Answer that says that the plaintiff is entitled to remove the soil and earth encroaching on her land.

In Sayers et uxor v. Briggs & Company (Jersey) Ltd (1963) J.J.249 the Royal Court said this:-

"The only allegation in the Order of Justice is that confusion may be caused by the choice of name by the defendant Company. Now it is not confusion which is of the essence of the matter but deception, whether innocent or not.

"We have considered whether in the circumstances we should nonsuit the plaintiffs but have decided that it is not in the interests of Justice that we should do so. We do not believe that to insist on the niceties of pleading serves any useful purpose in the administration of the law unless it can be clearly shown that any failure to do so would have for effect to take a party to the proceedings by surprise or to deprive him of a defence that might otherwise be open to him.

"In our opinion no such considerations arise in this case and we intend to treat the plaintiff's case as containing the allegation that the defendant Company is by its choice of name representing that its business is that of the plaintiffs".

The Court applies the same principles to the instant case and has decided not to nonsuit the plaintiff in respect of the "second strand" of her case.

In the circumstances, we shall also consider the question of a right of support.

Estoppel by Deed

The Answer of the defendant claimed that, because the defendant was a party to the plaintiff's contract of purchase of the 28th June, 1985, whereby it was agreed that either party could build a wall on the demarcation line separating the two properties not exceeding six feet above normal ground level, being by implication the level of the soil at the date of the passing of the said contract, the parties had agreed the level of the soil in the North-East part of the defendant's property on the 28th June, 1985, since which date the level of the soil had remained unchanged. Thus, although not pleaded specifically, that the plaintiff was estopped by her deed from pleading any change in the level of the soil prior to the 28th June, 1985, and, therefore, by any predecessor in title of the defendant.

Mr. Voisin failed to submit authority to support his contention. Mr. Thacker referred the Court to Cross on Evidence, 5th Edition, Chapter XIII section 2 - Estoppel by Deed. It is not necessary for the Court to cite the whole of this helpful extract. In Greer v. Kettle (1937) 4 All ER 396 Lord Maugham said:-

"Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between the parties and privies and therefore as not admitting any contradictory proof".

The learned author goes on to say:-

"Whatever may be the true modern basis of the doctrine of estoppel by deed, its scope is extremely limited under the present law. In the first place, it only applies between parties to the deed and those claiming through them. Secondly it only applies in actions on the deed."

In the instant case, the action is not an action on the deed. Moreover, as the Answer shows, it is alleged only by implication that the level of the soil was agreed. There is no solemn and unambiguous statement that the level of the soil on the 28th June, 1985, is the normal level of the soil.

Accordingly, the Court finds that the plaintiff is not estopped by the contract of the 28th June, 1985, from pleading changes in the level of the soil prior to that date.

Nuisance

It is unnecessary for the Court to recite all the authorities that were cited to us. We were referred by both counsel to certain passages from Halsbury's Laws of England, 4th Edition Volume 34, and the following will be sufficient for our purposes:-

"301....Nuisances may be broadly divided into....(3) acts or omissions generally connected with the user or occupation of land which cause damage to another person in connection with that other's use of land or interference with the enjoyment of land or of some right connected with the land.

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

"309.... In order to constitute a nuisance there must be both (1) an unlawful act, and (2) damage, actual or presumed. Damage alone gives no right of action; the mere fact that an act causes loss to another does not make that act a nuisance. For the purposes of the law of nuisance, an unlawful act is the interference by act or omission with a person's use or enjoyment of land or some right over or in connection with land.

"310.... An act which in some circumstances is lawful may in others become actionable as a nuisance. Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including for example, the time of commission of the act complained of, the place of its commission, the manner of committing it, that is whether it is done wantonly or in the reasonable exercise of rights, and the effects of its commission, that is, whether those effects are transitory or permanent, occasional or continuous. Thus the question of nuisance or no nuisance is one of fact.

"315.... Every person is required by law to exercise his rights, whether over his own or public property, with due regard to the co-existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance....

"316.... Where a person does some act which he is lawfuly entitled to do on his own land, it will constitute a nuisance if it causes physical damage to his neighbour's property, unless there is justification. Possible justifications are that the damage is a natural result of a reasonable use by a person of his own property, ...or that the damage was due to some act or default of the person affected, or to an act of God, ...or that the act is justified by some right such as an easement.... Instances of injury to property or interference with rights in respect of property are commonly found to arise from....the escape of water....

"317....Owners or occupiers of land are legally entitled to use or occupy their land for any purpose for which in the ordinary and natural course of the enjoyment of land it may be used or occupied, and are not responsible for damage sustained by the property of others through natural agencies operating as a consequence of such ordinary and natural user or occupation.... Each of the respective owners or occupiers of adjoining or neighbouring buildings or premises is entitled to the full use and enjoyment of his property in the

ordinary manner of its use and for the ordinary purposes for which premises are designed, and so long as he confines himself to such user and exercises such user and enjoyment in a reasonable manner, having regard to surrounding circumstances, he does not commit a nuisance.

"318.... As a general rule, no act can be justified as an ordinary user of premises which in fact results in substantial interference with the ordinary use and enjoyment of property by other persons. Also a person who injures the property of another or disturbs him in his legitimate enjoyment of it cannot justify that injury or disturbance as being the natural result of the exercise of his own rights of enjoyment, if he exercises his rights in an excessive and extravagant manner, or, it seems, if the inconvenience or injury resulting from the exercise of rights might easily be avoided.... A useful test whether lawful activities constitute a nuisance is what is reasonable according to the ordinary usages of mankind living in a particular society.

"320.... If an owner or occupier interferes with natural agencies or conditions and thereby imposes a heavier burden upon his neighbour he may be liable in an action for nuisance at the suit of the neighbour for damage occasioned thereby to the neighbour.

"364.... Any person is liable for a nuisance who either creates or causes it, or continues or adopts it, or who authorises its creation or continuance. The liability applies whether or not that person is in occupation of the land on which the nuisance is committed.... A person is liable as having caused or continued a nuisance....when inadvertently he does or authorises an act from which a nuisance arises as a natural and probable consequence....

"365.... An occupier of land is liable for a nuisance, even though he has not created it, if he has continued it while he is in occupation. Further, the occupier will be liable for a nuisance created after he became the occupier if he had knowledge, actual or constuctive, of its existence. An occupier of land continues a nuisance if, with knowledge (actual or constructive) of its existence, he fails to take reasonable steps to bring it to an end...."

The Court is satisfied that, in respect of nuisance, the law of Jersey follows the law of England and, therefore, we can have regard to the English authorities (see Dale v. Dunell's Limited (1976) J.J. Vol 2 1974-76 291).

Mr. Thacker cited a number of cases but each one appeared to turn on the facts relevant to itself and added nothing to the principles cited above from Halsbury, which are themselves based on the cases, and which we adopt as our view of the relevant law relating to private nuisance.

Mr. Voisin referred us to Mesny & ors. v. Marett & anr. (1931) 236 Ex.337 12 C.R. 328. Miss and Mr. and Mrs. Mesny were the reversionary owner and life-tenants respectively of "Seacliff", St. Aubin. Miss Marett and Doctor Marett were respectively the life-tenant and reversionary owner of "Beauvoir", St. Aubin, which was sited at higher level. A substantial landslide occurred, resulting in considerable soil and débris from the gardens and banks of "Beauvoir" falling or sliding onto the outbuildings and garden of "Seacliff" and against both the main house and a timber maisonnette erected in the garden. The plaintiffs sought an injunction for the removal of all soil and débris or, in default, damages on a daily basis and costs, without prejudice to a subsequent claim for making good the damage to the property which could only be ascertained after removal of the soil and débris. The defendants pleaded that the landslide had been an Act of God or an inevitable accident, that they had used their property in a normal and lawful manner and that the damage caused by the landslide had not been caused by their fault or negligence. Moreover, that it was a principle of law that the "fonds inférieur" was bound to receive the "éboulements" of every kind which fall from the "fonds supérieur" without human intervention. The Full Court, after a Transport de Justice, decided that:-

"Attendu que l'éboulement du 5 Mars, 1931, ne paraît pas avoir été provoqué par aucun acte, omission ou négligence de la part des défendeurs, lesquels n'out usé de leur propriété "Beauvoir" que d'une manière normale et légale; mais paraît plutôt être dû à des causes naturelles.

"La Cour, accueillant la prétention des défendeurs, les a déchargés de l'action; et sont les acteurs condamnés aux frais."

Mr. Voisin suggested that on the authority of Mesny & ors. v. Marett and anr. the last sentence cited by us from Halsbury para 365 that "An occupier of land continues a nuisance if, with knowledge (actual or constructive) of its existence, he fails to take reasonable steps to bring it to an end...." does not form part of the law of Jersey. That sentence is based on the English cases of Goldman v. Hargrave and others (1966) 2 All E.R. 989 P.C. and Leakey and others v. National Trust for Places of Historic Interest or Natural Beauty (1980) 1 All E.R. 17 C.A., both of which were amongst the cases cited to us by Mr. Thacker.

The former decided that there is a general duty of care on an occupier of land, on which a hazard to his neighbour arises, to remove or reduce the hazard, whether it arises by the act of God, or from natural causes or by human agency; and the standard of the duty of care is to require the occupier to do what is reasonable having regard to his individual circumstances. That case related to a tall redgum tree in the centre of the appellant's land which was struck by lightning and began to burn in a fork eighty-four feet from the ground. Early the next morning, the appellant telephoned to the district fire officer and asked for a tree feller to be sent. The tree was cut down about midday on the same day. Up to this time the appellant's conduct in relation to the fire was not open to criticism. The appellant, it was found, could have extinguished the fire by putting water on it that evening or the following morning, but instead of adopting that method, which was the prudent method, he adopted the method of letting the tree burn itself out and took no steps to prevent the fire spreading. The method so adopted by the appellant brought a fresh risk, the risk of revival of the fire, which was a foreseeable risk by a man in the appellant's position. In the event, the wind freshened, the fire revived and spread on to the respondent's property causing extensive damage. Accordingly, the appellant was liable in negligence.

It is not difficult to distinguish Goldman v. Hargrave and others from Mesny and others v. Marett & anr. and the Court has no doubt that in a proper case the Court would apply Goldman v. Hargrave and others. It was a case where an occupier, faced with a hazard accidentally arising on his land, failed to act with reasonable prudence so as to remove the hazard. Their Lordships found the existence of a general duty on occupiers in relation to hazards occurring on their land, whether natural or man-made. The existence of the duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. We respectfully agree.

Leakey and others v. National Trust was concerned specifically with landslide. For many years there had from time to time been slides of soil, rocks, tree-roots and other débris caused by the effect of natural weathering. Later, a large crack had opened up in the bank and it was pointed out to the defendants that there was a grave danger of a major collapse onto the house below. Some weeks later there was a large fall of the bank onto the land of the plaintiff. The defendants were found to be liable in nuisance and their appeal was dismissed. The Court of Appeal held that under English law there was both in principle and on authority a general duty imposed on occupiers in relation to hazards occurring on their land, whether the hazards were natural or man-made. A person on whose land a hazard naturally occurred, whether in the soil itself or in something on or growing on the land, and which encroached or threatened to encroach onto another's land thereby causing or threatening to cause damage, was under a duty, if he knew or ought to have known of the risk of encroachment, to do what was reasonable in all the circumstances to prevent or minimise the risk of the known or foreseeable damage or injury to the other person or his property, and was liable in nuisance if he did not. Where a substantial expenditure was required to prevent or minimise the risk of damage, the occupier's financial resources, assessed on a broad basis, were a relevant factor in deciding what was reasonably required of him to discharge the duty, and the neighbour's ability, similarly assessed on a broad basis, to protect

himself from damage might also be a relevant factor to be taken into account, depending on the circumstances. Because the duty was part of English law and because the defendants knew that the instability of their land was a hazard which threatened the plaintiff's property, that duty applied to them.

The instant case is not one concerning landslide or 'éboulement'. The matter of the law of Jersey on landslide or 'éboulement' was not argued before us and we are not prepared to say, therefore, whether Mesny and others v. Marett & anr. should be overruled on the basis of Leakey & ors. v. National Trust. Moreover, in Leakey & ors. v. National Trust the defendants were aware of the danger and of the possible consequences; there was knowledge that a potential nuisance of a significant nature existed and the defendants failed to take steps to prevent damage occurring. There is nothing in the report of Mesny and others v. Marett & anr. to show that the defendants knew or ought to have known of the risk of encroachment. Nor are we prepared to decide, without full argument, whether Leakey & ors. v. National Trust should overrule the priniciple of Jersey common law that the "fonds inférieur" is bound to receive the "éboulements" which, without human intervention, descend upon it from the "fonds supérieur".

But, as a proposition of the general law of nuisance, we adopt the principle of English law contained in Leakey and others v. National Trust in which, at page 35, Megaw, L.J. said this:-

"This leads on to the question of the scope of the duty. This is discussed, and the nature and extent of the duty is explained, in the judgment in Goldman v. Hargrave. The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of

which the claim is made. Thus, there will fall to be considered the extent of the risk. What, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and, if so, what".

Right of support and easement

We must deal with Mr. Voisin's submission that the defendant's property enjoys an easement as of right to receive support from the land of the plaintiff on the narrow strip to the West of 'Port Rest'.

Halsbury's Laws of England 4th Edn. Vol 14 deals with the creation of easements by implication of law, starting at paragraph 60:-

"60.... The doctrine of the creation of easements by implication of law is founded upon an implied grant which arises in connection with some express grant or disposition of the servient or dominant tenement. Such a grant can only be implied where both the dominant and servient tenements have been in common ownership so that the creation of an easement by implication of law may be said to be the outcome of the former relationship between the two tenements. The disposition which causes a cessation of the common ownership and thus gives rise to the implication of an easement may be of either tenement or a simultaneous disposition of both tenements.

"62.... Where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it is such as to be absolutely necessary for the enjoyment of the part retained and the accomodation is such that it is capable of constituting the subject matter of an easement.

"168... Apart from variations arising from easements, every owner of land has ex jure naturae, as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land. In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil, and therefore if one piece of land is conveyed so as to be divided in point of title from another contiguous to it....the right of support passes with the land, not as an easement held by a distinct title, but as an essential incident to the land itself.

"169... The natural right to support does not entitle the owner of land to insist upon the adjoining land of his neighbour remaining in its natural state, but it is a right to have the benefit of support, which is infringed as soon as, and not until, damage is sustained in consequence of the withdrawal of that support. ....."

Mr. Voisin referred us to Rouse v. Gravelworks Ltd. (1940) 1 All E.R. 26 C.A. in which the defendants in digging for gravel on their land created a large pit, which by natural causes filled with water and formed a lake reaching almost to the boundary of the adjoining property, of which the plaintiff was the owner. The wind blew the water thus collected onto the plaintiff's land, and caused damage by erosion. It was held, on appeal, that no action would lie for such damage as the water had accumulated only as a result of the defendants' natural user of their land and had escaped on to the land of the plaintiff only by the operation of natural causes.

At page 31, MacKinnon, L.J. said:-

"I agree that the plaintiff's cause of action quite clearly was a claim that the defendants had impaired that right of support of the plaintiff's land which, as neighbouring landowners, they were bound to give. I think the proper answer of the defendants to that is: "We have only used our land as we are entitled to, by digging out the mineral. When we dug out the mineral, we had not in any way impaired your right of support. Your land was as much supported as you were entitled to have it. Subsequently nature intervened, and water accumulated in our land. We are not liable for that. The water having accumulated, wind blew upon it, and the effect of the natural operation of wind and water was to erode the edge of your land. That is not a thing for which we are liable, because it is the natural result of the operations of nature, for which we are not responsible as having caused it". The result is that, in my view....the plaintiff fails to establish his cause of action".

The Court is not persuaded by Rouse v. Gravelworks Ltd. The case appears to have been decided solely on the issue of support; the issue of nuisance does not appear to have been addressed. In the light of the modern authorities the Court thinks that Rouse v. Gravelworks Ltd might well be decided differently to-day. Every person is required by law to exercise his rights over his own property with due regard to the co-existing right of his neighbour. Having used its land for ordinary and usual purposes, a hazard i.e. the lake, was created on the land of Gravelworks Ltd., thereby imposing a heavier burden upon its neighbour. Gravelworks Ltd. did an act from which a nuisance arose as a natural and probable consequence and, in the respectful opinion of this Court, was under a duty to remove or reduce the hazard, i.e. so to reduce the level of water that it would not injure the neighbour's land.

Mr. Voisin also referred us to Le Feuvre v. Mathew (1973) J.J. 2461 which decided that, in Jersey law, an implied grant (of a servitude or easement)

can arise upon the severance of tenements that have been in the same ownership if it is necessary to imply such a grant in order to carry out the common intention of the parties.

Not cited to us, notwithstanding that Mr. Voisin appeared as Counsel, no doubt because the action was founded in negligence, was Searley v. Dawson, Dawson v. Rothwell, Dawson v. Davies (1971) J.J. 1689. There, the duty of care owed by one neighbour to the other was examined and the Court said this:-

"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.

.....

III. Those rights of support are classed as easements and, accordingly, the owner of the servient tenement interferes with them at his peril....

.....

"Another approach might be to cite the maxim 'Sic utere tuo ut alienum non laedas' which is usually translated as 'Enjoy your own property in such a manner as not to injure that of another person'. From all we have been able to discover, however, that translation is not correct and it ought to read 'So use your property as not to injure the rights of another'. The result is that one is led straight back to the right of support, and the duty of the owners of land to respect it.

.....

"The maxim 'Sic utere etc' is more narrowly expressed in Domat, 'Loix civiles', Tome I, Titre 12, Section II, paragraph 8, page 117 -

'Quoiqu'un propriétaire puisse faire dans son fonds ce que bon lui semble, il ne peut y faire d'ouvrage qui ôte à son voisin la liberté de jouir du sien, ou qui lui cause quelque dommage'.

.....

"Pothier deals with 'servitudes réelles' Le Trosne edition 1844, Volume 16, Titre XIII....in paragraph 24...."Il est aussi Traité, sous ce titre, des obligations qui forme le voisinage entre les voisins'. That is immediately followed by his first rule which is, he says - 'Chacun des voisins peut faire que ce bon lui semble sur son héritage, de manière néanmoins qu'il n'en dommage pas l'héritage voisin'.

"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' and of which from the authorities cited 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 contigus les uns aux autres'. 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'.

In the opinion of the Court, Mr. Voisin advanced the defendant's case not at all by bringing in, unpleaded, although we allowed him to do so, the issue of support. The first sale of the property held in common ownership was that to the predecessor in title of the plaintiff. So that, the right of support, such as exists, is one by the owner of 'Port Rest', as the servient tenement to support the land of 'Port Selah' as the dominant tenement. But the plaintiff has done nothing to remove the support which the defendant's land receives from the plaintiff's land. And, if there is reciprocity in these matters, the defendant has done nothing to remove the support which the plaintiff's land receives from the defendant's land.

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 a 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.

The facts

We do not propose to review the evidence which we heard in any detail; but the following main considerations arise:-

Level of Soil

We find that the level of the soil in the North-East corner of 'Port Selah' is substantially the same now as it was in 1973, before the defendant carried out any work. This is clear from the evidence of Mr. John Bernard Tanguy. Further, we find that the level of the soil in the North-East corner of 'Port Selah' is substantially the same now as it was between 1952 and 1958. We are satisfied by the evidence of Mr. Bailey, the photographs exhibited to us and our own observations. Moreover, the plaintiff has failed to satisfy us that there has been any significant change in the level of the soil to the West of the West wall of 'Port Rest' at any time since the two properties ceased to be in the same common ownership in 1933. Neither the plaintiff nor Mr. John Thomas Le Rossignol, her builder, has any knowledge of the situation prior to her purchase in 1985. Mr. Griffiths, who we are sure, tried to assist the Court as far as was possible, could not be definite. He said that it was difficult to be conclusive but a level of the soil similar to that seen by the Court when we visited the property had been prevalent for many years. The situation had arisen primarily from building the house 'Port Rest' in that situation.

Probably the soil was not as high at the time and the plateau of ground is artificial. The North wall of the garden appeared to be of similar construction to that of the North wall of 'Port Rest'. In Mr. Griffiths' opinion the level of the soil had changed in this way - 1) the North wall was built up; 2) the soil was built up; 3) the gutter or gulley running alongside the West wall of 'Port Rest' had been put in place. He did not think the North wall was the original one, although this was possible. The difficulties which the Court faces in this matter are demonstrated by the fact that Mr. Griffiths estimated the approximate date of construction of 'Port Rest' to be one hundred years. He then said that it could be sixty to seventy or one hundred and fifty years. Mr. Le Rossignol estimated 'Port Rest' to be between seventy-five and one hundred years of age. Mr. Tanguy produced an extract of Godfray's Map 1849. 'Port Rest' is shown on that map. Therefore, it was built more than one hundred and thirty-eight years ago. Mr. Peter John Noble, a Chartered engineer called as an expert witness for the defendant, said that all the evidence available in drawing and photographic form confirmed that the original garden level to 'Port Selah' was always almost up to the first floor level of 'Port Rest' against its West gable wall. We must say that our own observations, the situation of the drainage channel or gutter running along the whole length of the West wall of 'Port Rest' and the position of an air brick at or about first floor level all lead us to take the view that Mr. Noble is correct in his assessment. But, it is unnecessary to go so far as that because the burden rests upon the plaintiff to prove, on the balance of probabilities, that the defendant or its predecessors in title have caused to be placed on its property in the North-East part thereof and extending over the boundary such a quantity of soil as to constitute a significant encroachment. In our judgment she has failed to discharge that burden.

The defendant's new wall and back-fill

In our judgement, the "second strand" of the plaintiff's case namely that the building by the defendant of an additional wall on the defendant's property, more or less parallel with the West wall of 'Port Rest', and the back-fill behind

that wall, had caused further water retention and, consequently, the percolation of water through the soil to the West wall of 'Port Rest', equally fails. Mr. Anthony Louis Sargeant said that he back-filled the cavity behind the wall some two feet towards the plaintiff's house, probably with rubble. He denied the use of clay which would have had to be brought onto the site. He used rubble and soil. Any clay was already in the soil. He placed weep-holes in the new wall. Mr. Griffiths expressed the opinion that the new wall must make matters "slightly worse". The weep-holes were not very efficient. Mr. Noble, who inspected trial holes, found back-fill behind the new wall with natural soil beneath it. The back-fill had been used because the ground had been dug away to enable the new wall to be built. The back-filling comprised granite modules and boulders, i.e. rubble, in light brown/golden yellow silt matrix. It extended over approximately one third of the distance between the new wall and 'Port Rest'. When pressed as to whether this back-filling would impede the natural drainage Mr. Noble said it would depend on the proportions, boulders could be better and silt could be worse. But we were left with the clear impression that the back-filling would have no significant effect. Again, the plaintiff has failed to discharge the burden of proof.

West wall of 'Port Rest'

We have no doubt that the West wall of 'Port Rest', and in particular the North-West corner, suffers from dampness and that the damp conditions have been aggravated in recent years.

But there are a number of factors that are conducive to that situation. There can be no doubt that 'Port Rest' was built on an excavated site. It was built either against or very close to the bank. The gap was not significant. Ground is in a damp condition permanently. Damp will be drawn in to the interior of the property 'Port Rest'. The North-West corner of 'Port Rest' is built at a level slightly lower than that of the road. Thus damp penetrates from the roadside as well as from 'Port Selah', and there is rising damp. There

is no provision for damp proofing. The West wall of 'Port Rest' and the original North wall of the garden, act together as a dam to retain water in the soil adjoining 'Port Rest'.

The aggravation of the dampness in recent years has most probably been caused by the fact that the drainage channel or gutter running along the whole length of the West wall of 'Port Rest' has been rendered ineffective. Formerly, it drained into the rear of the property, probably to what was an open space or yard. However, the plaintiff's predecessor in title had erected a lean-to construction or addition to 'Port Rest' and the water collected by the gutter, which includes rain water striking the West face of 'Port Rest', has nowhere to go except into the strip of land immediately adjoining and forming part of 'Port Rest'.

We are satisfied that the defendant is not responsible for that change of circumstances.

Conclusions

Neither the defendant nor any predecessor in title of the defendant has committed any unlawful act, i.e. has interfered by act or omission with the plaintiff's use or enjoyment of her property.

The defendant has not been guilty of any unreasonable, excessive or extravagant exercise of its rights over its property to the damage of the plaintiff.

The defendant was legally entitled to use or occupy 'Port Selah' in the way that it did. In doing so it did not interfere with the ordinary use and enjoyment of 'Port Rest' by the plaintiff.

Accordingly, we dismiss the plaintiff's Order of Justice and we discharge the defendant from the action.

IN THE ROYAL COURT OF THE ISLAND OF JERSEY

(SAMEDI DIVISION)

BETWEEN

BEATRICE WILBERFORCE BIRD (widow of William Hamish Mitchell) — PLAINTIFF

AND

DIDO INVESTMENTS LIMITED — DEFENDANT

The Plaintiff will call the following witnesses:-

1. The Plaintiff
"Port Rest",
Anne Port,
St. Martin

2. Raymond Griffiths,
17 La Motte Street,
St. Helier

3. John Thomas Le Rossignol,
"Milestone",
Maufant,
St. Saviour

~~AND the Plaintiff will make reference to the following authorities:~~

a) Halsbury 4th Edition - Volume 34.

Paragraphs 301, 307, 309, 310, 311, 315, 316, 317 318, 319, 320, 321, 364, 365, 378, 381.

b) Leakey -v- National Trust (1980 1AU E.R. page 17).

~~c) Sedleigh - Denfield -v- O'Callaghan (19403 AU E.R. page 349).~~

d) Goldman -v- Hargrave & Others (1966 2 AU E.R. page 989).

~~e) Broder -v- Saillard (Law Reports Chancery Division 1875 - 6 page 692).~~

~~f) Alan Maberley -v- Henry W. Peabody and Co. & Others (1946 2 AU E.R. page 192).~~

g) Dale and Another -v- Dunell's Limited (Jersey Judgements Volume 2 1974 - 1976 page 291).

~~h) Key (nee Shaw) -v- Regal (Jersey Judgements Volume 1 1950 - 1966 page 189).~~

i.) Cross on Evidence (5th Edn): Chapter XIII - Section 2 "Estoppel by Deed"

~~j) [illegible] -v- Wilson (Jersey Judgments.~~

~~[illegible] -v- [illegible] Co Ltd~~

VIBERTS
(CMBT)

(P.T.O.)

3 - APR 1987

GREFFE

File No. 86/158

IN THE ROYAL COURT OF THE ISLAND OF JERSEY

(Samedi Division)

BETWEEN	BEATRICE WILBERFORCE BIRD (widow of William Hamish Mitchell)	Plaintiff
AND	DIDO INVESTMENTS LIMITED	Defendant

~~The Defendant will make reference to the following Authorities:-~~

(a) Halsbury 4th Edition - Volume 14, paragraphs 60, ~~61~~, 62, ~~63~~, ~~64~~, 168, 169.

(b) ~~Halsbury 4th Edition - Volume 34, paragraphs 309, 310, 315, 316, 317, 318.~~

(c) Rouse -v- Gravelworks Limited (1940 1 ALLER Page 26)

(d) Mesney and Others -v- Marett and Others (Table des Decisions de la Cour Royale 1931-1940 Page 69).

(e) Le Feuvre -v- Mathew (Jersey Judgements Volume 4 1972-1973 Page 2461).

(f) ~~Le Feuvre -v- Matthew (Jersey Judgements Volume 5 1974-1976 Page 49).~~

(P.T.O.)

MMGV & Co.
(MMGV)

PTO

Authorities referred to in the judgment :-

C.S. le Gros' Traité du Droit Coutumier de l'Ille de Jersey p.442 - "par commune renommée".

Sayers et Uxor -v- Briggs & Company (Jersey) Ltd (1963) JJ 249

Grear -v- Kettle (1937) 4 AER 396

Searley -v- Dawson, Dawson -v- Rothwell, Dawson -v- Davies (1971) JJ 1689

Domat - 'Loix civiles', Tome I, Titre 12, Section II, paragraph 8, p. 117 - the maxim "Sic utere etc".

Pothier - le Trosne edition 1844, Volume 16, Titre XIII, paragraph 21 - "servitudes réelles"

Pothier - Traité du Contrat de Société - Volume V second appendix at p. 240 - paragraph 230 'du Voisinage'.
and paragraph 235 of the second Article of the appendix at p. 245.

(P.T.O.)

JUDGEMENT OF THE DEPUTY BAILIFF ON THE MATTER OF COSTS

(Following an application by the defendant's Advocate for an award of full indemnity costs)

DEPUTY BAILIFF: The principles to be applied have in fact been considered in Jersey and I hope that in future counsel will not forget that we now have our Jersey Law Reports and will look at th and use them. In Jones, née Ludlow -v- Jones (number 2), 1985/86 Jersey Law Reports at page 40, the then Bailiff had to deal with exactly this question and applied the dictum of Lord Justice Brandon in Preston -v- Preston, so that whilst Preston is helpful, we have a Jersey case which applies (in Jersey those principles. The Bailiff said there:-

"As I said a short time ago, I have never fully understood why a successful litigant is not entitled to his or her full costs, subject of course to the costs in question being reasonable, having been reasonably incurred and not being excessive I still do not understand why that is not the situation, but I have to accept that it is not the principle upon which the English Courts proceed and no doubt for that reason I have to accept also that it is not the principle upon which the Jersey Courts proceed. I think that is quite clear, first from Preston -v- Presto and secondly from the fact that there are very few examples in Jersey where full indemnity costs have been given, so obviously for good reason or bad reason, we appear to have followed the English practice and I feel that I must follow that practice also. There is a right of appeal against my decision and it may be that if an appeal is brought against the ruling that I have just given then perhaps the Court of Appeal will look into it to see whether in fact it is a principle which this Court ought to be following but it does appear to me that it is a principle that we do follow. The Preston case is very similar to this case....."

and then the learned Bailiff went on to in fact cite Preston which Mr. Thacker has read to us.* In the course of his

* (insert) - He then dealt with the facts of the particular case.

judgment, he dealt with a number of matters.He said that success was not a ground for giving full indemnity costs.He said that the fact that it had been a hard fought case or a long case were not reasons for giving full indemnity costs and nor were the means of the parties.Then he went on to say:-

"I therefore do not find the exceptional circumstances which according to our practice, whether that practice be good or bad, it is necessary to find in order to grant costs on a full indemnity basis"

Therefore the Court applies those principles and although it is a pity that this action ever came before the Court, the Court cannot go so far as to say that the action was brought improperly. It is also a factor that although the Court fully understands that the beneficial owner of the defendant company took umbrage at the attitude of the plaintiff or her legal advisor and resolved to do nothing more, if the spirit of conciliation had prevailed or had resurfaced, proceedings might have been avoided.On balance therefore, the Court does not find the exceptional circumstances that are necessary for an award of costs on a full indemnity basis and the Court awards taxed costs to the defendant company.

Authorities referred to in the judgment:-

Jones, nee Ludlow -v- Jones (No.2) JLR 1985-86 at p.40
Preston -v- Preston 1982 1AER at p.41 et seq

Other authorities referred to :-

Halsbury - 4th edition - Vol. 14 - paragraphs 61, 63, 64

Le Feuvre -v- Matthew JJ Vol. 5 1974-76 at p. 49

Halsbury - 4th edition - Vol 34 - paragraphs 311, 319, 321, 378 and 381

Sedleigh Denfield -v- O'Callaghan (1940 3 All E.R. at p. 349)

Broder -v- Saillard (Law Reports Chancery Division 1875-6 p. 692

Alan Mabarley -v- Henry W. Peabody and Co et al (1946 2 All ER p. 192)

Key, née Shaw -v- Regal JJ Vol. 1 1950-1966 at p. 189

(P.T.O.)