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# STATES OF JERSEY



## REPORT ON FORESHORE ISSUES TO THE MINISTER FOR INFRASTRUCTURE BY DEPUTY SIR PHILIP BAILHACHE

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Presented to the States on 2nd July 2024  
by the Minister for Infrastructure

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STATES GREFFE

## REPORT

### Introduction

1. The Minister for Infrastructure has asked me to submit a report on foreshore issues around complaints by Julian Mallinson and Alan Luce and the related decision of a Complaints Board presented to the States on 1 June 2018.
2. Until 2015 the foreshore was owned by the Crown and let on a long lease to the Public of Jersey. Over many years there have been encroachments upon the foreshore. They range from substantial encroachments, where adjoining owners of property have built over or on the sea wall or relief, to minor encroachments where ladders or steps have been constructed down on to the beach (foreshore). Occasionally, the Crown has acted against the encroaching owner, but mostly the encroachments have been tolerated. At customary law, prescription does not run against the Crown; encroaching landowners did not therefore obtain any possessory title in relation to the encroachments.
3. On 12 June 2015 the Crown gave, by Deed of Gift passed before the Royal Court, the seabed and foreshore around the Island to the Public of Jersey. Jersey Property Holdings (JPH), a department in the Minister's portfolio, assumed responsibility for the administration of the foreshore. JPH considered itself bound by a Ministerial Decision of 9 November 2006 entitled Statement of Land Valuation which indicated that JPH should "extract the optimum benefit from the Public's property assets."
4. It is an open question whether the policy towards foreshore encroachments changed following the transfer of ownership by the Crown to the Public in 2015. JPH states that it did not change and that before 2015 many landowners had been charged for encroachments, usually based on independent advice from a surveyor. It is probably fair to say that there was no consistent policy. Sometimes encroachments led to payments of compensation, perhaps pursuant to the 2006 mandate; sometimes they did not. My own recollection, having held the office of HM Receiver General between 1986 and 1994, is that serious encroachments were acted upon, but minor encroachments were usually tolerated. I do not recall any case of the extraction of compensation. Perhaps subsequent holders of the office operated a different policy.
5. In any event, in 2015 there was no written policy for JPH to follow. It seems, however, that post-transfer of ownership by the Crown, it did "extract" what it considered appropriate from landowners wishing to sell their land whose encroachments came to its attention, although that was not a consistent policy. No account appears to have been taken of the fact that the foreshore was in the ownership of the Public only by reason of a generous gift from the Crown.

**Julian Mallinson**

6. One such landowner who came to the attention of JPH was Julian Mallinson. Mr Mallinson is a chartered surveyor who had been engaged prior to 2015 by JPH to advise in relation to a foreshore encroachment. The facts of that case are not relevant. Suffice it to say that Mr Mallinson was clearly aware of foreshore issues when he acquired in 2009 some apartments called Brise de Mer on the St Clement's coast. At that time there was discussion with the Receiver General about the ownership of the adjacent seawall which had been claimed by Mr Mallinson's predecessors in title in 1886. That claim was never conceded by the Crown. In 2014- 15 Mr Mallinson carried out work on the property and constructed balconies which overhung in parts the relief of the disputed seawall. In 2014/15 Mr Mallinson received an offer to purchase Brise de Mer, and further discussions took place with the Receiver General and JPH. The proposed purchaser required assurances in relation to title.
7. Extensive negotiations took place between Mr Mallinson and JPH between February and August 2015, culminating in a Ministerial Decision of 3 September 2015 authorising a Deed of Arrangement settling the boundary line and licensing certain encroachments on terms. In June 2016, by which time the Public was the owner of the foreshore, the contract was passed between the Public and Mr Mallinson's company by which the Public sold certain rights resulting from the alleged encroachments for compensation amounting to £19,500, plus £5000 for professional fees, and GST, making a total of £25,725. Mr Mallinson was dissatisfied with the way in which he had been treated by JPH and complained to a States of Jersey Complaints Board under the Administrative Decisions (Review) (Jersey) law 1982. In that complaint he was joined by Mr Alan Luce.

**Alan Luce**

8. Another such owner was Alan Luce who acquired Roche de la Mer in 2005. In September 2015 he placed the property on the market for sale. Shortly after, he and his agents received a letter from JPH stating that the construction of Roche de la Mer constituted a clear encroachment on the foreshore. Potential sales were inhibited while protracted discussions took place on the level of compensation JPH would require in consideration of the alleged encroachment being permitted to remain. There was no dispute that the alleged encroachment had taken place before Mr Luce acquired the property. The encroachment was valued on the basis that the land was building land with planning permission for development. The value was assessed at £56,500 and reduced by half (because Mr Luce was not personally responsible for the encroachment) to yield a figure (including GST) of £29,662.50. To that were added the valuation costs and the Public's legal costs making a total of £34,387.50. Roche de la Mer was sold on 9 December 2016. The Public was a party in consideration of the above sum. The contract contained a clause empowering the Public at any time to require the removal of the encroachments "where such is necessary to maintain the safety of any persons making use of the Foreshore and/or the

structural integrity of the Sea Wall and any associated sea defence works in the vicinity." The whole process significantly affected the health of Mr Luce. Indeed, he told me that he suffered a mental breakdown and felt obliged to leave the Island. He feels extremely aggrieved that the findings of an independent complaints board were largely ignored.

### **Complaints Board decision**

9. The Complaints Board conducted a hearing on 11th April 2018. Its decision was presented to the States on 1st June 2018. The details of the complaints and the Board's findings will not be repeated and are available in R.71/2018. However, the Board was critical of JPH. It recommended that the Minister should establish a clear policy about the boundaries of the foreshore and any perceived encroachments (Para 8.12). It concluded that the actions of JPH towards Messrs Mallinson and Luce were "unjust, oppressive or improperly discriminatory" and contrary to natural justice (Para 8.16). The Board expressed the hope that, once a clear policy had been established, "the Minister will review the terms concluded with the Complainants and refund them any difference between the compensation each of them paid, and the amount of compensation (if any) that would be payable had the new policy been in place at the time" (Para 8.15). The then Minister for Infrastructure presented a Response to the States on 7th August 2018. The Board's recommendation in Para 8.15 was not accepted but the Minister did agree to review his policy.

### **Foreshore policy**

10. The then Minister presented a report to the States entitled Encroachments on the Foreshore: Revised Policy in September 2020. It was substantially re-written in an amendment lodged by the Deputy of Grouville on 31 December 2020 and that amended policy was adopted by the States on 2 March 2021. It remains in force.
11. The alleged encroachments in question (both for Mr Mallinson and Mr Luce) all occurred before 12 June 2015, i.e. the date upon which the Public acquired the foreshore. That being the case, the Policy states -
  - "(1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
  - (2) Interfering encroachments may be required to be removed and the encroaching party may be required, depending upon the particular circumstances of the case, (including the length of time that the encroachment has existed), to contribute appropriately to the cost of such removal.
  - (3) Non-interfering encroachments, which are not minor encroachments, will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement."

"Interfering encroachments" are defined as those which "(a) frustrate, obstruct or make harder the exercise of any of the Minister's/GHE's/JPH's duties, especially in respect of access for maintenance and repair of flood defences, and/or (b) reduce any right of access or exercised right as a

matter of longstanding habitual and recognised custom by the general Public, and/or (c) have the potential to undermine or cause damage to a flood defence or pollute the foreshore, and/or (d) affect the delivery of a service by the Government of Jersey.

"non-interfering encroachments" are those that do none of those things.

12. The Policy adds that any encroachment affecting flood defences may be dealt with differently, but that is not relevant here. I observe that Articles 28-31 of the Drainage (Jersey) Law 2005 give the Minister wide powers to maintain flood defences.

#### **Application of the Policy to Mr Mallinson**

13. As is clear from the hereditary contract of 3rd June 2016 between the Public and Brise de Mer Apartments Association (successor in title to Mr Mallinson's company), the alleged encroachments affecting Brise de Mer fall into two categories. First, there are two openings in the sea wall which have allowed two sets of steps to descend to the beach. Secondly, there are parts of the building, boundary walls, terracing, and appurtenances which may encroach on or overhang the seawall. As to the first, it seems clear that this is a minor encroachment. As to the second, they are not minor encroachments, and it might have been argued that they were interfering encroachments. However, the Public has conceded that they may all remain as at present established. It follows that they do not currently interfere and should be categorised as non-interfering encroachments. Indeed, the hereditary contract lays down conditions which may not strictly have been specified by the Minister in a licence agreement, but for all practical purposes may be so regarded.
14. Neither minor encroachments nor non-interfering encroachments give rise under the Policy to any obligation to contribute to potential removal, and there is equally no provision for compensation to be paid. If therefore, the Policy is to be applied to Mr Mallinson, it follows that he should, as recommended by the Complaints Board, be reimbursed the monies paid in 2016, together with appropriate interest. That conclusion is reinforced by the licence agreement executed on 1st July 2022 between the Public and Manner Ltd (the owner of the Jersey Guides HQ, the adjacent property to Brise de Mer) where similar encroachments were permitted to remain without the payment of any compensation by the licensee. Indeed, since the adoption of the revised Policy on 2 March 2021, no compensation has been extracted by the Public from any owner of land in relation to alleged encroachments upon the foreshore.

#### **Application of the Policy to Mr Luce**

15. The encroachments in relation to Mr Luce again comprise two elements. The first was a set of steps leading to the beach, which is clearly to be characterised as a minor encroachment. The second element was summarised in the contract of 9 December 2016 as follows - "Part of the

building, boundary walls, paved terracing and certain other appurtenances forming part of the Property encroach on to or overhang the Sea Wall and part of the Foreshore ... ". As with Mr Mallinson's encroachments, they were clearly not "minor", and it could have been argued that they were interfering encroachments. Nonetheless, the Public has conceded that they may all remain as at present established. It follows that they do not currently interfere and should therefore be categorised as non-interfering encroachments. They all occurred before 12 June 2015. No compensation would be due under the revised Policy approved by the States on 2 March 2021.

### **The general stance of JPH**

16. JPH was subject to some criticism in the report of the Complaints Board. The detail is recorded in that report, and I shall not repeat it. Suffice it to say that the Complaints Board found that the vulnerability of both complainants was exploited by JPH. Both Mr Luce and Mr Mallinson wanted to sell, and they needed to have an agreement with JPH without which the sales would have been thwarted. The Board found that JPH did not act fairly, promptly, and transparently in its dealing with the owners.
17. The officials in charge of JPH at that time are no longer in post. The current head of JPH has asserted that it did not act improperly and was always under political direction and acting on the advice of the Law Officers' Department. JPH opposed the making of any ex gratia payment to either of the complainants.

### **Conclusions**

18. The Complaints Board has been established by the States to adjudicate on matters of alleged maladministration. The panel dealing with these complaints was chaired by a very senior lawyer and was composed of competent and independent members. I do not regard it as my function to reexamine the issues determined by the Board. They heard and saw the witnesses and applied their judgment to the questions they had to decide. Unless the findings they made were perverse, which in my view they certainly were not, I must accept them.
19. In relation to alleged foreshore encroachments, the Government should indeed act fairly, promptly, and transparently. Delays of 16 months (Mr Luce) and 19 months (Mr Mallinson) in bringing matters to a conclusion are neither fair nor prompt. Transparency requires JPH to disclose valuations which have been commissioned, particularly if the landowner is paying. More generally, JPH should not act as if the landowner is an adversary. There are hundreds of owners in Jersey whose properties adjoin the foreshore and many of them have issues similar to those of Mr Luce and Mr Mallinson. Any issues of alleged encroachment arising before 2 March 2021 fall to be dealt with under the Policy adopted by the States on that day. It should not be difficult to decide whether any alleged encroachment is minor, interfering, or non-interfering and the Policy then lays down guidance as to how to proceed. They should be dealt with expeditiously.

20. JPH suggested that one of the reasons why ex gratia payments should not be made was that it would set a precedent. In a sense, of course, any decision sets a precedent. That is not a reason for not making decisions. The recommendations below are, however, based upon the particular facts of this case. They relate to encroachments which were subject to requirements to pay compensation after the transfer of the foreshore by the Crown to the Public; the requirements were found to have been unfair by the Complaints Board. I am not aware of any similar situations.

#### **Other issues**

21. I am conscious that both Mr Luce and Mr Mallinson would say that they incurred losses, substantial in the case of Mr Luce, apart from the compensation that was extracted from them when their respective properties were sold. Mr Mallinson incurred legal fees, the cost of indemnity insurance, and losses as a result of a prospective purchaser withdrawing from negotiations on account of the foreshore dispute. Mr Luce has told me that he also suffered a substantial reduction in the sale price of his property as a result of the "blight" attributable to the foreshore dispute. He also feels particularly aggrieved that other landowners with similar issues to him and Mr Mallinson were not pursued by JPH, contributing to a sense of victimisation. I have taken all those issues into account but concluded that complete justice is not attainable at this remove in time and in all the circumstances. My recommendations accordingly are restricted to issues which are in my view unarguable.

#### **Recommendations to the Minister**

22. (1) The Complaints Board expressed the hope that, once a Policy had been established by the States, the Minister "will review the terms concluded with the Complainants, and refund them any difference between the compensation each of them paid, and the amount of compensation (if any) that would be payable had the new policy been in place at the time." That seems to me a very reasonable expectation. It seems clear to me that no compensation would have been due if the new 2021 policy had been in force in 2016. I accordingly recommend that the Minister should make an ex gratia payment to Mr Mallinson of £25,725 and an ex gratia payment to Mr Luce of £34,387.50. These sums were of course paid to the Public some years ago; in the case of Mr Mallinson, on 3 June 2016 and in the case of Mr Luce, on 9 December 2016. I have considered whether the figures should be updated in accordance with the Retail Prices Index or whether interest should be added. It would be unusual to increase the amount payable by reference to the RPI even if that course has the merit of simplicity. I am conscious that interest rates have until recently been extremely low and many people would not have placed money in a bank deposit account when rates were close to zero. I have concluded that a fair solution is to apply a compound interest rate of 3% per annum, with yearly rests, to the above recommended ex gratia payments. Interest has been calculated from the date of payment to 3 and 9 December 2023 respectively. My calculations

are that Mr Mallinson should receive interest of £6389 making a total ex gratia payment of £32114. Mr Luce should receive interest of £7905 making a total ex gratia payment of £42293.

23. (2) I further recommend that the Minister consider whether the making of these ex gratia payments should be accompanied by an apology, on behalf of the Government of Jersey, for actions which were characterised by the Complaints Board as unjust and oppressive.

24. (3) The actions of the Government, in the form of JPH, were driven by an understanding that it was under an obligation, following the Ministerial Decision of 9 November 2006, to "extract the optimum benefit from the Public's property assets". That was interpreted as imposing an obligation to drive as hard a bargain as could be obtained. That does not seem to me an appropriate approach for an organ of the Government.

25. The MD of 9 November 2006 quoted from the report accompanying the proposition to establish Jersey Property Holdings which included the following statements -

"... All organisations, both commercial and 'not for profit', must make best use of their property to realise both a financial return and to ensure that services are delivered efficiently and effectively. The States of Jersey is no exception."

"... The current administrative approach must be changed into a more entrepreneurial and innovative approach which ensures that the best use is made of all property."

"... maximise and implement opportunities for cost reduction and for extracting capital from the portfolio."

And later, the States approved a Property Plan for JPH which set its aims as including "... the extraction of optimum benefit from property assets."

26. In my view the Government should, in relation to the members of the public whom it serves, always act as a "bon pere de Jami/le", which is the traditional way of expressing the duty to act fairly and reasonably. I accordingly recommend that the MD of 9 November 2006 be supplemented by the following sentence -

"The duty to extract optimum benefit from property assets should always be interpreted as imposing an obligation to act fairly, reasonably and with moderation having regard to all the circumstances of the case."

15 December 2023      DEPUTY SIR PHILIP BAILHACHE