STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINTS BY MR. A. LUCE AND MR. J. MALLINSON AGAINST THE MINISTER FOR INFRASTRUCTURE AND JERSEY PROPERTY HOLDINGS REGARDING THE HANDLING OF FORESHORE ENCROACHMENT CLAIMS

Presented to the States on 1st June 2018
by the Privileges and Procedures Committee

STATES GREFFE

2018 R.71

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Minister for Infrastructure and Jersey Property Holdings regarding the handling of foreshore encroachment claims.

Connétable L. Norman of St. Clement
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

11th April 2018

Complaints by Mr. A. Luce and Mr. J. Mallinson against the Minister for Infrastructure and Jersey Property Holdings regarding the handling of foreshore encroachment claims

Hearing constituted under the Administrative Decisions (Review) (Jersey) Law 1982

Present

Board members –

G. Crill (Chairman)
J. Moulin
G. Fraser

Complainants –

A. Luce
J. Mallinson

Minister for Infrastructure / Jersey Property Holdings –

R. Foster, Director of Estates, Jersey Property Holdings
P. Ahier, Principal Property Manager, Jersey Property Holdings
S. Forrest, Estates Surveyor, Jersey Property Holdings

States Greffe –

L.M. Hart, Deputy Greffier of the States
K.L. Slack, Clerk

The Hearing was held in public at 10.00 a.m. on 11th April 2018, in the Blampied Room, States Building.

1. Opening

1.1 The Chairman opened the Hearing by introducing the members of the Board and outlining the process which would be followed. He indicated that this would be an informal Hearing in order to ascertain an appropriate position from which the Board would reach its findings. There followed a short adjournment, during which the Board, accompanied by both parties, visited Grève d'Azette, St. Clement, in order to put the complaints of Messrs. Luce and Mallinson ("the Complainants") into context.

2. Site visit

2.1 Looking west towards Havre des Pas from the slipway near the Rice Bowl restaurant, the Board viewed the location of Roche de la Mer and Brise de Mer *vis à vis* the seawall at Grève d'Azette, St. Clement, which was of granite construction, curved smoothly southwards and whose height had evidently been increased at some point in the past along its length. The Board noted that several properties appeared to abut the seawall and that there were a number of openings therein, some of which had steps which led down to the beach. There was also a concrete World War II bunker, which formed part of the sea defences.

2.2 The Board observed that Roche de la Mer had one set of steps down to the beach and that Brise de Mer had two. Mr. Luce indicated that Roche de la Mer was located on the former site of 2 fishermen's cottages, which had been built in the same fashion as the extant neighbouring cottage, Prospect Place. Mr. Luce informed the Board that he had suffered tidal flood damage to Roche de la Mer. The attention of the Board was also drawn to the Carlton Hotel, which had entered into a contract in connexion with an encroachment on the foreshore.

3. Hearing

3.1 The Chairman indicated that the complaint by Mr. Luce, in relation to Roche de la Mer and the complaint by Mr. Mallinson, in relation to Brise de Mer, had been made separately. However, on the basis that they covered the same issues, it had been agreed by all parties that they should be dealt with together. It had also been stipulated, in advance of the Hearing, that the issue of the ownership of the foreshore was not something on which the Board would give an opinion. Ultimately, Messrs. Luce and Mallinson had transacted with the Public as the *de jure* owner thereof. It was further agreed that where reference was made within the report to Jersey Property Holdings ("JPH"), this would be taken to include the Minister for Infrastructure.

4. Summary of the Complainants' case

<u>Mr. Luce – Roche de la Mer</u>

4.1 The bundle of papers provided by Mr. Luce, in advance of the Hearing, demonstrated that he had acquired Roche de la Mer, formerly known as Littlecourt, on 23rd September 2005. At that time, the part of the property, which was later asserted to constitute an encroachment onto the seawall, had already been constructed by a previous owner. The contracts of acquisition referenced a right to the opening in the seawall and the steps, but made no reference to the seawall itself. At the time of purchase, Mr. Luce had investigated the possibility of paying a one-off insurance premium in the event of there being a catastrophic breach of the seawall, but had been unable to acquire cover, because he had no insurable interest in the seawall, or the foreshore, which was, at that time, in the ownership of the Crown but leased to the Public. In June 2015, the Crown made a gift of the foreshore to the Public.

4.2 In September 2015, Mr. Luce placed Roche de la Mer for sale with Broadlands Estates. He was subsequently written to – as was Broadlands Estates – on 9th September 2015 by Mr. Forrest, Estates Surveyor, JPH, to the effect that the construction of Roche de la Mer constituted a clear encroachment onto the seawall, which belonged to the Public of the Island. The letter indicated that JPH had the intention to devise a politically supported policy in respect of encroachments over sections of the foreshore and sea defences. The letter continued: "*In the meantime, it is JPH's intention to commission a valuation of the encroachments and revert with in-principal* (sic) *terms for a settlement, however, prior to doing so, JPH will require your confirmation that you are willing to participate and that you will be responsible for all fees incurred by the Public, regardless of the outcome*.".

4.3 The result of this letter was to cause uncertainty over title issues, which led to potential purchasers withdrawing from the process, or offering significantly below the asking price, subject to the issue being resolved. It also prompted Mr. Luce's mortgage lender to notify him that it would be renewing its arrangement with him every 6 months, as it had concerns over the security of the "asset". Mr. Luce indicated that at this time he felt that he was "*at the mercy of progressive buyers*".

4.4 Mr. Luce and Mr. Forrest subsequently spoke on the telephone, and on 11th December 2015, the latter sent Mr. Luce an electronic mail message, which stated: "*While one possible solution is to allow the encroachments to remain upon payment to the Public of a financial consideration and the passing of a contract before the Royal Court in which the terms upon which the encroachments could remain would be set out, the Public reserves the right in the alternative to seek the complete removal of all and any encroaching parts of your property. I cannot stress too strongly the seriousness of the encroachments and this should be brought to the attention of any prospective purchaser(s).*". This correspondence and others emanating from JPH were caveated "Subject to contract and Ministerial approval".

4.5 In February 2016, JPH wrote to Carey Olsen, whom Mr. Luce had instructed to represent him in this regard. The letter referenced the land on which Roche de la Mer was constructed, which appeared to be sand dunes abutting the high tide mark, having first been the subject of a transaction in February 1824. The seawall was constructed in 1846 and JPH contended that some part of the foreshore lay behind the inner face of the seawall to the extent of the '*plein de Mars'* (high water mark of the Spring tide). The letter stated that the Law Officers' Department had undertaken title research and had not found any contracts to give legal rights to Roche de la Mer, or any of the neighbouring landowners, to build either on, up to or against, the sea defence, or to create openings therein. In that letter, Mr. Forrest indicated that the Minister for Infrastructure had not, at that juncture, been consulted on its contents and it was not, therefore, possible to confirm what his views would be. In that letter, reference was made to the base of the seawall extending further inland than was visible by '*probably 1ft 6ins*', the premise being that the wall had foundations, which were wider than the section of wall that was above ground.

4.6 In April 2016, JPH informed Mr. Luce that it would be instructing BNP Paribas Real Estates ("BNP") to undertake a valuation of the encroachment and that he would be required to meet the costs thereof. Mr. Luce had previously proposed using another valuer and felt that JPH was restricting his freedom of choice. In response to JPH's electronic mail correspondence, Mr. Luce sought confirmation in writing that the Minister for Infrastructure had approved the claim against him and others and requested clarification on the position taken by the States. An answer to this enquiry was not forthcoming at that time.

4.7 On 2nd June 2016, Mr. Luce's lawyers wrote to JPH and raised a number of points. In respect of the claim for "monetary compensation" from their client they asserted that "*the Public ... pitches its unlimited resources against an ordinary homeowner; it intentionally blights the homeowner's prospects of selling by threatening both the landowner and prospective purchasers ... the only way the ordinary homeowner can force a resolution is by costly and time consuming litigation*". It was also submitted that the Crown had not, in fact, owned the foreshore in the location of Roche de la Mer and that it had been owned by the Seigneur of the Fief de Samarès. Mr. Luce's predecessor in title had owned the land as far as the high water mark. If the seawall, which had been constructed in 1846, had been built on the high water mark, or to the north of it, the Public had encroached on the land belonging to Mr. Luce's predecessor in title. If it had been built below the high water mark, the Public had encroached on land belonging to the Seigneur. It was questionable, therefore, how the Public claimed to acquire good title to the wall and how, by its own encroachment, it sought to claim a "*relief*".[1] This notwithstanding, Mr. Luce reluctantly agreed in this correspondence that BNP should be appointed as valuer. It was recalled that the issue of the ownership of the foreshore was not something on which the Board would give an opinion at the Hearing.

4.8 There followed an exchange of letters and electronic mail exchanges between Mr. Luce's lawyers and JPH over the proposed wording of the instructions to BNP, on the basis that there was no agreement over the extent of the alleged encroachment and Mr. Luce wished for the valuation to be based on various scenarios. On 24th July 2016 Carey Olsen wrote to JPH: "*Our client's position is that the claim is not made out on the arguments you have put forward, but he needs to sell his property and may be forced by the States' never before made claim to settle it.*".

4.9 During August 2016 amendments to the letter of instruction for BNP were proposed by Mr. Luce's lawyers and JPH. In an electronic mail message, Mr. Forrest indicated that a new policy in respect of the foreshore and the Island's sea defences was being developed, which would: "*address the operational requirements of the Island's sea defences and how these defences can best be maintained ... take in account the provisions of Part 4 (Flood Defence) of the Drainage (Jersey) Law 2005 ... address the Public's position with regard to existing and future encroachments onto the Foreshore and the sea defences and provide a framework for dealing with these on a case by case*

[1] An offset. Boundary structures (including boundary stones) can be owned with or without a *relief.* A standard *relief* is 1½ Jersey feet (1 foot 4½ inches imperial) wide, but this measurement can vary in certain circumstances (taken from the Jersey Legal Information Board glossary of legal terminology).

basis". However, it also conceded that: "*With regard to … the diminution in value of the Public's property (the seawall and the land claimed behind it), this land has no inherent value per se. However, as with any land, its value should reflect the use to which it is put.*".

4.10 Having instructed BNP, it subsequently emerged that that company was unable to undertake the work until the end of November 2016, which was unacceptable to Mr. Luce as it would have had the effect of further delaying the sale of his property. He had proposed that his original preferred valuer should be used, but this was declined by JPH, who instructed Buckley & Co.

4.11 The valuation by Buckley & Co. was obtained on 12th October 2016, in excess of a year after JPH had initially contacted Mr. Luce. Buckley & Co. provided an opinion on a range of possibilities, due to the differing views of the parties. On the one hand, the Public argued that the encroachment at Roche de la Mer extended as far as 8 feet and 5 inches beyond the southern face of the parapet and that the compensation payable should be the resultant increase in the value of the property. On the other hand, Mr. Luce contended that, in the interests of fairness, compensation should be payable on the diminution in the value of the land over which the property was said to encroach, mindful that the alleged encroachment had been constructed before he purchased the property.

4.12 Buckley & Co. assessed the diminution in the value of the property alleged to be owned by the Public as building land with planning permission for development as it existed at the time arising from the encroachment. It explored a number of scenarios, and the parties agreed the average of the following valuations. The width of the seawall plus 4ft. 4½ inches (3ft. of seawall foundations plus the seawall *relief* of 16½ inches) was valued at £51,000. The width of the seawall, plus 5ft. 9 inches (3ft. of seawall foundations plus the *relief* of the property of 2ft. 9 inches) was valued at £62,000. This gave an average of £56,500, which was reduced by half to give the figure of £28,250 plus GST (£29,662.50). Mr. Luce was also required to pay professional costs of £4,500, plus GST (£4,725.00), comprising a share of the costs of the valuation by Buckley & Co. and the Public's legal costs. His total outlay in connexion with this matter was, therefore, £34,387.50.

4.13 Buckley & Co's valuations were based on the hypothesis that the seawall was wider at its base than was actually visible above ground (as referenced in paragraph 4.5 above) and that the foundations "*extended northwards underground for a distance of 3 feet*". These additional 3 feet cost Mr. Luce in excess of £15,000. However, Mr. Luce provided evidence, within his bundle of papers, that JPH had been made aware in March 2015 – almost a year before they had written to him contending that the foundations extended further inland than was visible – that the seawall at the location of Brise de Mer had a vertical face to its landside.

4.14 When excavation work had been undertaken at Brise de Mer in order to lay the foundations for the columns which supported the balcony, it had been noted that the seawall had a vertical face. Mr. Mallinson had furnished Mr. Luce with a letter from his structural engineer, which confirmed this. He had also provided electronic mail correspondence between him and an Assistant Engineer at the Department for Infrastructure, in which the latter had opined: "*I would not*

expect the wall construction to extend further landside. I would expect a vertical face ...". It was extremely unlikely that the seawall should be constructed in a different fashion at the location of Roche de la Mer, because the 2 properties were located within 50 metres of each other.

4.15 On 9th December 2016, Mr. Luce eventually sold Roche de la Mer. The Public of the Island was party to the contract of sale. Clause 15 of the contract read as follows –

> "*THAT the Minister for the Department for Infrastructure, such other department of the States or other body having the administration of the Sea Wall or the Foreshore or any person or body to whom the functions of that person body or department may be transferred hereafter ('MDfI') on behalf of the Public may at any time require the Purchaser by notice served on it in writing to immediately (i) remove the encroaching walls, structures (or any part thereof) (ii) remove the terracing (or any part thereof) (iii) block up the openings in the Sea Wall and (iv) repair remove and/or replace the steps joined to the Sea Wall 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, such written notice to be issued on such terms and conditions as MDfI may in its absolute discretion determine having regard to the necessity 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, all such works being undertaken at the sole cost of the Purchaser*.".

4.16 Mr. Luce indicated that this was an unfair clause as, although he had been obliged to pay a significant sum in relation to the encroachment, this clause afforded him no guarantees that it could remain in place, as it gave the Minister the power to oblige him to remove it immediately. Further, he informed the Board that Clause 14 of the contract was incorrect in that it referenced 2 openings and sets of steps in the seawall onto the beach at Grève d'Azette, whereas there was, in fact, only one opening and set of steps from Roche de la Mer onto the beach. The error had been highlighted to JPH in August 2017, but had elicited the response from Mr. Forrest that: "*It is clearly an error that could be easily rectified in the future sale of the property, to which sale the Public would be happy to be party if so required.*". At the Hearing, Mr. Luce described this error in the contract as "*sloppy*", which was accepted by Mr. Foster.

4.17 In relation to the "trigger events" (see paragraph 5.5 below), which would prompt JPH to contact a landowner in respect of a suspected encroachment, Mr. Luce noted that the Department had indicated that it was always willing to discuss a resolution on a "without prejudice" basis. In his view, this was misleading and contradicted the stated aim of JPH to extract "*optimum benefit from property assets*".

4.18 Mr. Luce notified the Board that having reached a settlement with JPH, albeit under duress, he felt that the Department should treat all people whose properties potentially encroached on the foreshore, in an equitable manner. He was concerned that the owners of the properties, who were direct neighbours of Roche de la Mer, had not been approached by JPH, presumably on the basis that they were not seeking to sell. He described this as an inadequate and selective process.

4.19 Mr. Luce indicated that he felt "*ambushed*" and "*let down by the process*" which was based on "*unfair leverage*". He informed the Board that he had been told it would take approximately £100,000 and 10 years to challenge the actions of JPH through the Courts, which he stated was "*not justice*". The uncertainty over title, the delays and the duress from JPH had such a significantly adverse effect on his health and wellbeing that he had decided to leave Jersey on completion of his complaint against JPH.

Mr. Mallinson – Brise de Mer

4.20 The bundle of papers provided by Mr. Mallinson in advance of the Hearing demonstrated that he was the beneficial owner of Ksum Ltd., which had commenced the purchase of the freehold interest in the Brise de Mer Apartments at the start of 2009.

4.21 At that time, Mr. Mallinson instructed lawyers to act on his behalf, whose title checks raised the issue of the ownership of the seawall. Since 1886, the owners of the land on which the Brise de Mer Apartments had been built had claimed ownership of the seawall. Moreover, uncertainty existed over the extent of the southern boundary of the property and the location of the original foreshore. Accordingly, the vendor's lawyers were requested to liaise with the Law Officers' Department to seek ratification of the boundary. An electronic mail message, dated 6th February 2009, from the Head of Conveyancing to Appleby indicated that: "*I have now had the opportunity of discussing this matter with the Receiver General and he has instructed me that he is not prepared to give the confirmation requested in your email. He is not satisfied that our records are definitive enough to ascertain the extent of the Crown's foreshore and as he is dealing with several other similar cases at present he does not want to set any form of precedent*". A later electronic mail message (24th March 2009) from the same individual, stated: "*The Receiver General has instructed me that he is not willing to enter into any form of agreement in respect of the foreshore at present*". In the light of the foregoing, the lawyers acting for Mr. Mallinson agreed with the opinion of the vendor's lawyers that as the Crown had no reliable evidence of the extent of the foreshore, it was inconceivable that money would be expended in seeking to change the *status quo*. Accordingly, Ksum Ltd. acquired the Brise de Mer Apartments in May 2009.

4.22 At the time of acquisition, there was one set of steps down from the Apartments to the beach, but there had previously been a second set, which had been removed and the section of seawall blocked up. In October 2013, Mr. Mallinson contacted Her Majesty's Receiver General, requesting his consent to be a joint applicant on the form to seek planning permission to reinstate the second set of steps, on the basis that the Crown was the owner of the foreshore. H.M.

Receiver General acquiesced, as had similarly been the case in 2010, when the Girl Guides Association had applied for permission to install steps to the beach from a neighbouring property, and on 28th January 2014 Ksum Ltd. obtained permission to erect an external staircase onto the beach. No charge was made by H.M. Receiver General for either consent. Planning permission had also been obtained in August 2013 to transform 9 apartments into 6 and to construct balconies to the south-west elevation of Brise de Mer. This work to the apartments and the reinstatement of the steps onto the beach was completed in December 2014.

4.23 At this juncture, Mr. Mallinson received an offer to purchase Brise de Mer Apartments. Lawyers acting on behalf of the prospective purchaser opined that "*We consider that on balance the claim of ownership of the South wall of the Property towards the foreshore is not 100% clear*.". When Ksum Ltd. had acquired the Brise de Mer Apartments, Mr. Mallinson's lawyers, Ogier, had carried out their own research, which demonstrated that the seawall at the site of Brise de Mer (and Roche de la Mer) was constructed in 1846. As noted above, the first claim of ownership of the seawall by the owners of properties on which Brise de Mer is situated, was made in 1886. In the view of Ogier, it was not coincidental that this claim to ownership should have been made 40 years after the construction of the wall, because of the notion of "*possession quadraginaire*"[2], which would have been a familiar concept to conveyancers in the mid-19th century. Furthermore, they would have been fully aware that, whilst it was not possible to bring such a claim against the Crown, it was possible against another owner, which gave significant weight to the view that the foreshore in this area was in the ownership of the Seigneur of the Fief de Samarès. This opinion had also been expressed by the lawyers representing Mr. Luce (see paragraph 4.7 above).

4.24 The advice of the prospective purchaser's lawyers was forwarded by the former, without the advance knowledge of Mr. Mallinson, to the Minister for Infrastructure, asking if a deed of arrangement could be entered into. The Minister, in turn, redirected the enquiry to Mr. Foster, Director of Estates, JPH, on the basis that it was not strictly a political matter. On 15th January 2015, Mr. Mallinson sent an electronic mail message to Mr. Foster, maintaining that Ksum Ltd. had the legal ownership of the seawall and that no encroachment had occurred. He offered to pay any reasonable legal fees incurred by the Crown, or Public, in order to resolve any uncertainty over boundary issues, but asserted that he would not pay any "*compensation*".

4.25 Mr. Forrest responded to Mr. Mallinson on 27th January 2015, having sought the advice of the Law Officers' Department. As was the case with Mr. Luce, this correspondence and others emanating from JPH were caveated "Subject to contract and Ministerial approval". JPH contended that: "*The seawall … cannot form part of the property owned by KSUM Limited by way of prescriptive title and the recently constructed balconies appear to constitute an encroachment onto the sea defences … We see little reason, then, why KSUM Limited should benefit from the ratification of its encroachments on the preferential basis you seek.*". Mr. Mallinson subsequently met with Mr. Forrest and Mr. Foster, who

[2] Prescriptive possession was a customary law codified in the Code of 1771. Forty years' peaceable, uninterrupted and unchallenged possession of land can give good title to that land (taken from the Jersey Legal Information Board glossary of legal terminology).

refused to entertain any suggestion that the seawall was not in the ownership of the Crown at that juncture, reiterated that Ksum Ltd. had encroached onto the sea defences, and sought compensation in order to ratify the boundary.

4.26 On the basis that the prospective purchaser's lenders would not provide the funding for the acquisition of Brise de Mer Apartments until such time as the boundary had been ratified, Mr. Mallinson felt that he had no alternative other than to offer £10,000 to effect this ratification and by way of compensation for any alleged encroachments, thereby foregoing his claim to the ownership of the seawall.

4.27 On 9th March 2015, H.M. Receiver General indicated that, in principle, he had no objection to being a party to such a transaction. He referenced Mr. Mallinson's offer of compensation and stated: "*Normally I would need to employ the services of a valuation agent for an impartial assessment but this would be time consuming and I believe that time is critical in this matter*.". This notwithstanding, JPH and H.M. Receiver General decided that a valuation was required to calculate the proposed compensation for the alleged encroachment. The valuation was to cover the encroaching parts of the balconies onto the *relief* of the seawall; access rights to maintain the boundaries; and the use of the seawall's *relief* as an amenity space. At Mr. Mallinson's request, it was agreed that a separate price would be obtained for the latter. JPH instructed BNP to undertake the valuation, but Mr. Mallinson was not permitted to jointly instruct the firm, so was unable to be party to the terms of reference. Moreover, he was not allowed to have sight of the valuation, which was undertaken on 17th April 2015, despite numerous requests and having been required to pay for it. It was not until the documents were circulated by the parties in advance of the Hearing of the Complaints Board that Mr. Mallinson finally had sight of the valuation by BNP, because it had been included in the papers provided by JPH. According to the report of JPH, this initial valuation by BNP suggested a value of between £5,000 and £6,600.

4.28 In April 2015 the Brise de Mer Apartments Association was formed in order to facilitate the sale of individual apartments at Brise de Mer.

4.29 On 11th May 2015 the Principal Property Manager, JPH, Mr. Ahier, wrote to Mr. Mallinson to the effect that the Law Officers' Department had advised H.M. Receiver General not to participate in the contract to ratify the boundary, on the basis that it would be unsatisfactory to agree a boundary line without addressing the encroachments, and that there were concerns around liability in respect of the opening in the seawall and the steps down to the beach.

4.30 On 12th June 2015, the Crown gifted the Foreshore to the Public of the Island and Mr. Mallinson was informed by JPH that a revised valuation would need to be commissioned to cover additional alleged encroachments on which BNP had not previously been requested to provide an opinion, *viz* the 2 sets of steps which led from Brise de Mer down to the beach and the *relief* of the seawall. This notwithstanding that the western set of steps had been in place for in excess of 100 years, and the eastern set had been installed following a joint planning application by Mr. Mallinson and H.M. Receiver General (see paragraph 4.22 above). As previously, Mr. Mallinson was not permitted to jointly instruct the valuer, nor was he permitted to know the contents of the valuation. It was not

until the documents were circulated by the parties in advance of the Complaints Board Hearing that Mr. Mallinson finally had sight of the second valuation by BNP, because it had been included in the papers provided by JPH. According to the report of JPH, the second valuation by BNP suggested a consideration of £18,750.

4.31 On 3rd June 2016, the Public sold and transferred to the Brise de Mer Apartments Association various rights in connexion with the foreshore and seawall, resulting from the alleged encroachments, for £19,500, plus £5,000 for professional fees incurred by the Public and GST thereon (£25,725). This was some 18 months after Mr. Mallinson had initially approached JPH with a view to seeking a resolution to the boundary issue. Clause 6 of the contract of sale was in almost identical terms to those contained within clause 15 of Mr. Luce's contract of sale (see paragraph 4.15 above), which allowed the Public to require encroachments to be removed in the future. Mr. Mallinson notified the Board that even though the Brise de Mer Apartments Association had entered into the contract with the Public, the absence of full title arising therefrom continued to be problematic, and at least one apartment owner had encountered difficulties when attempting to sell, as had others in similar circumstances.

4.32 Mr. Mallinson highlighted that the amount that he had been required to pay JPH for the alleged encroachment at Brise de Mer was excessive, when compared with Roche de la Mer and Petit Chateau de la Mer, whose owner had also entered into a contract with the Public. He indicated that there was no correlation between the extent of the alleged encroachments and the valuation thereof, particularly as, at Brise de Mer, the complaint related to a balcony which was overhanging by just 1.13 ft.^{2} on to the *relief* of the seawall. He referenced a letter to Mr. Luce's lawyers, in the case of Roche de la Mer, where JPH had written: "*We would seek a valuation based on the diminution in the value of your client's property occasioned by the removal of the encroachments, but as we are seeking a solution which permits the encroachments to remain (upon terms to be set out in a future Deed of Arrangement), I see little point in seeking a valuation based on the costs of the removal of the encroachments.*". However, when BNP had been instructed by JPH to value the encroachment at Brise de Mer, the valuation was to be based on the cost of removing the same.

4.33 Moreover, Mr. Mallinson highlighted that he had, in his view, been treated prejudicially by JPH as he was the only person to be required to pay compensation for the existence of steps from his property onto the beach. The owners of Roche de la Mer and Petit Chateau de la Mer had not been treated in the same way.

4.34 At the Hearing, Mr. Mallinson asked officers from JPH why they had taken the valuation by BNP and then charged him extra. He cited their own policy, which referenced a "*fair and proper price*", and queried how the actions taken by JPH could be described as fair when they had approached an external valuer to obtain a fair value and then asked for more.

Joint areas of complaint

4.35 Both Complainants expressed the view that JPH had been "high-handed" in rejecting outright any doubts in respect of the ownership of the foreshore, which they had both raised, *viz* that the foreshore at the location of both Roche de la Mer and Brise de Mer had been owned by the Seigneur of the Fief de Samarès, rather than the Crown. In early correspondence, JPH had stated that, as far as the Public was concerned, the ownership of the seawall was not in question. This notwithstanding that a company acting on behalf of a Seigneur of another fief had been given a settlement of land on the Waterfront, worth £10 million, which was indicative of the assertion that legal title to the foreshore of the coast of Jersey was vested in the Seigneurs of those Fiefs that bordered the sea.

4.36 Although the Complainants had to meet the cost of the valuations of the encroachments, the way in which the instructions for the valuations were commissioned was a source of frustration for them both. Mr. Luce was refused his choice of valuer, albeit he was afforded input into the letter of instruction and was able to see the valuation. Mr. Mallinson was not permitted to jointly instruct the valuer, nor was he informed of the contents of the valuation. Moreover, the Complainants emphasized that JPH had not dealt in an equitable manner with all landowners. They cited the example of the Carlton Hotel, which had paid a significant consideration (£230,000) to the Public in relation to a number of doors and windows which had encroached onto La Collette Promenade. They described it as "*astonishing*" that hotels on either side of the Carlton had not been pursued in a similar manner.

4.37 Both Complainants cited the lengthy delay between their first contact with JPH in relation to the issues around boundaries and encroachments and the passing of the relevant contract before the Court. In the case of Mr. Luce, this took from September 2015 to December 2016; and in the case of Mr. Mallinson, from December 2014 to June 2016.

4.38 The Complainants also felt that the contracts were imposed on them by JPH, from a position of power, rather than being negotiated. JPH acted at a time when they were at their most vulnerable, because they were seeking to sell their properties. JPH required them to agree their terms, or to force a resolution by lengthy and expensive litigation. To quote Mr. Luce's lawyer: " … *it is not in Mr. Luce's best interests to litigate. Litigation is expensive and the Public has unlimited funds to draw upon. So, he must negotiate.*".

4.39 The Complainants alleged that as soon as the Public had acquired the foreshore in June 2015, it had begun to pursue "low-hanging fruit", albeit JPH did not develop a clear policy in relation to encroachments on the foreshore until December 2017. When the foreshore had been in the possession of the Crown, there was little evidence that alleged encroachments had been actively acted upon. Accordingly, for long periods of time, many homeowners had been led to believe that an encroachment onto the seawall was not an issue. Reference was made to the land upon which the seawall from Pontac to La Rocque was built and the reclaimed land to the rear. In 1971, the States had approved the purchase of the land with a view to gifting it to the neighbouring properties as extended gardens. A severe storm had caused a land collapse which had resulted in the States constructing and backfilling a new seawall. However, the

transaction was not completed and, in 2009, JPH sought the approval of the Minister to acquire the seawall from the Crown and to transfer to the 63 neighbouring properties the relevant co-extensive sections of reclaimed land behind the seawall. In the report to the Minister, it was stated: "*the land was acquired from the Crown for the sole reason of building the sea wall in 1971, and it would be morally wrong to seek to profit from that land*".

4.40 It was argued that the conditions imposed within the contracts (clause 15 in the case of Mr. Luce and clause 6 in the case of Mr. Mallinson) were unreasonable, given that they permitted the Minister for Infrastructure to require the purchaser to immediately undertake work, including the removal of any encroaching wall or structure, for which they had paid compensation. Moreover, these 'clawback' clauses were causing some lawyers acting for prospective purchasers to advise their clients not to buy the properties that were subject to such clauses, thereby 'blighting' possible sales. When lawyers acting for the Complainants had highlighted to JPH that the conditions were onerous, JPH had not been willing to negotiate.

5. Summary of the case of the Minister for Infrastructure / Jersey Property Holdings

5.1 JPH had also provided a bundle of papers in advance of the Hearing. It indicated that prior to the acquisition of the foreshore from the Crown in 2015, it had leased the same and had, with the consent of the Crown, effected a level of land management control as if it were the owner. It further stated that it had responsibility as the flood defence authority in the Island, under the Drainage (Jersey) Law 2005, to provide, maintain, improve and extend facilities and measures to protect Jersey from flooding. The seawall at Grève d'Azette was considered to be a valuable flood defence structure for a large number of properties and the coast road. In general terms, JPH's case was that any encroachment onto land in the ownership of the Public should not obstruct, or make it more difficult for it to exercise any of its powers or functions, and this was particularly the case in relation to the maintenance and repair of sea defences.

5.2 JPH argued that, in passing contracts with Messrs. Luce and Mallinson, it had not simply been a case of obtaining a consideration for the encroachment, but to reflect the stewardship role that JPH had in respect of the custody and care of the asset held by the Public. Further, its policy: "Statement on Land Valuation", which had been approved by the States in 2006, indicated that it should extract "*optimum benefit from property assets*". If the Public disposed of property, or granted rights over property, at less than the best consideration, this could be deemed a subsidy for the purchaser, and it was important to ensure that the nature and amount of the same could be justified. Accordingly, such matters had to be considered on a case-by-case basis.

5.3 According to JPH, the granite sea wall at Grève d'Azette, which had been constructed in 1846, had been built on the foreshore in order to operate as a sea defence. Part of the foreshore lay behind the inner face of the seawall to the extent of the full Spring tide ("*plein de Mars*"). As a result, when the Public was gifted the foreshore by the Crown, it acquired the area of land behind the

seawall, which was part of the foreshore. This was on the basis that the foreshore was defined as the area lying between the low water mark and the high water mark of the '*plein de Mars*'.

5.4 The granting of planning permission, such as Mr. Mallinson had obtained in relation to the second set of steps at Brise de Mer, did not remove the requirement for the person obtaining such permission to have the relevant legal rights to build, or carry out other operations on another person's land. It would be expected that a property owner would be aware of the extent of their own property, having been advised of such by their lawyer on acquisition. JPH indicated that there appeared to be an increased awareness of the Public's ownership of the foreshore, as evidenced by the location of the Homestill development at Grève d'Azette, which had been set back from the seawall.

5.5 JPH made the point that there was no expectation for the Crown, as former owner of the foreshore, or the Public, as current owner, to continually monitor any developments on properties adjacent to its land. This had particularly been the case for the Crown because, as previously noted, *possession quadraginaire* did not run against it, whereas it did for any other landowner, including the Public. As a consequence, there were certain "trigger events" which would prompt JPH to contact the owner, or agent, when an encroachment came to light. These could be a planning application, the marketing of the property, or change of ownership, or the receipt of information. JPH indicated that they would then take a view on how to proceed, generally in dialogue with the owner.

5.6 According to JPH, the Crown had not developed a policy to deal with encroachments, because *possession quadraginaire* did not run against it. It did not wish to lead proceedings in relation to the foreshore, so would rely on the Public, as tenant, to deal with them. Each case would be dealt with on its merits, but would usually result in the removal of the encroachment, or the "*sale of the value of the rights consistent with the benefit to the encroacher*". H.M. Receiver General would, by agreement, receive between 5 and 10% of the valuation.

5.7 Mr. Foster indicated that JPH had not been involved in the transfer of the foreshore from the Crown to the Public, but had been aware of it. The foreshore policy, which had been approved by the Minister in December 2017, had been based on the experience of the Public when dealing with encroachments as the tenant of the Crown, and was intended to complement and supplement the 2006 "Statement on Land Valuation" policy. It was argued that the way in which JPH dealt with encroachments currently was not materially different from before the policy had been introduced. The contracts with the homeowners whose properties abutted the seawall at Pontac (as referred to in paragraph 4.39 above) had been used by JPH as the template contracts for subsequent seawall arrangements. Those properties had been authorised in writing to extend and use up to what was then a new seawall, and contracts had since been passed to reflect that they encroached with permission thereon.

5.8 The foreshore policy set out the procedure that was to be followed when encroachments were brought to the attention of JPH. The policy provided that landowners were to be notified within 28 days of the discovery of the encroachment. Depending on the "severity" of the encroachment, there were various options. If it was considered too trivial to warrant action, it would be

left in abeyance. If the encroachment was more than trivial, but recovery of the land was not "*currently*" required, the land might be licensed, or leased, to the landowner, subject to further investigation and agreed terms. As an alternative, disposal of the land, or the sale of the rights, might be felt more beneficial to the Public than licensing or leasing. In other cases, where voluntary compliance had not been achieved, the Minister would take formal steps, as appropriate.

5.9 With regard to the assessment of the "value" of the encroachment, Mr. Foster indicated that there was no set policy on whether or not to engage a valuer. In cases where a piece of land had little value, JPH would be unlikely to use a valuer, particularly if it was the vendor. Where an issue was contentious, JPH would be more likely to engage the services of an external valuer. There was nothing to prevent a landowner from commissioning their own valuation if they were not satisfied with the valuer selected by JPH. In relation to Brise de Mer, JPH had taken the view that because the encroachment was recent, the Department could take its own valuation advice. In the case of Roche de la Mer, the encroachment was historical and had not been constructed by Mr. Luce, so the decision had been taken that the valuer could be commissioned jointly. Once the valuation was received, JPH would take legal advice and then make a recommendation to the Minister as to the level of compensation payable, either at the value provided, or at a different figure.

5.10 The policy provided that a valuer, when assessing the value of an encroachment, might consider the following, or a combination of the following: the value added to the freehold interest of the property, which had benefitted from the encroachment; the cost of rectification, by means of removing the encroachment and reinstating the land to its prior state; or evidence of other settlements and ongoing negotiations. In the case of existing encroachments, the value sought might be reduced to reflect the length of time that the encroachment had been in place, or other relevant factors. These were set out in a sliding scale, and ranged from no reduction for any encroachment less than 5 years old, to a maximum 50% reduction for any encroachment aged over 40 years.

5.11 In JPH's written case it was stated that: "*Encroachment involving a seawall is not a scenario which fits into traditional property transaction. There is not a market place for such land, and it becomes a special transaction between the two parties. There is no other party which the Public can seek to sell to. All that the Public can do is look at what the encroacher has gained from building on the Public's land*".

5.12 In the case of Brise de la Mer, the valuation provided by Buckley & Co. had been £56,000. The foreshore policy had not been in place at the time, but JPH indicated that it had been under development and had, accordingly, reduced the compensation payable by 50% in recognition of the length of time that the encroachment had existed.

5.13 Specifically in respect of Mr. Luce, JPH opined: "*The settlement was for a modest consideration compared to the overall value of the property … the encroachments are not trivial in scale … A 50% reduction was accepted to reflect the historic nature of the encroachment and period of existence of the encroachment. At no time was Mr. Luce forced to admit guilt* (sic) *for the*

encroachments. It was accepted that he himself was not responsible for them. Nevertheless it was a problem that he inherited when he bought the property and should have been dealt with by his lawyers at that time. In addition, he enjoyed the benefit of the encroaching parts of his property".

5.14 JPH's concluding view in respect of the case of Roche de la Mer was that it had "*dealt with the encroachment fairly, looking after the interests of the Public of the Island in a manner that is also consistent with the future maintenance of the sea wall as a flood defence*".

5.15 Specifically in relation to Brise de Mer, JPH indicated that the encroachments were not historical, but arose from works carried out once planning approval had been obtained. According to JPH, the balconies were built in part onto the Public's *relief* on the rear face of the sea wall, the patios for the 2 south-west ground floor apartments encroached onto the same Public land, and the access openings through the seawall, with the steps down to the beach, were being used for direct access, despite there being no contractual access rights: "*... the balconies, patios and direct beach access were only possible by utilising adjoining land in Public ownership. Brise de Mer was therefore deriving gain from land not in its ownership.*".

5.16 As was also the case with Roche de la Mer, JPH's view in respect of Brise de Mer was that the encroachments were not trivial in scale, and the settlement was for a modest consideration compared to the overall value of the property.

5.17 JPH's concluding views in respect of Brise de Mer was that: "*Mr. Mallinson has no grounds for complaint. JPH has dealt with the encroachment fairly, looking after the interests of the Public of the Island in a manner that is also consistent with the future maintenance of the sea wall as a flood defence.*".

6. Questioning by the Board

6.1 Mindful that the Board had indicated that it did not intend to voice an opinion on the ownership of the foreshore, JPH challenged the allegation by the Complainants that it had been "high-handed" in relation to this issue. Mr. Foster indicated that it was not for JPH to determine ownership, because they acted on advice from the Law Officers' Department. He informed the Board that he was not aware of any challenge to the ownership of the foreshore in this area and was clear that the Public had ownership thereof.

6.2 The Board indicated that, in correspondence between JPH and the Complainants, reference to encroachments implied that the boundary was clear and that the neighbouring owners had obviously extended beyond it. However, during the site visit to Grève d'Azette, the Board had observed an arc of seawall and queried whether that absolutely followed the boundary of the foreshore or whether it, in fact, was built according to other topographical, structural and geographical considerations. It was mooted that whilst properties along the length of the seawall might encroach, in places, onto the foreshore, it could equally be the case that the Public, as owner of the seawall, was encroaching onto land in private ownership.

6.3 JPH accepted the point and informed the Board that the boundary of the foreshore was not a matter on which it had sought advice, as there was a legal definition of "foreshore". The presence of fixed structures provided JPH with an indication of the relative positions, but it was conceded that it was not possible to be absolutely certain. The Board was mindful of JPH's own policy on encroachments on the foreshore, which stated: "*It may fairly be said that there is no map showing (with a sufficient degree of accuracy) the extent of the upper limit of the Foreshore nor the extent of private land towards it, albeit Admiralty charts, Ordnance Survey and other materials have been reviewed to see whether greater certainty could be provided*.". Officers from the Department explained that, when dealing with these issues, JPH sought to achieve a reasonable position and needed a starting point for any discussions, because it was of no benefit to either party to have an unresolved boundary.

6.4 Mr. Foster informed the Board that, during 2018, JPH would be seeking the necessary resources to clearly identify boundaries around the foreshore and to highlight any potential issues. Encroachments onto the foreshore had the potential to interfere with the maintenance of the sea defences; and from a public perspective this was the primary reason for seeking to resolve matters where these existed. He accepted that this was a significant piece of work, which would take time to complete. The Board questioned whether it was the policy of JPH to establish the sea defence area, or merely to identify any encroachments. Mr. Ahier expressed the view that both went hand-in-hand. JPH wished to establish the extent of the foreshore by means of research, but in cases where the foreshore was found to be located behind the seawall, it would have to consider how to deal with any properties that were abutting, or encroaching on, the same.

6.5 The Board noted that JPH wished to create consistency in respect of boundaries *vis à vis* the foreshore, but that it was constrained currently by a lack of resources. It suggested that when the foreshore had been in the ownership of the Crown, which was not adversely affected by '*possession quadraginaire*', there had been no driving need to achieve this, but that the transfer of ownership to the Public meant that "*the clock was ticking*". Accordingly, the Board suggested that there would be people who owned property which encroached onto the foreshore, but they would not come to the Department's attention for 15 years, for example, due to a lack of resources. As a result of the sliding scale adopted by JPH in its foreshore policy, these people would benefit from a fundamentally different outcome from those individuals who were unfortunate enough to come to the attention of JPH as soon as the policy had come into force. Mr. Foster indicated that JPH intended to deal with the more substantive encroachments at an early juncture, and anticipated that the work could be completed within a 5 year period. He was, however, unable to indicate how many properties currently adjoined the foreshore. The Board queried how JPH's stated aim to deal with people in a consistent manner could align with the sliding scale contained within the foreshore policy. Mr. Foster responded that the Government sought to be fair and reasonable in its approach, in balancing the needs of individuals against those of the Public. Where these needs did not coincide it could be difficult, but it was in the best interests of all concerned to reach a solution, and he believed that JPH was successful in this regard.

6.6 The Board queried the delay between JPH first making contact with the Complainants in relation to the encroachments, and the passing of the relevant contracts. The Chairman, as a lawyer, indicated that, in his experience, it should have taken no more than 3 weeks to ascertain the definition of a boundary and encroachment. In the cases of the Complainants it had taken up to 18 months to resolve and this was, in his view, indicative that there was something very much awry in the process.

6.7 Although it had not previously been raised by JPH, the Department indicated that, where it was safe and practical, its policy was that the foreshore was to be enjoyed by the Public of the Island, and it would seek to identify whether there was a genuine prospect of preserving and enhancing those areas, mindful that the work to do so would be resource-hungry and would have to compete with other demands on public funds. It was noted that a promenade already existed thereon in many places around the coast. If the foreshore was not accessible because it had been blocked by an encroachment, JPH would consider the type of encroachment and take a view on whether it should be removed. Mr. Foster informed the Board that a judgment would be taken on a case-by-case basis because, *inter alia*, there was no point in creating a land-locked amenity space to which no-one could gain access. However, it was not possible to prescribe every eventuality within a policy. Mr. Forrest indicated that under the provisions of the Drainage (Jersey) Law 2005, there was a prohibition on any construction within 5 metres of a designated flood defence (which included the defence of the land against sea-water and coastal erosion), which would relate to any seawall so designated. In other cases, it was proposed that there should be an access strip of 8 feet to enable access for machinery, if so required.

6.8 The Board opined that the neighbours of the foreshore would need to be involved in order to establish a clear boundary, and suggested that when dealing with Messrs. Luce and Mallinson, JPH could have notified the owners of neighbouring properties that it would be prepared to negotiate in relation to their boundaries, on the basis that the Public required land behind the seawall in order to ensure the efficient maintenance thereof. It mooted the establishment of a default position whereby the Public, as owner of the foreshore, would consider any approach in order to establish a boundary up to the seawall and deal with any encroachments on a separate basis. Mr. Foster agreed that this would, in principle, be possible. He indicated that the Department had invited anyone who believed they might be affected to contact them, and agreed that a communication exercise would form part of the larger piece of work to establish the location of the foreshore.

6.9 The Board questioned the "clawback" provisions imposed within the contracts (clause 15 in the case of Mr. Luce and clause 6 in the case of Mr. Mallinson). It was suggested to JPH that they were oppressive, on the basis that the Public had taken money from the Complainants, but had not passed good title. Whilst indicating that these were standard provisions and that the Law Officers' Department had been responsible for drafting the contracts, the officers from JPH undertook to review them. The Board also highlighted the section of the contracts which related to repairs and maintenance of the seawall, and expressed surprise that these afforded the Public access rights onto neighbouring properties. The Chairman indicated that whilst he could understand the requirement to retain access over public land which had been encroached upon,

it was a different matter to create new rights onto another person's property, where such rights had not previously existed. Mr. Ahier informed the Board that the Public had the responsibility to maintain the sea defences and, whilst every effort would be made to repair the seawall from the sea side, it was possible that access from the land side would be required.

7. Closing remarks by the Chairman

7.1 The Chairman thanked the Complainants and the representatives of JPH for their time and contributions, and indicated that a report of the Hearing would be prepared in due course, which would be circulated to both parties for their input on the factual content. The findings of the Board would subsequently be appended thereto.

8. The Board's findings

8.1 One of the complaints made by both Complainants was that JPH did not adequately consider their arguments in respect of the ownership of the foreshore. As stated at the outset of this report, the Board was not prepared to consider the matter of the ownership of the foreshore, in part because that is a legal issue rather than an administrative one, but also because both Complainants ultimately chose to enter into contracts passed before the Royal Court on the basis that the Public was the legal owner of the foreshore, and both swore oaths to abide by the terms of those contracts. The Board therefore considered the complaints, accepting at face value that the Public is the legal owner of the foreshore, rather than making any finding to that effect.

8.2 Prior to the transfer of the foreshore by the Crown to the Public of the Island, it is apparent that there was no set policy as to how the Crown dealt with matters relating to boundaries, or encroachments, between the foreshore and neighbouring properties in private ownership. Requests from the owners of properties adjoining the foreshore for clarification of boundaries, or encroachments, were dealt with by the Crown on an *ad hoc* basis, acting on the advice of the Public as lessee of the foreshore. Arrangements tended to be on a pragmatic and case-by-case basis, and were generally prompted by the neighbouring owner requiring clarity of boundaries, usually for the purposes of the sale of the relevant property.

8.3 It is worth reiterating that the most critical factor differentiating the ownership of the foreshore by the Crown from the ownership by the Public is the legal principle of prescription. Time does not run against the Crown, meaning that the Crown could take steps to remove an encroachment towards the foreshore at any time, irrespective of the length of time such encroachment had been in place. The same principle does not apply to the Public, meaning that once the foreshore was transferred into the ownership of the Public, any encroachment towards the foreshore which can be shown to have been in place for a period of 40 years subsequent to the date of transfer, was legitimated by the passage of time. As soon as the foreshore was transferred to the Public: "the clock started ticking" as far as any encroachments towards the foreshore were concerned. With that in mind, it was, therefore, entirely appropriate that the Public should

formulate a policy relating to its ownership of the foreshore and, by extension, how it approached the matter of encroachments towards it.

8.4 The Board accepts that the Public has a responsibility, *inter alia*, to provide, maintain, improve and extend facilities and measures to protect Jersey from flooding. However, the Public also has a responsibility to manage the property for which it acts as custodian on behalf of the people of the Island, in a fair and proper manner. It is right that, as a general rule, public land should not be given away, but it is also appropriate that negotiations involving public land should be conducted in a fair and transparent manner apposite to the nature of the transaction.

8.5 It is a fundamental pillar of both complaints that JPH exploited the vulnerability of the Complainants in requiring a clarification of the boundaries of their respective properties in order to conclude the sales of their properties, and that there was really no negotiation over the terms upon which the Public would be prepared to ratify the *status quo* as far as the boundary and alleged encroachments were concerned. It is, of course, the sale of a property that most commonly prompts the clarification of a boundary, or the ratification of an encroachment and, in such a case, it can be said that the property seller who seeks clarification comes to the negotiations at something of a disadvantage. Nevertheless, the Board is in absolutely no doubt that, when it is approached by a neighbouring owner seeking such clarification or ratification, the Public has a clear duty to act fairly, promptly and transparently in its dealings with that owner. The Board does not consider that it did so in either of these cases.

8.6 Whilst the Board considers that it was appropriate that JPH should seek a valuation of the alleged encroachments, and also that such valuation should have been at no cost to JPH, the Board is strongly of the view that, once obtained, any valuation should have been made available to the relevant owner to form the basis of negotiation, along with any other valuation that the owner may have commissioned separately. The basis on which any valuation was assessed would have been apparent and any disparity clear. Terms of settlement could have then been negotiated in the normal manner, whereas in both cases JPH appears very much to have adopted a "take it or leave it" stance. The Board accepts that JPH believes that it was acting reasonably, in that JPH considers that it could have demanded greater levels of compensation than, in fact, it did; but the fact remains that the financial terms, and also the contractual terms, of settlement were not the outcome of what anyone could reasonably regard as a negotiated settlement. In short, it appears that JPH exploited the vulnerable position that the Complainants found themselves in as owners urgently needing to sell their respective properties.

8.7 In addition, the Board considers that JPH acted unfairly by demanding from Mr. Mallinson a higher amount of compensation than that assessed by BNP, its appointed independent valuer. The Board is of the view that if an independent valuation is sought by the Public, then the amount of such valuation is the maximum that can be justified, whilst being only the starting point in any negotiation. In non-commercial transactions such as these, it is inappropriate for the Public to seek to maximize profit but, rather, members of the Public should be dealt with in a fair, equitable and transparent manner.

8.8 The Board acknowledges that each case of potential encroachment has to be dealt with independently, and the appropriate level of compensation – if any – assessed and negotiated case-by-case. That will necessarily take some time, but the Board could see absolutely no justification for the inordinate amount of time it took for JPH to reach concluded arrangements with the Complainants (16 months in the case of Mr. Luce and 19 months in the case of Mr. Mallinson). JPH was aware of the stress and anxiety being caused to the Complainants by the continuing delay, yet it appears to have done nothing to bring matters to a timely conclusion. Given the huge potential number of similar situations which will arise in the near future, involving virtually every other property adjoining the foreshore where boundaries and possible encroachments may be unclear, the Board urges JPH to refine its procedures, determine responsibilities, and above all make public its policy with regard to its stewardship of the foreshore. The Board was informed that JPH is seeking additional manpower to assist with the task, but the Board considers that the establishment and publication of a fair and transparent policy regarding the boundaries of the foreshore and encroachments towards it are an even greater priority.

8.9 The Board considers that there should be a policy which acknowledges that it is in the public interest for the landside boundary of the foreshore towards private properties to be clarified. The Board notes that, since entering into contracts with the Complainants, the Minister has devised a policy to deal with encroachments, but that policy does not identify what the default location of the landside boundary of the foreshore should be.

8.10 The Board was extremely concerned by JPH's statement that the foreshore is an amenity to be enjoyed by the Public at large. If, as the Public suggests, the foreshore extends landwards from the seawall, the implication is that JPH is happy for the general public to have free access onto what neighbouring owners have, for many years, thought of as "their" property. Whilst the Board would applaud any plan to establish more accessible coastal promenades, or pathways, suitable for public access, such a plan must sit alongside a clear policy for the clarification of boundaries towards the seawall where it is not intended to establish a promenade, or other public access.

8.11 The Board suggests that the landside face of the seawall should be the starting point for the fixing of the boundary of the foreshore. The Public should retain such land as it considers essential for the safeguarding and maintenance of the seawall, with any residual part of the foreshore transferred to the adjoining owner for an appropriate consideration. In addition, on a case-by-case basis, there should be negotiations to allow encroachments within such retained areas of land to remain. Alternatively, it would be appropriate for the Public to require and enforce the removal of such encroachments, but only where the maintenance of the seawall, or the fulfilment of the Public's sea defence obligation is impossible.

8.12 As stated earlier, the Board considers it appropriate that the Minister should establish a clear policy with regard to the boundaries of the foreshore and the treatment of any perceived encroachments towards it. However, the Board considers that the sliding scale adopted by JPH to calculate an appropriate "discount" in relation to encroachments which have been in place for a period of time is unfair, discriminatory and arbitrary, and does not align with the stated aim of JPH to deal with private property owners in a consistent manner. Moreover, the Board considers the sliding scale to be something of a blunt instrument, and thus an inappropriate remedy for the failure of the Public, as lessee of the foreshore for many years, to monitor adequately any potential encroachments.

8.13 The Board is further of the view that the contractual conditions that the Complainants were forced to accept were unreasonable. The Board is in no doubt that the Complainants had no choice but to accept the terms stipulated by JPH if they wished to sell their properties, and to that extent they were "forced to accept" them. JPH informed the Board that several of the clauses were "standard", in that they had been included in a number of similar previous contracts with owners adjoining the foreshore. Be that as it may, the Board considers that a number of them were unreasonable and oppressive. For example, the Board considers it to be unreasonable for JPH to require payment of a substantial sum in compensation for permitting encroachments to remain, but then to impose an obligation on the owner to remove the encroachments at his, or her, own cost, if requested by JPH to do so at some time in the future. Similarly, the Board found it unreasonable for JPH to impose a condition requiring the owner to allow the Public access onto the neighbouring property for the purpose of maintaining the seawall, when no such right previously existed, and no compensation for the granting of such right appears to have been considered. Such conditions have a detrimental effect on the value of the properties, but no acknowledgement of that was made by JPH in determining the compensation demanded.

8.14 The Board notes that JPH has undertaken to review the wording that was used in the contracts with the Complainants in respect of similar circumstances that arise in the future, and the Board considers it essential that it does so. The Board would expect that, having done so, JPH will offer the current owners of the properties, formerly owned by the Complainants, the opportunity to adopt revised conditions in place of those unreasonable conditions that the Complainants had little option but to accept; this at no cost to the owners.

8.15 By the same token, the Board expresses the hope that, notwithstanding that the contracts with the Complainants have been passed through Court, once a clear policy regarding the fixing of the boundary of the foreshore and the payment of compensation in relation to any encroachments has been adopted, 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. In any event, the Board expresses the hope that the Minister will refund to Mr. Mallinson the difference between the compensation that he paid, and the lesser amount assessed by BNP as being the appropriate amount of compensation.

8.16 In conclusion, the Board, having considered whether the complaints could be upheld on any of the grounds set out in Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, concluded that the actions of JPH (and thereby the Minister) in the cases of Messrs. Luce and Mallinson were "unjust, oppressive or improperly discriminatory" and were "contrary to the generally accepted principles of natural justice". Accordingly the Board upholds the complaints.

8.17 The Board asks for a response from the Minister within 2 calendar months of the publication of its report.

Signed and dated by –

G. Crill, Chairman ..... Dated: .....

J. Moulin ..... Dated: .....

G. Fraser ..... Dated: .....