STATES OF JERSEY

COMMITTEE OF INQUIRY: REG'S SKIPS LIMITED – PLANNING APPLICATIONS – FIRST REPORT

Presented to the States on 16th September 2010
by the Committee of Inquiry: Reg's Skips Limited – Planning Applications

STATES GREFFE

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1 INTRODUCTION

1.1 The Committee of Inquiry was appointed by the States on 20th October 2009 with the following terms of reference –

> *To investigate all planning matters relating to the various relevant planning applications made by, or on behalf of, Reg's Skips Ltd. in connection with the activities of the company as skip operators –*
>
> *(a) to establish whether the various planning applications were determined appropriately and to a standard expected of the Planning and Environment Department;*
>
> *(b) to establish whether the legal fees accrued by Reg's Skips Ltd. totalling nearly £300,000 were as a result of any failings in the processes or actions of the Planning and Environment Department; and*
>
> *(c) to make recommendations for changes and improvements to the planning process to ensure that any failings identified in relation to these applications are not repeated in the future.*

1.2 The proposition to establish the Committee was brought to the States by Senator F.E. Cohen, Minister for Planning and Environment ('the Minister'). He proposed the first two of the above terms of reference, recognising that they would require a thorough look not only at procedure and decision-making in his own Department, including from before he himself became Minister, but also at the impact of its actions upon Reg's Skips Limited ('RSL), the company's landlord, Mr C. Taylor (owner of Heatherbrae Farm, St John), and neighbours Advocate and Mrs M. Yates, who were the principal complainants in the case. The third, broader, term of reference was added by an amendment during the States debate on the proposition.

1.3 This initiative by the Minister followed an earlier debate on a proposition by Senator B.E. Shenton that Reg's Skips Limited ('RSL') should be compensated for costs incurred in defending a civil action brought against the company in the Royal Court by Mr and Mrs Yates. The reasoning behind this proposition was that the legal action against RSL had arisen only because of shortcomings on the part of the Planning and Environment Department ('the Department') regarding RSL's relocation to Heatherbrae Farm in 2005 and its handling of subsequent events after complaints were received about noise pollution. After lengthy debate the proposition was not agreed by the States, whose sentiment was that the matter warranted independent examination before any view on its merits could properly be taken. The Minister responded promptly to this by proposing to set up the Committee.

1.4 The initial debate in the States had been on 1st April 2009. The Minister's proposition to take matters forward through a committee of inquiry was agreed on 13th May 2009. There was then a five month delay until our being established was agreed by the States on 20th October. After due formalities we thus began work only in November 2009, some eight months after Senator Shenton's initial proposition was lodged and almost five years since the commencement of the main train of events to be examined.

1.5 We started by seeking out relevant files and documents held by the Department's Development Control Section and other departments such as Health Protection (part of the Health and Social Services Department). It proved to be a less than wholly straightforward exercise for all the relevant papers to be identified and drawn together. There were a lot of them. We then identified those persons from whom we judged we should receive oral evidence in order to begin to understand what had occurred. Between December 2009 and March 2010 we held five public hearings for this purpose. We received or requested a range of memoranda and advice from various interested parties and have had helpful exchanges with several of them to clarify or illumine particular things as our work has progressed. This includes our having received very useful comments for accuracy on sections of our report in draft.

1.6 We place on record that we have had full cooperation from all those with whom we have needed or wanted to communicate. In particular, we have received valuable assistance from Mr and Mrs R. Pinel, the proprietors of RSL, and from the Minister and officers of the Department.

1.7 The voluminous evidence that we have received and reviewed has sometimes been less than simple to digest and interpret. The case had many twists and turns, some unusual, over several years. The papers from the Department also revealed that not inconsiderable elements of the actions it took concerning RSL, including Ministerial decision-making, were carried through with only limited preparation of reports or written memoranda, and without satisfactory minuting of decisions and actions taken. It also needs to be said that some of the key events we have been investigating happened over five years ago and memories fade, especially of the more commonplace activities that tend not to be recorded in detail in a busy government department. One potentially key witness, the late Advocate C. Lakeman, who represented RSL in the Court of Appeal in 2008, sadly died before we were in a position to seek to interview him. All this has made our task of understanding that much more onerous and is one reason why it has certainly taken a little longer to prepare this report than we had initially envisioned. We are confident, though, in now presenting it that we have been able to read, hear and review all appropriate evidence and that our analysis, conclusions and recommendations are accordingly well-founded.

1.8 This report addresses only the first two of our three terms of reference, that is, those concerning RSL's planning history and the way it, and Mr and Mrs Pinel themselves, came to be faced with some very particular problems and, eventually, substantial legal costs. We intend to present before long a second, final report pursuant to our third term of reference, on possible changes and

improvements to the planning process aimed at averting a repeat of any failings we have identified in examining RSL's case. We have found on the Department's side a fair number of failings of procedure and process, as will be apparent from this first report, and we want to give ourselves time enough to ensure that, once these are open for debate, so to speak, we are then able to make good, credible recommendations for the future conduct and governance of the planning process in Jersey that reflect what emerges from this report. This is not least because we got to know in the course of our work that we were not the first reviewer or official body in recent years to have identified 'failings' and apparent organisational weaknesses within the Department; and, indeed, in this regard we have also noted a recent initiative of the Minister himself to enlist expert advice to help simplify the planning process to make best use of the Department's resources. In the meantime, though, it is important that our findings and conclusions about RSL's case are brought into the public domain without more ado.

1.9 Our report starts with a short summary of our main findings. This summary is, in truth, reasonably comprehensible only when read alongside the main body of our report. That comprises a narrative account of RSL's planning case, the various actions by, and interactions with, the Department surrounding it, covering principally the period 2005–2008, and other key events, notably Mr and Mrs Yates' successful obtaining of an injunction requiring RSL to leave their premises at Heatherbrae Farm and related cases in the Royal Court and the Court of Appeal. The narrative is interspersed with commentary and criticism as the story goes along that we hope speaks largely for itself. Our conclusions in relation to our first two terms of reference then follow, together with certain recommendations.

1.10 We have added three annexes for the benefit of the reader. First, we have prepared a chronology of main events to assist charting a course through quite dense territory. Secondly, we have sought to adumbrate the Island's waste management strategy and policies, broadly as they obtained at the time. This is important background to the case. It includes, for example, reference to action by what is now the Transport and Technical Services Department (TTS)[1] in 2003, endorsed by the then Finance and Economics Committee, deliberately to further discourage the receipt of unsorted skip loads at the La Collette reclamation site, a policy that had a direct impact upon the nature of the skip industry in the Island by, in effect, imposing a requirement for mixed loads of inert waste in skips to be sorted on private land before being taken for disposal. Thirdly, we have reproduced the transcript of a telephone conversation on 9th January 2008 between the Minister and Senator Shenton. We were made aware of this conversation in evidence that we received and we deduced, correctly, that it had been recorded. We therefore prepared a full transcript from the recording on file at Senator Shenton's place of work. This conversation, together with the very fact of its having been recorded, has already happened to achieve some public notoriety and, since it is a very

[1] Previously known as the Public Services Department.

important piece of evidence, any misunderstanding about what was said in the course of it needs to be averted.

1.11 As already noted, we include such reference as is necessary to various cases in the Royal Court and the Court of Appeal: Mr and Mrs Yates' unsuccessful application for leave to seek judicial review of certain decisions of the Department and the Minister concerning RSL; their successful action in *voisinage* against RSL in the Royal Court (Yates v Reg's Skips Limited ([2007] JRC237)), RSL's unsuccessful appeal against the Royal Court's order for it to vacate its premises at Heatherbrae Farm ([2008] JCA077B), the Royal Court's direction that the Minister should pay a proportion of RSL's costs ([2008] JRC088), and the Minister's successful appeal against that order ([2008] JCA203). The significance and somewhat unusual nature of these cases adds more than a footnote to the history of RSL's planning case. It is not for us to seek to reopen the judgments that were delivered but we do comment on aspects. Linked closely to this, we also comment on aspects of the Department's evidence submitted both to the Royal Court (in both instances, but in the first on behalf of the plaintiffs, Mr and Mrs Yates) and to the Court of Appeal (on the costs appeal), which we think was not entirely sufficient in its account of the planning history, a factor possibly not without consequence in the way the various cases went. In any event this succession of legal actions is an especial reason why RSL's case in these years was out of the ordinary.

1.12 We do not apologise for having written a quite lengthy report. The shortcomings we have uncovered in the way that RSL's case was handled by the Department, especially once complaints about the company were first received in 2006, were considerable and we have felt it only correct to seek to elucidate them in some detail in order to justify our conclusions and to set the scene for recommendations in both this report and our second. Those in particular who profess interest in the quality of public administration in Jersey and the importance for good government of its being conducted to the highest standards will, we trust, find the narrative of some interest, perhaps regardless of specific interest or otherwise in planning policy and practice itself.

1.13 Throughout our report we have named all relevant actors in the story, including officers of the Department and some other officers. We are conscious that this has not always been the practice in reports such as this but our view is that disguising or omitting names would not be good on public policy grounds and might even seem to be tantamount to dissembling on our part. Moreover, if we did not name the relatively few officers who were involved in RSL's case, others, we reasoned, soon might or would. We do believe, however, that individual officers should not in any way be inhibited from saying publicly what they will about our report and our findings, whether individually, collectively or through the Minister or their Chief Officer. That is the best way, we think, to ensure good debate about our findings and the best contribution to the learning and improvement that may flow from them.

1.14 Where we have commented on the actions of individuals, those persons had the opportunity to comment for accuracy on drafts of what we proposed to say about them. We reviewed with care the drafting of our report in the light of comments received, making many changes as a result. The resultant findings

and conclusions, however, are ours alone and they do include criticism, to varying degrees, of the actions or approaches taken by the Minister, of other politicians involved in the work of the Department, and of certain officers. We have not shied away from doing this in fulfilment of our remit but in all cases we have been determined to present such criticism in a measured way.

1.15 One mitigation of any such criticism, perhaps applicable especially in regard to those who handled day-to-day work on RSL's case, is what we consider to have been some systemic weaknesses in the management and organisation of the development control function in the Department that potentially allowed elements of poor procedure and process to go unremarked and unchecked. Organisational weakness or failing does not excuse action that may have been unsatisfactory, misdirected or poorly executed, or corporate action that fell short of standards to be expected by citizens, but perhaps in some way helps to explain it. We also appreciate that the Department faced a good deal of pressure because of its relentless workload at a time of buoyant economic activity, and that senior officers also had to contend with other challenging factors, such as the introduction in 2006 of the Planning and Building (Jersey) Law 2002 and, in one particular instance, untoward external pressure from a political source. The true failing in this case was a corporate one and the responsibility for that has to be shared quite widely, including at the political level where justified. The same goes for learning from it.

1.16 We also make the point that many of the events we have endeavoured to describe and consider took place a good few years ago. Things have moved on, including in respect of both the political and official leadership of the Department, and while it has been our duty to seek to establish accurately what happened in this case several years ago, and why it happened, particularly where it did not go right, we are equally conscious of the need to look forward to improvements in the planning process and not just backwards to things that could have gone better at the time but didn't. That will be the theme of our second report. Meanwhile, we hope that the States, in accepting our analysis and recommendations, will create closure of an unfortunate saga, for the sake of all involved or concerned.

1.17 Transcripts of our public hearings will be made available in due course on the States Assembly website at www.statesassembly.gov.je. Other key documents that we sought or received will similarly be available. Some will not, such as, for example, legally privileged communications, material from commercial sources or otherwise given to us in confidence, and some documents relating to other planning cases that we examined for comparative purposes.

1.18 The Committee's direct expenditure to date has been £4,135, which has been found from the existing States Greffe budget. Two-thirds of this sum comprises the costs of recording and transcribing oral evidence. Most of the rest is attributable to hiring a good room at the Town Hall for our public hearings and the cost of newspaper advertisements about the same. Time spent on the case so far by our appointed Clerk has been notionally costed at approximately £10,000 but the Greffier of the States has been able to absorb this within his budgets for 2009 and 2010 without seeking refund from another source. No expenses have been claimed by any member of the Committee,

whose contribution has been voluntary, although we received lunchtime refreshments during four of our five public hearings. The budget of £15,000 from the Planning and Environment Department that was identified for our work by the Minister for Treasury and Resources we have thus, so far, not needed to use.

1.19 Last but certainly not least the Committee wishes to place on record its commendation of the excellent support and advice it has had from its Clerk, Mr Ian Clarkson of the States Greffe. Our task would have been next to impossible without his continuous industry, knowledge, wisdom and grip from the moment of our appointment. His contribution has been an example of public administration in Jersey at its very best.

2 SUMMARY OF MAIN FINDINGS

2.1 A planning application submitted by RSL in 2004 to relocate to The Homestead, St. John, was generally determined appropriately, although the Department did not take into account relevant Island Plan waste management policies. (Paragraphs 4.1–4.9)

2.2 The policy and legal bases for the enforcement action initiated by the Department in 2004 to inhibit RSL's operations at La Prairie, St Peter, were not beyond challenge. The main driver was concern at the visual impact of the site as seen from the adjacent main road. The Department had no documented procedures or guidance for staff on 'pre-1964' sites. Nothing was put in writing to question the sorting of skips on the site by RSL although the notion of 'unauthorised' skip sorting at La Prairie became, later on, a key element in enforcement action against the company at Heatherbrae Farm. (3.8-3.14)

2.3 Once Heatherbrae Farm had been identified by RSL in January 2005 as a potential new location, the Department encouraged and assisted the move. In considerable part this was because it was seen as a 'solution' to the visual amenity 'problem' at La Prairie. The Department itself, unusually, sought pre-application advice from the Planning Sub-Committee and the very next day, notwithstanding a cautious response by the Sub-Committee as recorded in its minutes, assisted the landowner, Mr Taylor, to prepare and submit a planning application, which was accepted for processing immediately despite loose wording (which we believe was suggested by officers of the Department). (5.6–6.12, 9.14)

2.4 The Department's subsequent handling of this application fell short of a reasonable standard, although at this initial point that was not in any way detrimental to RSL. Health Protection was not properly consulted. It was told only that the use would be '*commercial*' with no mention that a skip business would be involved. Later on, it said that, had it known what was involved it would have advised refusal. Policy considerations regarding such factors as noise pollution and development in the Countryside Zone were not taken into proper account, and the draft conditions were not reviewed by a senior officer in signing off the file as they should have been. (One of these conditions, requiring operations to be conducted '*in the same way...as a skip storage and sorting yard only*' as at the previous site, was very loosely worded, and the Department's interpretation of this came to lie at the heart of the problems that it later caused for RSL.) It is also far from clear that officers were empowered to determine the application under delegated powers, as they did. (6.8–7.28)

2.5 The Department's celerity in 2006 in initiating formal enforcement action against RSL in response to one neighbour's complaints about noise failed to take into account the scope of the planning permission that had been given. The permission had imposed no enforceable constraint either on the quantum of sorting of skips or on the working methods to be used for sorting. But, in response to the complaint, it was presumed by the Department that it had, and that an increase in the number of skips sorted, compared with activity at the

previous site (for which there was no documented evidence), and the use of mechanical assistance for sorting, amounted to a material change of use ('intensification') that required a fresh planning permission. This was not well founded in planning policy. (9.15–9.38)

2.6 The enforcement action taken by the Department against RSL in 2006, and key aspects of its subsequent treatment of the case, were capable of being seen as weighted too much in favour of the complainant's position, important though that was. The first action was initiated but two weeks after the first complaint was received (nine months after RSL had begun operations at Heatherbrae Farm), in the context of a barrage of well-argued communications to the Department from the one complainant. No written summary of the issues, including an analysis of the background to the 2005 permission and the looseness of the relevant condition, was prepared for review before any action was taken. (9.19–9.38)

2.7 The Department had no procedures laid down governing the enforcement function. There was a blank space in the Department's procedures manual under the heading of 'Enforcement'. (9.8–9.12)

2.8 The enforcement action, requiring RSL to cease using a mechanical digger to sort skips full of mixed inert waste, which RSL obeyed notwithstanding the questionability of its lawfulness, had negative financial implications for the company in that it had to employ additional temporary labour to sort skips manually in order to maintain turnover. (9.26, 10.18)

2.9 An outcome of the enforcement action was an invitation to RSL to submit a request for reconsideration of two of the conditions of the 2005 planning permission, in particular in order to allow mechanical sorting of skips. The Department should not have proceeded in this way because the planning permission already authorised skip sorting without constraint on method. A letter from RSL's lawyer objecting as a matter of law was, without being answered, deemed by the Department to constitute a formal request for reconsideration and was duly put in the public domain as an 'application.' It should have been protected under legal privilege. Nor was the landowner informed. This was maladministration by the Department. (10.1–10.7)

2.10 The Department's report prepared for the Minister for a site visit at Heatherbrae Farm in September 2006 was extremely unsatisfactory. It offered no analysis of 'intensification' as a planning concept or of the legal arguments submitted on RSL's behalf in relation to the 2005 permission. It drew conclusions about noise that went beyond careful and measured advice from Health Protection. Somewhat astonishingly, it recommended that RSL should be required to end <u>all</u> skip sorting. There were no supporting arguments whatsoever to back up this extraordinary proposition, which would have amounted to a revocation of the planning permission, and no consideration at all given to the fact that the Minister had no powers to order such a revocation, and that even if he had a compensation situation would arise. The Minister fortunately had the good sense to ignore the report but the fact that it was presented to him at all did him, as well as RSL, very poor service. Nor was the report made public in accordance with normal practice. (It was supplied to the

complainant on request after the event but not given to the other parties, who got to see it later only by chance when it was too late to take issue with alleged inaccuracies in it.) This too was maladministration. (10.28–10.40)

2.11 The Minister's good intentions at the site visit to seek to achieve a reasonable compromise were undermined –

(a) by the lack of advice available to him about the validity of the existing permission, and

(b) by the lack of advice available to the landowner, Mr Taylor, in order to give precision to the intended way forward signalled by the Minister (roofing over the yard used by RSL subject to meeting requisite, but unspecified, noise reduction objectives). (10.29-10.30, 10.42–10.46)

2.12 The Department failed formally to record the decisions taken by the Minister at the site visit and the basis on which he made them. This was in breach of the rules for the recording of such decisions presented to the States shortly before the commencement of ministerial government. (10.54–10.55)

2.13 Mr Taylor followed the advice of the Minister and the Department given at, and following, the site visit, at not insignificant cost. This included taking professional advice on noise mitigation and various works on his site. This culminated in his submission, in December 2006, of a planning application to roof over the area utilised by RSL at Heatherbrae Farm. At the September 2006 site visit he had been led to believe that this would be approved provided the application could be backed by independent evidence of appropriate noise mitigation. (10.44-10.46, 11.20–11.29)

2.14 The decision in January 2007 to reject the 2006 reconsideration 'application' and to serve an enforcement notice on RSL was made at an informal meeting at which neither the advice given to the Minister (especially on Mr Taylor's actions to seek ways of reducing noise since the September 2006 site visit) nor the reasons for the decision he reached were documented. The decision itself was not recorded at the time. These were breaches of the updated rules on the recording of ministerial decisions that had been presented to the States but a month previously. The decision was recorded only some five months later when the 'applicant', Mr Taylor, asked for copies of key documents. The wording of the decision document prepared then did not record what the Enforcement Notice had actually said. In fact, it reproduced the untoward September 2006 recommendation to end all skip sorting that the Minister had ignored! (12.1–12.14, 13.27–13.28)

2.15 When the case was referred to another planning officer following the decision of RSL to appeal against the Enforcement Notice, that officer concluded almost immediately that the notice was both unreasonable and unenforceable. This was readily confirmed by advice from HM Solicitor General. This was because it was recognised that one condition attaching to the 2005 planning permission was wholly inadequate (paragraph 2.4 above) and that the Department's attempt to rely on it to inhibit 'intensification' of a business was impermissible. The notice was subsequently withdrawn. (12.16–12.23)

2.16 Officers of the Department met with the complainant to advise him of the withdrawal of the Enforcement Notice. That was a reasonable courtesy. There was, however, also some discussion at this meeting of the tactics the complainant might now want to pursue, including whether a civil action against RSL might be the most effective method of his resolving things. Although this did not influence the complainant's actions it was inappropriate subject matter to have been raised by an officer of the Department. (12.32–12.33)

2.17 In April 2007 the Department refused Mr Taylor's 'roofing-over' application under delegated powers. The handling of this decision, and the reasons given for it, were not satisfactory given what had happened at, and since, the September 2006 site visit. In particular, a very high, effectively impassable, test of noise mitigation was imposed, possibly unthinkingly, that went beyond Health Protection's advice on the application. There was no planning policy on noise on which case officers could draw. Given the particular circumstances of the case and the prior involvement of the Minister, whose intervention at the site visit had led to the application in the first place, this application should have been referred for a political decision. (13.6–13.26)

2.18 The Department acceded to a request by the complainants' lawyer to provide a witness statement for the Royal Court on their behalf as plaintiffs in their civil action against RSL (the *voisinage* case). This was very unusual, though not inherently irregular. Legal advice, either on the statement itself or the giving of it, was not taken. The statement was provided to the Royal Court only 24 hours before the case began. This put RSL's lawyer at a considerable disadvantage and inhibited his ability to challenge it. On his application, however, two paragraphs of the statement were struck out by the Court, including an expression of sympathy for the predicament of the complainant and an acknowledgement that, with hindsight, the 2005 planning application was more significant than had been anticipated at the time. The statement rehearsed key aspects of the planning history without exactitude. In particular, it did not address the Department's motives in encouraging RSL's move to Heatherbrae Farm in order to resolve what it saw as the La Prairie 'problem', or set out the supportive actions it took to get the planning permission accepted and decided quickly. It did not address the 'intensification' question as a matter of planning policy, the defectiveness of the key 2005 condition (paragraphs 2.4 and 2.15 above), or, following on from that, the reasons for the withdrawal of the Enforcement Notice. This was important not only intrinsically but also because it created an unsatisfactorily incomplete factual basis for the Court. (13.44–13.49)

2.19 The Royal Court found against RSL and issued an injunction requiring it to leave Heatherbrae Farm after a due period of notice. The Court, however, expressed sympathy for the plight of the defendants and concluded that RSL had been '*permitted, if not encouraged*' by the Department to establish its business at Heatherbrae Farm, which it did in good faith. This led to the Court ordering that the Minister should pay 25% of RSL's legal costs (albeit that the order was subsequently overturned). (14.1–14.5, 16.1–16.10, 16.17-16.22)

2.20 RSL's decision to appeal against the Royal Court's judgment was directly influenced by the Minister's assurance, given during a telephone conversation with Senator B.E. Shenton in January 2008, that Mr Taylor's 'roofing-over' application, by now the subject of a request for reconsideration, would be approved. What he said touched directly on the one plausible line of appeal in view at that stage, viz. a change of circumstances that could enable the Court to take a different view. Although the Minister also said that RSL needed to be sure that it had taken good legal advice before appealing, and notwithstanding the singular circumstances of the conversation, he should not have made any such statement, not only as a matter of principle because it fettered ministerial discretion but also because he had stood himself down, several months before, from determining the case on account of a perceived conflict of interest. During the conversation the Minister expressed a personal view of the process surrounding the granting of planning permission for RSL in 2005 that he had expressed to Senator Shenton, a view he could have acquired only from officers' briefing. (15.3–15.16, Annex 3)

2.21 Mr Taylor's 'roofing-over' application request for reconsideration was, nonetheless, rejected by the Assistant Minister in April 2008 in line with a strong recommendation from the Department. These parties were unaware of the Minister's assurance. The report presented to the Assistant Minister did not serve her well. It failed to set out the full case history, including the Minister's intervention at the September 2006 site visit that had heralded the application now before her. It iterated, again, an all but unachievable noise test that had not been recommended by Health Protection and the line of argument concerning 'intensification of use' that had been discredited by the withdrawal of the Enforcement Notice a year earlier. It made no mention of the enforcement notice saga itself. The report was published and then, unusually, was withdrawn because of objections by the parties. The revised version did not remedy the deficiencies noted above. (15.21–15.49)

2.22 RSL lost its appeal against the *voisinage* judgment. It decided to switch to another law firm and the grounds of its appeal were changed on the advice of the new lawyers. Had this change not been made, the original, single, ground of appeal (the putative imminent likelihood of approval of the 'roofing-over' application) would have fallen away once the application had been rejected. This would almost certainly have led to the appeal's withdrawal. Thus RSL's decision to switch lawyers was, with hindsight, costly. It was not a decision that could be directly attributed to failings on the part of the Department. (15.18–15.20, 16.11-16.16)

2.23 RSL's costs consequent upon the Department's enforcement actions against it from April 2006, the *voisinage* case, the costs hearings relating to the same and the appeal were £249,000. This is somewhat less than the sum cited in our terms of reference. It mostly comprised legal fees, including taxed plaintiffs' costs payable by RSL as the losing side. But it also included labour costs incurred in 2006 as a result of the Department's enforcement action to halt mechanical sorting of skips. (17.1–17.8)

2.24 Of the £249,000, we consider that the sum of £157,000 was incurred as a direct consequence of failings in the processes or actions of the Department. This

figure excludes costs incurred following RSL's acceptance of the second opinion and its consequent decision to change lawyers on or around 20th February 2008. The balance, £92,000, would, for better or worse, have been averted had the ground of appeal remained unchanged, for given the Department's decision in April 2008 to refuse the request for reconsideration of the 'roofing-over' application the ground would have become untenable. We understand RSL borrowed a considerable sum in order to settle its costs but, in the absence of firm evidence to confirm the arrangements made, no interest costs have been taken into account in preparing our calculations. (15.20, 16.16, 17.5)

2.25 Mr Taylor spent in excess of £10,000 on planning applications, driveway resurfacing works and professional fees. Mr and Mrs Yates incurred legal and professional costs of £170,000 of which they recovered £80,000 from RSL. It would be impracticable to seek to estimate how much the whole episode notionally cost the Department in time and effort, but it would have been a lot. (17.9–17.11)

3 HOW REG'S SKIPS BEGAN

3.1 Mr and Mrs Pinel decided to start their own skip business after J.H. Michel & Son, for which Mr Pinel worked, was purchased in 2000 by Mr W. Le Marquand's recycling and skip hire business.

3.2 Mr Pinel purchased his first skip lorry on 27th September 2000, together with 50 skips. Reg's Skips then commenced operations from Home Farm, Le Mont de la Hague, St. Peter, having leased land at that property from Mr G. Le Ruez.

3.3 RSL was formed in March 2001.

3.4 The company offered from the outset a waste collection, sorting and disposal service. Mixed loads were generally sorted on site. Sorting of waste materials was generally performed by hand, although bought-in mechanical assistance was utilised when loads were too heavy or bulky to process in that way. RSL gained its own capacity to sort skips mechanically after 22nd June 2005, when the company leased a mini-digger.

3.5 RSL identified significant demand for the services it provided. It was therefore able to achieve notable growth within its first two years of operation. By December 2002 the company had acquired its fourth skip lorry and a significant quantity of additional skips, and employed a fourth driver. Management support was provided by one part-time member of staff. RSL later acquired one further skip lorry and one ancillary vehicle (which was subsequently replaced), and took on two additional members of staff. By 2004 RSL possessed approximately 350 skips, the number remaining close to that thereafter.

3.6 On 14th December 2001 the Department received a complaint about RSL's operations at Home Farm from an anonymous 'concerned parent' whose children attended the neighbouring St George's School. Mr and Mrs Pinel believe that the complainant was the owner of a competitor company. This prompted some investigations by a Planning Enforcement Officer, who concluded that the operations carried out at Home Farm by RSL were not authorised under the Island Planning (Jersey) Law 1964. Although the owner of Home Farm subsequently submitted a planning application to seek to regularise the use, this was subsequently refused by the Department on the grounds that the storage of skips was considered an inappropriate use in the countryside and contrary to Policy C6 (Countryside Zone) of the Island Plan 2002.

3.7 On 19th January 2004 a Review Board upheld the decision to refuse the application and by April 2004 RSL was forced to vacate the premises. It is worthy of note that the primary policy basis on which the Committee based its refusal and its case before the Board (and which, one year on, it would later put to one side) was as follows –

> *'the storage of skips represents an inappropriate storage use in the countryside, detrimental to the amenities of the area and contrary to*

Policy C6 (Countryside Zone), which states that this zone will be given a high level of protection and there will be a general presumption against all forms of new development for whatever purpose.'

3.8 The company relocated to a site in St Peter, known as La Prairie, La Route de Beaumont. This site, which also belonged to the owner of Home Farm, was smaller than the Home Farm site and adjacent to the main road. Planning permission was not sought because La Prairie had been in commercial use since well before the coming into force of the 1964 Planning Law. We understand that the site had been a 'haulage depot' where vehicles, trailers, skips and other items of building plant were stored and maintained.

3.9 Sales records and invoices shown to us by RSL indicate that the company was receiving and processing on average about 50 mixed loads per month while at La Prairie. Broadly half of these were taken for processing to another company, Abbey Plant, because of La Prairie's limited size. For a time in 2004 RSL also sorted mixed loads at a property known as McQuaig's Quarry, St John. We learnt, however, that that arrangement ceased after a few months following intervention by a Planning Enforcement Officer.

3.10 Mixed load sorting generated significant income for RSL and its having to subcontract such work impacted on profitability. For that reason Mr and Mrs Pinel were keen to find another site with more space. The urgency of this search was heightened in the latter part of 2004 following complaints to the Department about the appearance of the La Prairie site, at least one of which was made by a member of the States. Mr Le Gresley, the Assistant Director – Development Control, also told us that having motored past the site from time to time he had commented to his Enforcement Section that the site '*looked a mess*'. Mr G. Bisson, former Enforcement Officer, told us that he had received a number of complaints about the sorting of skips at La Prairie and that several of the complaints had been made by politicians. On 19th August 2004 he therefore wrote to RSL in respect of the La Prairie site, saying –

'For the avoidance of doubt, I would confirm that the storage of skips is in order, however, the keeping of skips full of waste material is not'.

3.11 This intervention reflected several factors. First, the complaints received, and indeed Mr Le Gresley's comments to Mr Bisson, were essentially about the visual impact of RSL's activities at La Prairie, notably for passers-by and motorists, not noise impact or disturbance of neighbours. This was confirmed to the best of officers' recollections in our first public hearing. Such enforcement action as was taken against RSL at this point was driven by those reasons. Secondly, Mr Bisson said that his view, once he had checked with planning colleagues, was that the keeping of full skips, and skip sorting, at La Prairie represented a material intensification amounting to a change of use beyond that of a haulage depot. He told us that he knew that sorting of skips did take place (although to his knowledge by hand only) and that he had said to Mr Pinel that it was impermissible. Various conversations with Mr Pinel led to the letter of August 2004 noted above, which however, and perhaps not

insignificantly, did not explicitly say that sorting of skips was not permitted. It was concerned, rather, with the 'visual' problem of the storage of full skips because, to quote from the letter again, *'the site is in full view to passing members of the public'*.

3.12 Thirdly, the intervention rested on a presumption that the Department was empowered at that time to control the site under the 1964 law, notwithstanding that commercial usage had been in place well before 1964. We conclude that this was presumptive action because the Department was unable to demonstrate to us that it had any relevant entry in a procedures manual or any formal legal advice on file covering the subject of 'pre-1964' sites. Nor did the Department possess any reliable documentary evidence confirming the precise use to which La Prairie had been put prior to 1964. What was on file, however, was evidence that in 1996 the Department had considered an established commercial haulage use at another site to be sufficient for the purposes of both skip storage and sorting. Given that La Prairie seems to have benefited from a long-established commercial haulage use, we suggest that the Department was not quite as well placed to progress enforcement action as it had indicated. Mr Bisson said that he had a good personal knowledge of the La Prairie site history. We accept that but this was hardly sufficient by itself to give legitimacy to the Department's seeking to control RSL's operations on the site, especially in view of the Department's actions in 1996.

3.13 We ourselves sought legal advice on whether RSL could lawfully have been prevented from continuing to sort skips at the La Prairie site. We concluded from this advice that the Planning Department's approach was not beyond challenge. Article 5 of the 1964 Law required that the Committee's permission was needed to develop land. It also confirmed that a material change in the use of a building or land would constitute development and, further, that the deposit of waste or refuse on land would constitute a material change of use in certain specified circumstances. From the evidence we have received we cannot conclude that these factors applied to RSL's operations and it might well have taken legal action to resolve the question had RSL not been minded to respond to the Department's pressure in the cooperative manner that it did. The larger concern, though, is that the Planning Department was seeking to act in a way that potentially had a significant adverse impact upon a private business in the absence of settled policy and procedure backed up, as necessary, by legal advice. The enforcement function, Mr Le Gresley said to us, *'was just custom and practice over the years, to be honest'*.

3.14 It seems RSL largely complied with Mr Bisson's letter and avoided storing full skips at La Prairie, save occasionally overnight or at weekends, which it was told was all right. We deduce this because the Enforcement Section case file notes reveal a marked lack of activity in respect of La Prairie between August 2004 and May 2005. No specific enforcement action was taken in respect of skip sorting, which continued as and when.

4 THE HOMESTEAD APPLICATION

4.1 In May 2004, shortly before Mr Bisson first intervened at La Prairie, RSL applied to the Planning Department for planning permission to operate from a property known as The Homestead, La Rue de L'Etocquet, St John. The application was marked P/2004/1056 and assigned to the then Miss E. Baxter, Senior Assistant Planner. Her advice after assessment was that the application should be refused, on the grounds that the anticipated disturbance (particularly noise) to neighbouring residents would be too great and because the proposed use would not be appropriate in the Green Zone. This was accepted by a senior officer and the application was duly turned down under delegated authority. As RSL was desperate for a viable new home, and as The Homestead seemed at that time to be the only available option, RSL submitted a request for reconsideration of the application by the full Environment and Public Services Committee (EPSC).

4.2 The EPSC carried out a site visit at The Homestead on 20th January 2005 with Senator P.F.C. Ozouf, then President of the Committee, in attendance. Connétable R.N. Dupré of St John was not present and took no part in the subsequent determination of the application as he had previously expressed an opinion on it.

4.3 The report by officers for the site visit was limited in detail and did not address relevant waste management policies within the Island Plan 2002. This is an omission that occurred again in subsequent reports about RSL and it leads us to the view that the Department had not in any guise taken steps corporately to ensure that these important wider policies were taken into account, alongside other, possibly more 'mainstream', planning issues in the Island Plan. Mr Thorne in fact confirmed that in his evidence to us, referring not just, or even mainly, to RSL's case. (Yet, as will be seen later (paragraph 13.33 below), the Minister, when he became involved in RSL's case, did have such considerations well within his purview, which in our view was creditable.) What this seeming omission meant in 2005 was that the Department did not readily perceive RSL to be a 'waste management' business operating in a sector of the economy for which planning policy properly made some considerable provision. By the same token it is evident that the Department was not conscious of other States policies that were having the very direct, and indeed deliberate, effect of driving up demand for skip sorting on private land. Nor is it apparent that the connection to broader policy was made by other departments consulted on the application.

4.4 RSL's request for reconsideration was refused on 20th January 2005, notwithstanding representations in support of the company by Deputy P.J. Rondel of St John. The refusal reflected the Committee's concern at possible noise disturbance affecting neighbouring residents and the anticipated appearance of the site from the north. These were clearly not unreasonable concerns.

4.5 It is nevertheless apparent that the EPSC was trying to keep the door open for RSL. The minute reads as follows –

> *'The Committee decided to maintain refusal of the application, but noted that the applicants would be invited to re-apply with modifications to the application, notably guarantees in respect of the permanent coverage of entrances on the south side, and the screening of the site from the north.'*

4.6 This positive intent may have been reflected recognition by Senator Ozouf and his political colleagues of the wider waste policy implications. In any event it was commendable. Mr and Mrs Pinel, however, told us that they had decided at this point not to pursue the Homestead site option further, not least because they realised that the issue of neighbours being very close would remain problematical however a possible re-application might have been formulated.

4.7 Miss Baxter (who no longer works at the Planning Department and who is no longer resident in the Island) telephoned Mr and Mrs Pinel promptly after the 20th January meeting and reported the Committee's decision. Confirmation of the decision was provided subsequently in a letter she sent dated 1st February 2005. This letter made clear that the Department would seek to assist RSL in its search for a new home. The following extract is of particular note –

> *'During our telephone conversation I indicated that I would attempt to put together a list of recent applications for sheds and sites which may be suitable for the business which you currently operate. I am still in the process of compiling this list and shall forward it to you in due course. If in the mean time you find a site which you feel may be suitable, please write into the Department and I shall be happy to offer an informal opinion as to whether the site may be appropriate.'*

4.8 This was a very satisfactory and helpful stance by Miss Baxter, no doubt building on the political discussion to which she had recently been privy, and Mr and Mrs Pinel told us that they took the same view.

4.9 We conclude that the Homestead application P/2004/0156 was generally determined appropriately and to a standard expected of the Department. We say more later about the impact of the helpful approach instigated by EPSC and reinforced by Miss Baxter.

5 HEATHERBRAE FARM

5.1 Mr and Mrs Pinel's search for a new location for their business continued. It was at the point of the Homestead refusal in January 2005 that the Pinels received a suggestion from a third party that they should approach Mr C. Taylor, the owner of Heatherbrae Farm, St John.

5.2 Mr Taylor had recently ceased dairy farming, taking advantage in 2002 of an initiative by the States to restructure the dairy industry. Through his consequent pursuit of alternative uses for his farm buildings and farmyard land, he had established a regular contact at the Planning Department. This was Mrs E. Ashworth (then Miss Clapshaw), a planning officer of long standing. On 1st August 2002 Mr Taylor had received an initial three year, time-limited permission for a change of use at Heatherbrae from redundant dairy buildings to dry storage. Thus began an important evolutionary change in the use of the Heatherbrae Farm site.

5.3 The 2002 permit issued to Mr Taylor specified three conditions. Conditions 2 and 3 in particular demonstrated that the Committee of the day had adopted a very cautious approach to the application, having weighed the commercial realities facing the landowner against the land use implications for a site deemed to fall within the newly classified Countryside Zone now that the Island Plan 2002 had come into effect. These said –

> '*2. That prior to the dry storage operation coming into use, the User shall be agreed with the Planning and Environment Committee.*
>
> '*3. The use hereby permitted is for dry storage purposes only and no processes or manufacturing shall take place on the premises, nor shall any employees be engaged on the site.'*

5.4 Mr Taylor said that he felt that these arrangements were stricter than had been imposed in some other, similar, circumstances but it is not within our remit to consider that.

5.5 When Mr Taylor identified a potential client for one of what became his series of dry storage units he would write to Mrs Ashworth with details. We observe that these letters were processed rather informally and that they were not referred to the full Committee in accordance with its August 2002 decision. Instead Mr Taylor would receive a letter from Mrs Ashworth confirming whether the proposed use and user were considered '*acceptable*' by the Department or, if more information were required, requesting the same. Mr Taylor, and indeed the Department, relied on such letters of confirmation in lieu of the issuing, each time, of a new or updated permit and he had no reason but to assume that officers had the authority to administer such approvals in such a manner on the Committee's behalf. Our own view, having reviewed the August 2002 decision and the delegation agreement in place during this period, is that these particular matters were not authorised for determination at officer level.

5.6 One of the proposed users of the Heatherbrae Farm site was a haulage company looking for somewhere to park lorries and a mechanical digger. Correspondence between Mr Taylor and Mrs Ashworth in April 2004 indicates some relatively specific concern on the latter's part about aspects of the proposed use, including the possibility of the sorting of loads occurring. Approval was given by Mrs Ashworth only after she had reviewed additional information on traffic movements and other matters, and after Mr Taylor had accepted that any storage of topsoil and hardcore would require a separate change of use application. One can surmise from this episode, as did Mr Taylor, that the Department was quite strongly focussed at this point on his not being able to go beyond normal dry storage at Heatherbrae Farm.

5.7 When Mr and Mrs Pinel got to know about Heatherbrae Farm as a possible option for the relocation of their business, they communicated the suggestion promptly to Miss Baxter pursuant to her offer of assistance already made. Mr Taylor told us that Miss Baxter accordingly visited Heatherbrae Farm on or shortly before 24th January 2005, saying that she thought it would be an ideal site for RSL and that were he to be agreeable to RSL's moving to his land he would be '*helping out the Department*'. Miss Baxter, in her written evidence, said that she could not recall the visit, although it might well have occurred. Mrs Ashworth certainly said in her evidence to us that it had. Mr Le Gresley said he had no reason to doubt that it did. We conclude that it definitely did. Notwithstanding, Miss Baxter did not think that she would have spoken in quite the terms reported by Mr Taylor but we have no reason not to accept the latter's testimony on the thrust of Miss Baxter's remarks. As reported, they were entirely in keeping with the helpful stance of the EPSC that we have already identified, and with the terms of Miss Baxter's letter to RSL.

5.8 Mr Taylor was thus, as he put it, left with the clear impression not only that the Department regarded Heatherbrae Farm as a potentially good location for RSL but also that he would be assisting the Department if he submitted a planning application to that end. By this time, January 2005, as the three year period of his original change of use permission approached its end, he was entitled to infer that the Department's stance towards his property was changing from that referred to at paragraph 5.6 above. This was naturally positive for him from a business perspective. The stringency of the conditions attached to his temporary 2002 permit and the slight difficulty he had had the previous year over the vehicle storage application should otherwise have left him in not much doubt that the chances of securing planning approval for something on his land going beyond dry storage to an enterprise such as a skip sorting business would be remote at best.

5.9 Soon after Miss Baxter's visit to Heatherbrae Farm, Mr Pinel also visited it for the first time. He readily came to the conclusion that the site in question – the former silage clamp, a partly walled, concreted area – would be ideal for RSL and he expressed that view to Mr Taylor. The latter, having regard as well to Miss Baxter's positive stance, thus began to commit time and resources to the securing of permission for RSL to relocate to his property.

5.10 On 24th January 2005 Mr Taylor wrote to Mrs Ashworth citing an approach *'from Mr Reg Pinel of "Reg's Skips Limited" '*. This letter was written in the

usual manner, seeking approval for RSL to undertake skip storage and sorting at Heatherbrae Farm. The letter made no mention of Miss Baxter's visit and it followed broadly the same format as Mr Taylor's previous letters about possible tenants. He told us that he took this step immediately following Miss Baxter's visit and her encouragement to him to 'take on' RSL. RSL itself had no contact with the Department at this stage about Heatherbrae other than Mr and Mrs Pinel's initial contact with Miss Baxter in January that had set things in motion.

6 THE MARCH 2005 "PRE-APPLICATION"

6.1 The Planning Sub-Committee (PSC) considered the proposed relocation of RSL as a 'pre-application advice' item at its meeting on 9th March 2005. Mr Taylor, however, had not requested 'pre-application' advice; he had no reason to, having already had the benefit of Miss Baxter's views. He had, at this point, simply 'applied' for a new tenant in the usual manner in place since August 2002. Given that RSL had not requested pre-application advice either (the company had no contact with the Department during this period), we are satisfied that the agenda item was initiated by the Department itself. This was not a usual procedure but was not unreasonable if one concludes that the Department was at that time at least partially aware of the policy implications arising from the proposal in a way that made it desirous of guidance at the political level. The evidence indicates that the Homestead and Heatherbrae Farm cases were the Department's first concerning skip sorting on land in the Countryside or Green Zones. That the Department itself took this step underscores, moreover, the fact that it was actually keen to get RSL moved to Heatherbrae Farm in order to bring to an end what it regarded as the 'visual' problem caused by RSL at La Prairie. The Department's evidence submitted to the Royal Court on behalf of the plaintiffs in the *voisinage* case in 2007 stated wrongly that RSL itself applied for pre-application advice.

6.2 The Chairman of the PSC at the time was the then Deputy J.L. Dorey of St Helier. Only Connétable R.N. Dupré of St John was present with the Chairman for the consideration of the item. Deputy M.A. Taylor had withdrawn, having cited a conflict of interest.

6.3 The report submitted to the PSC was prepared by Miss Baxter. There is no evidence on file to show that the report was seen in draft by Mrs Ashworth, the main repository of knowledge about Heatherbrae Farm, or that it was reviewed before issue by senior officers. The template for such reports includes a space for a senior officer to add her or his signature and the date of signing; the copy of the report on the file, however, lacks such an endorsement.

6.4 Miss Baxter's report made it clear that RSL was involved, that the company both hired out and sorted skips, and that it operated at that time with four lorries. Broader factors, however, were not covered in the report in a comprehensive manner. For example, RSL's operation was described as a '*small amount of commercial use,*' yet the only data provided by which the scope for impact could be gauged by the Sub-Committee was the number of lorries owned. Although Heatherbrae Farm's dry storage permission was correctly noted, no reference was made to the fact that, in 2002, the Committee as previously constituted had viewed the site with sufficient caution to make the dry storage permission temporary in the first instance. Nor was reference made to the fact that the temporary permission would be up for renewal shortly. The report did not outline the full range of occupants at Heatherbrae Farm approved by officers without recourse to the EPSC and did not elaborate on the waste management processes to be conducted on site. Importantly also, it did not in any guise elucidate the encouragement for RSL's intended move to the new site that had already occurred; rather, the matter was inappropriately

presented as solely an initiative of the site owner, Mr Taylor. Whether or not the (only) two PSC members knew more of the case than had been set out in the report, which we have no reason to presume, the historical record on the planning file would be clouded by these shortcomings.

6.5 The essence of the report was that Heatherbrae Farm was already 'intensively used' for dry storage and that, therefore, the proposed change of use would not have a detrimental impact upon the character or amenity of the area. And any impact upon neighbours would be limited. It stated –

> ***'Impact on Neighbours*** *The nearest neighbour to this site is the owner, who has approached the Department with this suggestion. It is considered that whilst it is proposed to convert a small part of the shed to a commercial use (rather than the whole site), this will not be damaging to the character of the countryside as the use is similar in nature to those already located on site.'*

6.6 The position of the site within the Countryside Zone, as defined by Policy C6 of the Island Plan 2002, was recognised, as was the fact that such commercial activity in the Countryside Zone would not normally be regarded as a desirable use. This had, of course, been the clear position adopted both by officers and the EPSC when RSL's application for skip sorting at Home Farm had been rejected. Although waste policy considerations themselves could have been prayed in aid – they were highly topical at the time in the lead up to the 2005 Waste Management Law and the Solid Waste Strategy debate – they were not mentioned. A site visit was not recommended. Instead the PSC was all but invited to set any policy conflict to one side in order to enable a problem to be sorted through the following observation –

> *'...it has proven difficult for Reg's Skips to find a suitable alternative site in the Built-up area that would not detrimentally affect neighbouring residents.'*

6.7 Unusually, in a notable deviation from normal practice, the Committee's discussion was minuted as a confidential or 'Part B' item. In accordance with the provisions of the Code of Practice on Public Access to Official Information, the Minute was marked with an exemption clause asserting that disclosure would, or might, be liable to constitute an unwarranted invasion of the privacy of an individual. This meant, for example, that States Members interested in these things would have been able to read this particular item only following a specific request to the Committee (that would, in practice, have required prior knowledge). A review of the PSC's minutes for 2005 reveals that pre-application advice was generally recorded as an open or 'Part A' item, both before and after March 2005 (although, of course, this was 'pre-application' advice of an abnormal kind because, as we now know, it was not initiated by a prospective applicant). Indeed, Senator Ozouf, the then President of EPSC, told us that he worked on the basis that, wherever possible, Planning minutes should be recorded as Part A items on grounds of transparency. We find it quite hard to believe that there was not some element of deliberativeness by the Department in the Part B categorisation, perhaps linked to the relative

sensitivity of any issue concerning commercial development in the Countryside Zone, simply because Part A was the default option.

6.8 Minutes of the PSC were recorded by a Committee Clerk from the States Greffe. The particular minute of the discussion on 9th March is rather short and perhaps simply reflects a rather perfunctory discussion by the Sub-Committee as it worked its way through a large agenda. Two aspects of it are, nevertheless, worthy of remark. First, there is no reference to *'Reg's Skips'* or even the word '*skip*' in the text. This compounds the opaqueness of the proceedings. Secondly, the minute suggests that the PSC's reaction to the proposal was quite cautious –

> *'...the Sub-Committee agreed that it would be appropriate for the applicant to submit a more detailed proposal.'*

6.9 This wording, subsequently endorsed by the PSC as an accurate record, certainly fell some considerable way short of conceding the principle of a skip company operating from a site in the Countryside Zone, a principle that had been robustly opposed by the Committee as previously constituted. It also fell notably short of the recommendation made in Miss Baxter's report, which had suggested the following course of action –

> *'Advise Reg's Skips that it is appropriate to submit an application for assessment and that it will be viewed (provided all other issues can be adequately resolved) favourably.'*

6.10 The evidence of various officers, however, was that the Department took the view that the principle of a skip company operating from Heatherbrae Farm had received the Committee's approbation, and it was put to us that the minute, in its brevity, was not an accurate reflection of the outcome of the meeting. Minutes of meetings are, for sure, not verbatim records but there is nothing else on file to support this view. We feel obliged to rely on the official minute, as formally approved by the PSC, which did not concede the principle of skip operations at Heatherbrae Farm. Our judgement accordingly is that the Department ended up interpreting the PSC's decision of 9th March 2005 in somewhat more positive terms than were warranted. This was mainly reflected in the subsequent planning application being determined without reference back to the PSC, a decision which we do not believe officers should have taken themselves because of its sensitivities or had the proper authority to take (paragraph 7.19 below).

6.11 But the sense of positiveness was also conveyed directly to Mr Taylor. In the first formal response to Mr Taylor's letter of 24th January 2005 to Mrs Ashworth, Miss Baxter wrote to Mr Taylor on 10th March, the day after the PSC meeting, saying –

> *'Whilst the Committee were not prepared to pre-determine the application, it was of the opinion that this may well be a suitable location for such an operation.'*

6.12 This wording, perhaps, could be held to fall halfway between Miss Baxter's recommendation and the minute of the meeting itself. Miss Baxter also rang up Mr Taylor on the telephone to tell him about the meeting. Mr Taylor was clearly encouraged by what he had been told, which prompted surprisingly rapid action, aided by the Department, to get a planning application submitted and accepted. This is described in the next section of the report.

6.13 In his evidence to us Senator Ozouf, as the Committee President of the day, expressed concern that the matter had been considered by a sub-committee comprising but two persons, one of whom, moreover (the then Connétable Dupré of St John), had previously expressed a view in public on an earlier application concerning RSL and had thereby disqualified himself from taking part in the determination of that particular application. Senator Ozouf also expressed concern upon learning that the substantive application had not been referred back for further consideration at a political level.

7 THE SUBSTANTIVE 2005 APPLICATION

7.1 Mr Taylor went to the Department on 10th March 2005, the day after the PSC's meeting, having been telephoned by Miss Baxter and told that the PSC had reacted favourably to the proposal on an 'in principle' basis. This was before he would have received her letter of the same date. At the Department's offices he completed a planning application form there and then in the reception area and paid an application fee of £210. His application was accepted for processing that same day without more ado – that is, no questions of form or detail were raised upon it, as is sometimes the case ahead of an application's 'acceptance' – and it was designated P/2005/0423.

7.2 Mr Taylor described his application in the following terms –

> '*CHANGE OF USE OF AREA (FORMERLY A SLURRY STORE) FROM DRY STORAGE TO COMMERCIAL. ALSO CHANGE OF USE OF DRY STORAGE BUILDING (APPROX 800-1,000sq ft.) TO COMMERCIAL.'*

7.3 The format used and the description given on the application form broadly accorded with those submitted by other parties for change of use applications. This, and the specific terminology used, supports Mr Taylor's clear recollection that he wrote out the description having been given advice by an officer at the Department's reception area and with the benefit of guidance from Miss Baxter herself. It was nevertheless an unsatisfactory description in that no mention was made of what the 'commercial' operation in question was, that is, skip sorting and storage. In evidence to us Mr P. Thorne, Director of Planning, observed –

> '*Commercial use is not something we recognise in planning terms. Virtually every premise is commercial in some shape or form. What is important is the nature of the use'*

7.4 This illustrates precisely the problem with the description given. The reference to commercial use was rather meaningless in the absence of any reference to the nature of the proposed use. For that reason alone, the application should not have been accepted in that form. The fact that it was is explained, in our opinion, only by reference to the encouragement already given to Mr Taylor that an application by him on behalf of RSL would indeed '*help*' the Department and that there was therefore a desire to move things along with reasonable alacrity perhaps regardless of precision.

7.5 The Highways Section of the Public Services Department was not consulted on the application by the Department. Although there was no statutory or formal administrative requirement for this, the omission seems somewhat surprising given that the Trinity Infill Report, published only six months previously, should, indeed must, have alerted the Department to the potential implications

arising from skip lorry movements[2]. In this regard, on 14th September 2004 and following presentation of that report Deputy J.A. Hilton, who was then Chairman of the PSC, made a statement in the States in which she said –

> *'Since the report was published I have discussed the whole issue with the President and Chief Officer. Changes have been implemented whereby in future any significant traffic implications will be clearly marked as to the likely volume and effect.'*

What happened, or rather did not happen, regarding the 2005 application is an indication of how the Department, at working level, seemed simply unresponsive to political direction even of such an overt kind.

7.6 The Health Protection Section of the Health and Social Services Department was consulted but the information given to it was limited to the brief description on the application form, which made no reference to a skip operation but only, with imprecision, to 'commercial' use. The response by Mr Binet, Environmental Health Officer, was therefore, equally, somewhat limited –

> *'There is no objection to the proposed change of use in principle. However, some commercial operations are more likely to cause nuisance to neighbouring properties than others. Commercial uses likely to cause problems with noise or smell should not be permitted.'*

7.7 This response was not unreasonable given that Mr Binet was not made aware of the specific commercial operation envisaged. He told us that had he known a skip company was in the frame he would have responded rather differently.

7.8 There were other weaknesses in the consultation process on the application that served to compromise its usefulness, including an apparent failure to consult Jersey Water in accordance with Policy NR1 of the Island Plan 2002. A wider question is begged as a result about the way departments other than Planning go about commenting on planning applications, about the duties that those departments believe they face, or do not face, in making comments, and about the way that the Department helps them or otherwise in this important task. This continues to be a not insignificant issue throughout this narrative and we shall seek to address the general point in our second report. For present purposes, Health Protection's not being made aware of what lay behind Mr Taylor's application was, as will be seen, an administrative shortcoming of some magnitude.

7.9 At some point between 11th March and 21st March 2005 someone within the Department considered it appropriate to modify the description of the application by adding the parenthesis *'(for Reg's Skips Ltd.)'*. The Planning files give no clue as to why this was done. Although an improvement, this still left the description less than precise. The modified wording was used when

[2] R.C.43/2004 refers

notice of the application was published in the Jersey Evening Post (JEP) on 22nd March 2005. Mr A. Pritchard, Community Health Team Leader at Health Protection, told us that the revised description was not signalled to him and his colleagues. Health Protection told us that they now receive the full text of each notice published in the JEP and that their staff regularly scan the planning application notices in the JEP to see if anything might warrant comment from them, even though they may not have been officially notified of it; nonetheless, we are not clear that this was the established position in 2005. In any event, the small but important addition was not spotted. It was poor practice on the part of the Department that official consultees were not directly notified of the change. Had this been done, and, indeed, an explanation given in the first place of what 'commercial' meant in this particular instance, it is very likely that, at the least, Mr Taylor's eventual planning permission for RSL would have contained tighter conditions; and that may have led to a very different outcome in the face of the complaints about noise that arose afterwards. If nothing else, RSL would have been far better placed to make an informed decision on whether to relocate to Heatherbrae Farm.

7.10 One letter of representation was received by the Department in response to the notice in the newspaper. Mr W. Le Marquand, owner of another skip hire and waste management company in competition with RSL, submitted an objection dated just one day after publication of the notice. In an evidently carefully composed letter he remarked in particular the absence of descriptiveness and commented that the true nature of the operation envisaged was possibly being hidden. He added –

> *'I understood Planning's policy was to ensure that the general public was to be made aware of the exact uses that were intended so that the general public could comment properly.'*

7.11 Given what we have just noted about the opacity of the application as accepted by the Department, we were surprised by the pertinence, and even prescience, of this observation, albeit that it is not inconceivable that Mr Le Marquand's own commercial interests motivated him to comment in such terms. We were made aware that relations between Mr Le Marquand and RSL had been less than cordial since RSL was established. We are also aware from our analysis of the Department's files that, at that time, Mr Le Marquand himself was directly engaged with it – indeed, with the same development control team as had been dealing with RSL – on matters of compliance with the Island Planning Law arising from his company's operations in St Peter. Notwithstanding, there is no evidence that the Department took his comment into any account, or responded to it, even though it clearly raised a 'planning' issue.

7.12 Minutes of EPSC or PSC meetings tended to record which policies of the Island Plan 2002 were considered prior to a particular decision being made. The file for the 2005 application indicates that only Policies C6 (Countryside Zone) and NR1 (Protection of Water Resources) were considered by officers prior to determination. In her March 2005 'pre-application' report, Miss Baxter had identified Policy C6 as being the more critical.

7.13 The Countryside Zone policy sets out a '*general presumption against all forms of new development*'. It then gives examples of development that may be permitted as an exception, subject principally to considerations of '*impact on the character*' of the Countryside Zone and the extent to which the proposal '*accords with the principles of sustainability that underwrite the Plan.*' Developments that could be permitted as an exception include the conversion of existing buildings to '*appropriate and non-intrusive*' commercial uses or '*development that has been proven to be in the Island interest and that cannot practically be located elsewhere.*' We consider that this latter clause was relied on by Miss Baxter when she wrote in her pre-application advice report that RSL had not been able to find a site in the Built-up Area. This point has some significance for later parts of this narrative.

7.14 We noted at paragraph 3.6 above that in 2004 the EPSC had cited Policy C6 as firm justification for preventing RSL from staying at Home Farm, St Peter. The same test would imply that planning permission for skip storage and sorting at Heatherbrae Farm would be a less than straightforward matter, although it need not have been ruled out having regard to the savings in the Policy. The 'pre-application' report prepared for the PSC in March 2005 had noted the location as being in the Countryside Zone but did not really adduce the pros and cons of the proposal regarding Policy C6. That seems consistent with an intention by officers to rely on the 'nowhere else suitable' exemption noted in the preceding paragraph.

7.15 It is evident, though, that Mr Taylor's planning application should have been considered in the context of a broad range of Island Plan policies. Policy G2 (General Development Considerations) was relevant in the context of potential impact on public health, safety and the environment. Policy G6 (Transport Impact Assessments) might have indicated a possible need for a transport assessment in the case of an application involving a company with four lorries and 350 skips, albeit that such an assessment might have needed to take the form only of an outline statement. Policy C19 (Change of Use and/or Conversion of Modern Farm Buildings) might not have been relevant because of Mr Taylor's extant time limited permission for change of use from agricultural to dry storage use but Policy IC12 (New Industrial Development in the Countryside) might have been a reasonable policy to bring into play in view of the 'nowhere else suitable' approach that was adopted. Above all though, the application should have been assessed against the waste management policies at Section 14 of the Island Plan. It would have scored quite highly against those. The absence of such assessments, while no doubt facilitating an early decision on the application, meant that later on there was a somewhat weak policy foundation, so to speak, on which the debate about RSL's operations, whether 'for' or 'against', could be based.

7.16 There is no evidence in the Department's files that the requisiteness of any of these assessments was weighed, or the assessments themselves undertaken. This was a failure of due process, seemingly explicable – but nonetheless not excusable – only by the desired intention to ensure speedy delivery of a successful application in order to 'help' the Department resolve the La Prairie 'problem' without recourse to the obvious uncertainties of enforcement action

in relation to the circumstances of that site. In making this observation, we feel it is important to recollect the scale of the 'problem' that Planning was seeking to address. The complaints regarding La Prairie generally cited no more than the alleged untidiness of the site, and the principal 'enforcement' concern recorded on file was the visual amenity of passers-by on the main road. But the complaints that would follow at Heatherbrae Farm would allege an impact of a somewhat different kind on those living nearby.

7.17 Mr Taylor's planning application was approved on 23rd May 2005. Curiously, records held by the Enforcement Section of the Department indicate that the Enforcement Officers learned from Mr Le Gresley, the Assistant Director, some 6 days before the permit was signed off that it either had been, or would soon be, issued. The fact that they were briefed in such terms only adds more weight to our conclusion on 'encouragement', in that any further enforcement action at La Prairie was now otiose.

7.18 Miss Baxter drafted the permit and its conditions. She described for us the practice in the Department for the signing-off of permits under delegated authority. Non-controversial items could be handled at her level but where it was judged that there was or might be a degree of controversy, or where representations had been made, it was the Assistant Director's responsibility to review the proposed decision and conditions in draft and then sign them off accordingly. The system had previously worked through the use of differently coloured files. The Heatherbrae Farm case was, Miss Baxter explained to us, handled on what would previously have been a grey file, indicating that its sign-off was Mr Le Gresley's responsibility as Assistant Director. Mr Le Gresley told us that, to his regret, in this instance he approved the application without reviewing the permit conditions that had been drafted by Miss Baxter.

7.19 The planning permission was issued on the basis that Mr Le Gresley as an Assistant Director had sufficient authority to make the decision without reference back either to the PSC or the full EPSC. Proceeding under delegated authority was in order if, as it was put to us by the officers concerned, it was given that the committee or sub-committee had sanctioned the principle of the change of use for the benefit of RSL. Having regard, however, to the scope of the relevant PSC minute of 9th March 2005 (paragraph 6.8 above) and having reviewed the delegation of powers arrangement in force at that time, we have some difficulty in concluding that officers were authorised to determine the application in the absence of a further political decision. Mr Le Gresley told us that action was taken in good faith on what was seen as a 'green light' from the Sub-Committee. We do not doubt the good faith but procedurally this was in our view incorrect. This might well have been noticed by Mr Le Gresley had he actually looked through the file put to him by Miss Baxter; but he did not. At the time it made no odds for Mr Taylor or RSL. They had a good, wide-ranging permission (unaffected, once issued, by the absence of delegated authority) that enabled the move to Heatherbrae Farm to proceed successfully and a business to continue developing. In turn the Department had resolved a problem, that is, its concerns about the appearance of the highly visible roadside site in St Peter. But later, when the going got difficult, a political decision on the permission, and the more rigorous attention to detail probably

necessitated by that, could well have been a crucial foil for RSL in the battles in which it found itself engaged, not least with the Department itself.

7.20 Five specific conditions were attached to the permit issued to Mr Taylor. These, and the reasons given for them, were as follows –

CONDITIONS

1. *The owner of this site shall notify the Department on the commencement of the use hereby approved on this site. Within 3 months of that commencement of the approved use at Heatherbrae Farm, the operators [sic] existing site on La Route de Beaumont (to the east of 'Tile Barn' and north west of Field 814) shall permanently cease. The use of this site shall operate in the same way as the current site as a skip sorting yard only and for no other purpose.*
2. *The permission hereby granted shall enure for the benefit of Reg's Skips only, not for the benefit of the land, or for any other person or persons having an interest in the land.*
3. *Notwithstanding the provisions of the Island Planning (Use Classes) (Jersey) Regulations 1965, or any subsequent amendment thereto, the building and land in question shall be used for the storage and sorting of skips only and for no retailing, and no other industrial business or manufacturing use.*
4. *The permission hereby permitted shall only operate between the hours of 8am and 6pm Monday to Friday and 8am to 1pm Saturday and not at all on Sundays or Bank Holidays.*
5. *The area approved for use by Reg's Skips shall be limited to the one outside area (former silage clamp) and one indoor area (in the southern portion of the shed) indicated on the plans hereby approved. No other areas shall be occupied by this user without the written permission of the Environment and Public Services Committee.*

REASONS

1. *For the avoidance of doubt and to prevent two sites operating in tandem when the site herby [sic] approved is less intrusive and damaging to the amenities of the area.*
2. *This permission has been granted on the basis of very particular circumstances (personal permission) and can be met on this site without unacceptable harm to other interests.*
3. *This change of use has been approved for storage and sorting of skips only. A different use may harm the character of the surrounding area and the Committee requires to retain control over the use of the building in the interests of the character of the area and the amenities of adjoining properties.*

4. *To protect the amenities of occupiers of neighbouring properties and the area.*

5. *For the avoidance of doubt.*

7.21 Much if not most of this language is, as one would expect, perfectly all right. It was made quite clear that the permission was for the storage and sorting of skips only, and that this activity was to be confined to a given area of the farm buildings and land only. Hours of operation were specified unambiguously. A time limit was imposed for removal from La Prairie and, importantly, that the operations now approved for the new site should permanently cease at the former. Provision was made for possible future flexibility in the size of the operational area, subject to the Committee's decision. The permission was made personal to RSL, and not to run with the land.

7.22 The reasons for these various conditions were, equally, not unreasonably specified. It was emphasised that the change of use was for storage and sorting of skips only and nothing else. It was made clear that the two sites, La Prairie and Heatherbrae Farm, were not to operate in tandem and that the consent reflected the fact that the latter was 'less intrusive and damaging to the amenities of the area' compared with the former. Any different use other than skip storage and sorting was not allowed because it might harm the character of the surrounding area; the permission indicates that in mind here were retailing, any other industrial business (that is, other than skip storage and sorting), and manufacturing. The restriction on hours of work was to protect the amenities of occupiers of neighbouring properties and the area.

7.23 The main, important, weak spot was the last sentence of Condition 1: '*The use of this site* [that is, the new premises at Heatherbrae Farm] *shall operate in the same way as the current site* [that is, La Prairie] *as a skip sorting yard only and for no other purpose'*. This was very imprecise, and there was no clarification in the reasons as to what it was intended to mean. The argument made later, and put to us in evidence, was in essence that RSL's operations at La Prairie were fairly 'small-scale' and that the intention was to carry this over to the new location. The permission worded in this way was not intended, it was put to us, to sanction the 'larger operation that RSL subsequently became'. Later sections of this report will address this in considerable detail because it was the cause of the whole unsuccessful and, we believe, inappropriate enforcement saga that ensued following complaints about noise first received in 2006. Suffice it to be said for the moment that, the principle of imprecision apart, it was a bad condition because, as a review of the relevant file quite readily reveals, the Department had on record minimal information about RSL's operations at its former locations. Yet it had had not a little engagement with RSL over several years, since its time at Home Farm, including as a party in a complex administrative appeal, and should have understood its business and its scale and impact, for example in relation to traffic movements. The business was well known to several leading politicians and the full EPSC had only recently been engaged on its case. The Enforcement Section had, of course, been engaged on it too. For such reasons one would have expected to find significantly more background detail on file, and thus able to be brought to bear on the decision, than was the case. Perhaps it was just presumed when

the relevant sentence was drafted that all the necessary information was to hand. Or, more likely, perhaps the sentence was just written in a rush, with insufficient aforethought.

7.24 In evidence to us it was accepted by Mr Le Gresley and others that Condition 1 was insufficiently precise. But in 2006 and early 2007, the Department asserted, and continued to assert, in seeking to take enforcement action against RSL that it was 'clear and precise'. The confusion of thinking, or the failure of analysis, on the Department's part that this represented had an extremely significant impact upon RSL, as will emerge from this narrative.

7.25 It should be noted that Condition 1 also acknowledged that La Prairie was a site on which skips were indeed sorted. This tallies entirely not only with Mr Bisson's evidence but also with RSL's business records supplied to us by Mr and Mrs Pinel. But it was said later by the Department that in its view La Prairie was 'unauthorised' for such use because its pre-1964 use was as only a haulage depot. This is a relatively minor point but it emerged later during the Department's attempted enforcement actions against RSL.

7.26 Condition 2 is also worth some remark because its slightly unusual nature was the genesis of some complications once complaints were made about RSL's operations from May 2006. The normal position is for a planning permission to be tied to the land not an individual. We asked why the Department thought it right to limit the permit to a specific user (about whose business model the Department did not know as much as perhaps it thought it did) rather than link it to a properly defined category of use. Building on the second reason cited at paragraph 7.20 above, Mr Le Gresley, in his evidence to us, said –

> *'it is permissible for the Minister to say: "We are giving consent for this particular person" because we are giving consent on a particular basis of an operation that we are looking at and we would not want another operator to come in and work in a different way.'*

7.27 We understand the point being made. We take it as further evidence that the Department was focussed on ensuring that RSL itself would be incentivised to leave the La Prairie site as soon as possible, and that Mr Taylor would, equally, be incentivised to take on RSL as a tenant, not being permitted to let his land to any other skip operator. But, as we explain later, this condition helped to generate some of the muddle and confusion that afflicted the Department once the complaints about RSL emerged, when it failed to appreciate who was the proper holder of the 2005 permit.

7.28 By way of an aside, when, more than two years later, the Department sought legal advice on RSL's case in relation to a subsequent planning application by Mr Taylor, the advice given by the Law Officer's Department will, we believe, have left the Department in no doubt that such a condition personal to a company was inappropriate because its shares could be transferred to others without effect on its legal personality. In that sense, such a permission was akin to a permanent permission. The permission would cease only if RSL ceased to exist. We have not needed to explore in our report the possible

implications of this but we do suspect that, although the device was adopted by the Department in this case for a reason, there was no thinking through of those implications beforehand.

7.29 In any event, Mr Taylor advised RSL that he had now obtained a valid permit and he concluded a lease agreement with RSL, whereupon the company set about relocating to Heatherbrae Farm during July 2005. On completing its move to what was a bigger and more practicable site than La Prairie, RSL ceased utilising the services of its subcontractor and went back to sorting all mixed loads received.

7.30 For all the reasons outlined above, the processes surrounding the acceptance, consideration and determination of the 2005 application by the Department were unsatisfactory. There were failures of procedure and analysis, and a want of supervision by senior officers.

7.31 Notwithstanding the foregoing and for the avoidance of doubt our clear feeling is that, had the 2005 application been processed to the required standard and been determined at the political level, the outcome would still have been to approve the relocation of RSL to Heatherbrae Farm. First and foremost, the Department was extremely keen to get RSL off the La Prairie site. There is no reason to suppose other than that this objective would have been supported at the political level on the grounds of visual amenity advanced by officers. Secondly, there were certainly justifiable waste policy grounds that would have been unlikely not to have attracted political support had they been advanced by officers (or even if they hadn't). The States had deliberately priced itself out of the mixed load sorting business to preserve the integrity of the incinerator and the La Collette 2 reclamation site for disposal of burnable and inert waste in line with the then emerging Solid Waste Strategy. This had created a new, growing market for skip sorting on private land, to which the planning system needed to respond, from a starting point of, seemingly, no available sites for such business. Thirdly, a number of landowners were trying to find alternative, viable, uses for redundant farm buildings and relevant States Committees of the day had sought, and were seeking, to help them. Fourthly, the fact that alternative sites for RSL were seemingly so hard to find was a key, and reasonable, factor in the contention that such a business could be permitted in the Countryside Zone, as Miss Baxter had hinted in her March 2005 report to the PSC. Although subsequent events demonstrated the need for noise pollution to be managed, we suspect that RSL might still have been operating from Heatherbrae Farm today had the potential noise problem, touched on by Health Protection in its comments, been identified and addressed objectively at the outset.

8 THE EVOLUTION OF HEATHERBRAE FARM

8.1 There were two developments of note between the issuing of Mr Taylor's permit for RSL in May 2005 and the first complaint about RSL's operations at the end of April 2006. Both concern the evolution of Heatherbrae Farm from a redundant dairy farm to a commercial site.

8.2 The first concerns a decision by the PSC on 29th June 2005 to remove a *corpus fundi* condition at Heatherbrae Farm and to make permanent the time-limited change of use agreed in August 2002.[3] We note that the PSC minute is, once again, relatively brief. Perhaps more importantly, it indicates that discussion was focussed almost entirely on the corpus fundi matter (which is not of concern to us) and not on the permanent change of use (which is of greater relevance). In short, making permanent the change of use seemed to have been accepted as a given. There is no indication that the PSC received even a summary of relevant planning events since the temporary permission had been granted three years earlier. There is certainly no indication that the land use implications of the newly approved change of use for skip storage and sorting in one part of the same site (which in commercial use terms went well beyond the dry storage use under consideration at the meeting) had been drawn to the attention of the PSC. This was a very significant application indeed, which required careful and informed consideration by the PSC but the minute indicates that it may well not have received that.

8.3 The second development occurred on 19th October 2005, when the PSC approved an application submitted on behalf of Mercury Distribution, which had recently leased one of the former farm buildings at Heatherbrae Farm from Mr Taylor. A change from dry storage use only to warehouse and distribution point use was sought.[4] The list of factors taken into account by the PSC at that meeting was comprehensive. It included –

(a) an assessment of the commercial operation undertaken by the applicant company and the vehicular activity anticipated as a result;

(b) the scope for impact on the countryside and on neighbouring properties arising from the anticipated vehicular activity;

(c) access to and from the prospective warehouse; and

(d) the potential benefits at sites elsewhere in Jersey that would accrue if the applicant company were permitted to consolidate its operations on the one site.

8.4 The application was approved on several conditions, including that the applicant company limit vehicular movements to and from the site to between 8.00 a.m. and 5.00 p.m. Monday to Friday and that the permitted use would not be allowed to evolve beyond warehousing and distribution. A noise condition,

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[3] PSC Minute A19 of 29th June 2005 refers

[4] PSC Minute No. A27 of 19th October 2005

requiring compliance with Noise Rating Curve NR40 during the daytime and NR30 during the night-time, was also attached. We understand that this was recommended by Health Protection because, on this occasion, the Department had provided sufficient detail for Health Protection to deduce that external air conditioning units would be fitted to the building in question. This had prompted Health Protection to visit the site and take background noise measurements before commenting. No such condition was attached to the permit for RSL, a matter of considerable import later on.[5]

8.5 Our assessment of these two planning decisions, the approvals given by Mrs Ashworth for various tenants prior to June 2005 and the decision regarding RSL itself in 2005 leads us to the clear impression that, by October 2005, Heatherbrae Farm was evolving into a small commercial estate with somewhat inconsistent operating restrictions applicable to individual units on site. We think that the overarching land use implications of this series of decisions were being lost in the process because the officers concerned did not identify, assess and report the material planning considerations properly to the PSC or to the full EPSC. The proper course of action might have been for the Department to pursue the formal rezoning of the whole site.

8.6 There is a particular significance in this in that, moving forward to 2008, one of RSL's grounds of appeal against the decision in the *voisinage* case was exactly that the neighbourhood had changed because of '*the steady development of alternative business at Heatherbrae Farm'*, and that therefore the Royal Court had applied the law of *voisinage* wrongly in the circumstances. RSL's advocate backed up this argument by reference to Mr Taylor's 2002 change of use permission, which had changed Heatherbrae Farm from farming to commercial use. The Court of Appeal rejected the argument, saying that there was nothing in the granting of the 2002 permission[6] which could properly be regarded as operating to alter the character of the neighbourhood. On that basis this view was perhaps fair enough but one may be entitled to wonder whether the Court of Appeal would have said it quite like that had it had evidence of the whole planning history of Heatherbrae Farm.

[5] See paragraphs 10.24–10.25

[6] We understand that no direct reference was made in the Court to the cases in 2005 concerning Heatherbrae Farm to which we refer in this section.

9 THE COMPLAINTS

9.1 To set the context in which the complaints about RSL at Heatherbrae Farm were made, starting in 2006, and how they were addressed by the Planning Department, we consider first two ancillary matters. Both are important because they led to justifiable suspicion on the part of both Mr and Mrs Pinel, and Mr Taylor, that there was an 'unlevel playing field' as far as the Department was concerned between them and the complainants.

9.2 The first is that there was a delay of some nine months before Mr and Mrs Yates first complained about the activities of RSL at Heatherbrae Farm. Their first complaint was made to the Department on 27th April 2006 in a telephone call from Mrs Yates. We were told by Mr Taylor that there had been no mention of the matter at all to him by those neighbours in the preceding months; Mr and Mrs Pinel too said the same. The same went for other neighbours as well, one of whose properties was somewhat nearer to RSL's operations area than the Yates' boundary, which was some 60 yards away.

9.3 Mr Yates offered an explanation for this delay and this accorded with the account he and his wife had given the Royal Court. They gradually became aware of an increase in noise from the site during the latter part of 2005 and the early part of 2006. The Royal Court was told by Mrs Yates in November 2007 that her husband and she had had a fence erected on their boundary with Heatherbrae Farm in February 2006 to try to mitigate the noise emanating from RSL's operations.[7] Mr Yates said in his affidavit of 27th October 2006 in support of seeking leave for judicial review of the Minister's decisions concerning RSL that the purpose of the fence was to screen his property from increasing activity at Heatherbrae Farm but that it might improve the noise position too. It is perhaps strange that no complaint was made at the point when the fence was planned or built, nor any contact sought with Mr and Mrs Pinel, or Mr Taylor, to discuss the noise issue that had allegedly arisen. Mr Taylor recalled that he did have contact with Mr Yates in January 2006, when the latter asked him if he could utilise his property for the purpose of constructing the fence, and again in April 2006 apparently because of some disagreement over its line on the boundary. Mr Taylor said, however, that no mention was made to him on these occasions about noise, whether from RSL or any other of his tenants.

9.4 Both Mr and Mrs Pinel, and Mr Taylor, in their evidence to us, attached a degree of significance to this delay. Although afterwards the question of 'intensification' of RSL's operations became a very substantial issue, they contended, with justification in our opinion based on a review of RSL's trade records, that RSL's volume of business varied little between the autumn of 2005 and the spring of 2006; it was not '*increasing*', as later came to be claimed. Mechanical sorting of mixed loads took place as and when throughout this period and none was being subcontracted for sorting elsewhere. Mr Taylor offered us the view that the dispute that arose between

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[7] Yates -v- Reg's Skips Limited [2007]JRC237

him and Mr Yates over the positioning of the new fence was, perhaps, the factor that caused the escalation.

9.5 Mr Yates explained to us that he and his wife had been away from Jersey at the point in March 2005 when Mr Taylor's planning application had been advertised in the newspaper. (He noted, correctly, that in 2005 the requirement for notices of planning applications to be displayed prominently for 21 days had not yet been brought into force.) He had been away for a fortnight and would thus have seen a notice had there been one; and he would then have objected to the application. This is an entirely fair point but the other side of the argument is that the planning system is run for the benefit of applicants and not just complainants. The fact that Mr Yates did not object at the time of the application in 2005 (nor, incidentally, did he object to the subsequent applications at Heatherbrae Farm referred to in Section 8) should, in our opinion, have been taken into appropriate account by the Department in the manner and scale of its response to his complaint. We have, however, formed a clear view that it was, in fact, taken into no account at all. It was put to us that our argument is wrong, and that a complainant may complain whenever he or she likes regardless of positions adopted or not earlier. Of course a planning complaint can be made at any time but it seems axiomatic to us that the Department should then take all factors into account in deciding the nature of its response. A complainant's failure to have objected at the outset seems to us to be at least a relevant factor in this regard.

9.6 This is, we believe, borne out by the Minister's response to Mr and Mrs Yates' application for leave for judicial review of his decisions regarding RSL, submitted by HM Solicitor General on 9th November 2006, which we presume represented Departmental policy. This considered statement addressed the point directly as a factor militating against a grant of leave, saying –

> *'...The applicants were out of the Island and did not see [the notice] and if they did not see it they could not have been prejudiced by its terms ... The fact that the applicants were out of the Island is not a valid reason [for being granted leave].'*

9.7 It is not within our terms of reference to seek to resolve the differences of opinion about what happened in the period leading up to Mr and Mrs Yates' complaint, and even if it were it might be a nugatory task. We sense that the neighbourhood around Heatherbrae Farm was wanting neighbourliness, and this state of affairs was not conducive to seeking to sort things out informally. Mr and Mrs Pinel were well aware that their business had the potential to be problematical from an 'environmental' perspective, while conscious too that recycling was an important function in the Island's economy and for its 'environment.' They were genuinely taken aback , they told us persuasively, especially given that they had been so helped by the Department to make the move to Heatherbrae Farm, to learn about Mr Yates' complaint from the Department itself, Mr or Mrs Yates having sought no contact at all with them first to discuss possible mitigation, to which they would, they said, have been very open.

9.8 The second matter arises from the fact that the person in the Planning Department who mainly dealt with Mr Yates after he had made his complaint about RSL was Mr M. Porter, an Enforcement Officer, rather than Mrs Ashworth, who had been dealing with the Heatherbrae dossier since 2002. This was not out of order: a complaint had the potential to trigger enforcement action if a planning condition had been breached and in any case might require appropriate investigation. In view, however, of the importance of 'enforcement' action in the whole RSL case, especially from 'La Prairie' onwards, we judged that we should first briefly consider the position of 'enforcement' generally in relation to the Department's development control function, how the enforcement function was guided and managed, and how enforcement and planning officers worked together on casework as a team.

9.9 We were not at ease to discover that almost nothing was laid down on how enforcement officers should go about their business or on how their work should relate to the planning side. We examined the Department's procedures manual in place at the time. This was a weighty ring-binder file. We found that the section titled 'Enforcement' in the list of contents was entirely empty. It contained not a single piece of paper. To our surprise we understood, incredulously, that this position still obtains. What it meant (and we think still means) in practice was that the Department's 'enforcement' function, a crucial part of its statutory armoury, operated by particular reference to the attributes and approach of the few individuals concerned and with no formal corporate governance or management arrangements in place to give assurance about its effectualness and accountability, whether to the Department's political or official leadership, or indeed to citizens. For an area of administration so intimately connected with the interface between public and private rights, and where procedure must be unquestionable and seen to be so in order to ensure fairness, we can say only that we were flabbergasted by the lack of written procedures, rules or guidance. It was, and if it still obtains is, a systemic weakness of the first order.

9.10 In looking at this one aspect of the Department's business arrangements thus, we cast no aspersions on the officers concerned, who clearly endeavoured to fulfil diligently their roles as they saw them. They drew, in some cases, on much experience, for example from the States of Jersey Police. In practice, though, the evidence we have discerned in the case of RSL suggests they were obliged to address issues and policy factors that should have been the province of qualified planners. When we raised this with relevant officers we were told that there was complete and frequent intercourse among all concerned in order that policy and practice on individual cases was decided appropriately with senior-level input. Enforcement officers, we were told, acted only on this basis. We do not doubt that there was much informal communication but we fear we found little recorded evidence of discussion among team members about, for instance, the delineation of policy on problematic issues or decisions on the tactics and handling of cases. There was certainly no evidence of, for example, multi-disciplinary teams, including officers from elsewhere as need be (such as Health Protection), given the lead by senior management to run complex cases.

9.11 In this respect Mr Bisson told us in his evidence that he relied extremely heavily in his work on personal knowledge going back many years, as well as talking to his planning colleagues. Mr Thorne and Mr Le Gresley accepted that there was an absence of protocols governing the enforcement function, the latter describing it rather as *'just custom and practice over the years'*. It was also apparent from what Mr Thorne told us that records on enforcement matters were not routinely available to planning officers, yet we were also told, on a different occasion, that the latter had clear policy and oversight of the enforcement function. We considered too that there seemed to be some difference between enforcement officers' own perception of their role in supporting the planning side on dispute resolution and the Department's 'official' view of the role as evidenced by the relevant job descriptions.

9.12 All in all we did not feel very confident from these various exchanges – and of course the lacuna in the procedures manual – that there was good management grip in the Department about the nature of the enforcement role and its boundary, or otherwise, with 'planning'. This is something we may comment on further in our second report. But as far as RSL's case was involved, we found it hard not to gain the feeling that it had on occasions the appearance or capability of being problematical as we rehearsed the Department's handling of the case once, from 2006, it moved quite considerably into 'enforcement' mode.

9.13 We now turn to the complaints themselves. It is evident that when Mr Yates engaged with the Department, and with Health Protection, he did so incessantly and forcefully, in a manner and with an intensity that one might imagine the Department only rarely experienced even allowing for the passion often exhibited in controversial planning cases. The pressure applied was, we believe, given greater credence by the Department because of Mr Yates' status as an Advocate of the Royal Court and a man of standing in the community of the Island. As a man of law and partner in a leading St Helier law firm he was of course exceptionally well-placed to put articulate demands for information and evidence upon the Department and to question by what powers it was doing, or not doing, things.

9.14 More than one of our witnesses asserted that Mr Yates' actions were as those of a bully. We make no comment about that. And we make no criticism of Mr Yates for knowing how, and being well able, to pursue his case to the uttermost of the civil law. While it is not easy entirely to dissent from the view that occasionally Mr Yates may have pushed at the margins of reasonable behaviour, his diligence, and even passion, in taking forward his case was clearly remarkable and staunch. A particular issue for us has been to seek to assess whether he was to any degree assisted by an approach on the part of the Department that could possibly be construed as the favouring of one party, him, over another. We make this point because this was certainly the sense that Mr and Mrs Pinel soon got in early summer 2006 as enforcement action began against RSL on the basis of Mr Yates' strong, persistent and seemingly erudite complaints. We shall allude to several instances where this was certainly their view of events or where the evidence we have reviewed could be held to support such a view. We are conscious too from what we heard

from some officers that there was a view in the Department that, certainly in the period up to 2005, RSL had come to be seen as 'something of a nuisance', taking up the time of planning and enforcement officers because of the 'unauthorised' nature of its activities. It is necessary for us to be scrupulously careful in making any judgements in this sphere and the evidence will need to speak for itself. But we do own to some considerable unease if the starting point for the Department was indeed that the company was a nuisance to be managed rather than, as the Minister later put it on several occasions, a significant Island business to be dealt with properly.

9.15 Over a period of some three weeks after Mr and Mrs Yates' initial complaint to the Department on 28 April 2006 about the noise caused by RSL, a number of further telephone calls made by Mr Yates to both Mrs Ashworth and Mr Porter were followed up rapidly by many e-mails, eight of which were sent by Mr Yates using his work e-mail account or by Ogier staff on his behalf. Mr Yates was also in contact with Health Protection, from which contact he soon learnt that Health Protection had not been told that RSL was to be the occupant of the new commercial premises at Heatherbrae Farm. Conscious from the start of the 'in the same way [as La Prairie]' condition on Mr Taylor's planning permission for RSL, he sought information about RSL's practice at La Prairie from a business acquaintance who chanced to live just by there. He visited the Department on 12th May to look at files concerning the occupants of the other units at Heatherbrae Farm; this took place in the Enforcement Office, with Mr Porter present. These exchanges represented the opening salvo in a veritable barrage of correspondence and communication with States Departments. Mr Porter himself was referring to it in those terms as early as 3rd May. In the files that we have reviewed we have counted just under 90 separate e-mails or other items of correspondence from or with Mr Yates concerning RSL covering the first year from April 2006 alone. This figure is exclusive of the significant number of telephone calls also made.

9.16 Looking at all Mr Yates' communications at this early stage one can readily see at work a lawyer's skills of mastering a brief at speed and powerful advocacy of a cause. It is fairly evident that the ferocity, even implacableness, of the attack caught the Department off guard. Mr Porter noted later on, for example, in a briefing note for the Minister, that after RSL had moved to Heatherbrae Farm all had been going well, until, that is, the barrage began. Our principal interest, however, is to look at how the Department behaved under the onslaught and to see whether its duty to be fair to all parties in the dispute became in any way compromised. We regret to say that we think it did.

9.17 Mr Yates' first complaint was about the noise caused by the sorting and moving of skips: noise in the form of loud bangs and thumps as material such as rubble or metal was loaded into empty skips, and the clanging of chains and the like as skips were mounted on to lorries or unmounted from them. He told us that he and his wife had gradually become more aware of the noise in the months leading up to April 2006. Initially he thought this came from a scaffolding company occupying one of Mr Taylor's dry storage units. When he first realised that RSL was operating at Heatherbrae Farm, and had done his

initial research into the 2005 planning permission, he came to the view, he said, that what he described as an increasing level of noise was due to an intensification of RSL's operations and, in particular, through use of a mechanical digger rather than manual labour for the sorting of many skips. This was, in his opinion, by comparison with what the company had been doing at the La Prairie site, whereof, as already noted, he had made enquiries of an acquaintance who resided nearby, His account was, of course, anecdotal evidence. The acquaintance in question, Mr M. Sumner, told us that he was generally out at work for much of the day. He had nevertheless been able to form the following view about RSL's activities at La Prairie –

> *'...in terms of activity on the site it largely involved the storage of empty containers stacked quite neatly in ... well, around the periphery of the property. Sometimes those containers had waste materials in and occasionally I would see a couple of guys sort of working their way through the containers to separate the materials into such that, you know, there would be all wood in one and all metal in the other, et cetera. There was not an awful lot of activity except that occasionally a lorry would turn up, a specialised lorry, that would be capable of picking up and loading and off-loading these containers. That is quite a noisy process.'*

9.18 Mr Yates, having examined the conditions attaching to Mr Taylor's planning permission for RSL and carried out all this other research, then asserted, with undoubted pertinacity and perspicuity, that the operations at Heatherbrae Farm were not being conducted '*in the same way*' as at La Prairie, in breach of Condition 1. He contended that the main purpose of the La Prairie site had been to store skips, that any sorting of skips had been 'intermittent and of limited duration' and that any sorting had been done by hand only. He also animadverted that RSL appeared to be operating in breach of Condition 4 of the 2005 permit by starting work before 8am.

9.19 In this initial period Mr Porter sought to familiarise himself quickly with RSL's planning history. He discussed the complaint and the history of RSL with an enforcement officer colleague, Mr J. Doublet, who has since retired, and with planning colleagues. As Mr Yates' complaints gathered pace he resolved to record his actions with care lest a complaint emerged against him.

9.20 Mr Porter responded to Mr Yates' complaints by visiting Heatherbrae Farm on 8th May 2006. This was his fourth working day after receiving notice of the very first complaint (from Mrs Yates). It was also three working days after Mr Binet of Health Protection had visited Mr and Mrs Yates in response to their separate complaint to him. We note that by this time Mr Porter had already received three e-mails and four voicemail messages from Mr Yates. By close of business on 8th May he had had three telephone conversations with Mr Yates too. The visit Mr Porter made to Heatherbrae Farm was unannounced. He spoke with Mr Pinel, and with Mr Taylor, referring only to a 'neighbour' and not to Mr Yates by name. For both parties, and after some nine months of operations, this was their first news of the complaint.

9.21 Mr Porter's file notes give an indication of just how quickly after the 8th May visit he moved from his initial stance in response to Mr Yates that RSL's operations were in accordance with a valid permit and that '*there was little recourse.*' He correctly identified that Condition 4 would be being breached if it was the case that operations were beginning before 8am, as Mr Pinel had not sought to hide. And he came to the view, based also on what Mr Pinel had quite openly told him when asked (clearly pursuant to Mr Yates' assertion on the point), that there had indeed been an 'intensification' of RSL's business at Heatherbrae Farm compared with the position that had obtained at La Prairie, in the sense that more mixed load skips were being sorted as business volumes grew. Mr Porter also learned (as Mr Yates had reported in his first complaint on 28 April) that a mechanical digger had been deployed to increase skip sorting efficiency, noting Mr Pinel's comment to him that the company '*[could not] go back to sorting by hand*.' (We established, however, that this item of plant had been leased by RSL shortly before the move to Heatherbrae Farm, while it was still based at La Prairie, to improve efficiency and to substitute for hiring one in for use at La Prairie when needed.)

9.22 Over the next few days Mr Porter discussed the alleged intensification of use with Mrs Ashworth and with Mr A. Townsend, Principal Planner. There are no written records of the conversations that took place. Mr Porter also recalls having discussed the matter *'quite regularly'* with Mr Le Gresley although, similarly, there are no file records of what may have been said. The view was reached, having regard to the inquiries made by Mr Porter, that RSL was not complying with the requirement in Condition 1 of the 2005 permit for it to work '*in the same way [as a skip sorting yard only]'* as at La Prairie, or with Condition 4 on hours of operation. These views concurred with Mr Yates' assertion that specific breaches of the 2005 planning permission were taking place, notably 'intensification'. Mrs Ashworth's view was that *'[Mr] Porter had established the intensification'*.

9.23 There is no evidence that any consideration arose among those concerned as to the possible imprecision of the *'in the same way'* condition or to what the concept of 'intensification' actually meant in planning terms. The burden of all the evidence we received from officers was that it was taken as read that if RSL were doing more sorting work at Heatherbrae Farm than previously at La Prairie, it was in breach, and that what Mr Pinel had said to Mr Porter in response to being asked about this, without caution of any kind, coupled with Mr Yates' own investigations about La Prairie, was evidence enough of this for enforcement action to begin. As Mr Le Gresley put it to us, it was the *'small operation'* at La Prairie that the Department *'was seeking to allow, not the larger operation that RSL subsequently became.'* Legal advice was not taken about whether the relevant sentence of Condition 1 could support this judgement; it was presumed, as Mr Porter put it when he wrote to RSL on 10th May, that the conditions were '*clear and precise*.' This was correct insofar as hours of work were concerned, and in respect of another issue also mentioned by Mr Yates concerning the parking of vehicles outside the 'approved' area (which was in fact a temporary arrangement during some trench works). But the imprecision of the 'in the same way' condition as later admitted to us by Mr Le Gresley, and its consequent unenforceability as later realised by the

Department, was at this moment not the subject of any regard whatsoever. Action against RSL thus proceeded on the basis that it was precise and that its business growth in the sorting of skips, and its use of a mechanical digger to that end, were impermissible. It is unfortunate that, as already noted, none of the analysis and discussion leading to these conclusions that we were told took place in the few days at issue within the Development Control Office and the Enforcement Section was recorded on file.

9.24 Mr Porter invited Mr and Mrs Pinel to the Department on 10th May. Mr Yates had already been informed by Mr Porter that this meeting was to take place. This prompted Mr Yates to e-mail Mr Porter on the morning of Monday 8th May, having been unable to get through on the telephone. Among several points *'by way of update, and for your meeting on Wednesday'*, Mr Yates said that the digger was *'still'* being used each day, and that *'subject to your views, it seems that there is no reason why they should be using the digger at all as they have no justified use for it, and it seems fair to expect that unless their permit is varied, it is removed from the site'*.

9.25 When Mr Porter met Mr and Mrs Pinel again on Wednesday 10th May he told them that the Department's view was that RSL was acting in breach of Conditions 1 and 4 of the 2005 permit because –

(a) in respect of Condition 1, the operation had intensified beyond that which was permitted, and

(b) in respect of Condition 4, work was being done on site outside the permitted working hours.

9.26 Mr Porter formalised the position in an 'enforcement' letter handed to Mr and Mrs Pinel directly. This referred to the receipt of *'several complaints'* about how RSL was operating, that were *'broad in nature'* but which related primarily to the breach of *'specific conditions'* attached to the 2005 permit. Two of the Department's concerns that he listed were about hours of work and vehicle storage outside the approved operational area. The third was about RSL's apparent increased sorting of mixed skips. *'From hand sorting of a few skips each week, the company now sorts several skips per day with the assistance of plant machinery. This intensification of use does indicate that the company has grown outside of the bounds required by this planning permit..... <u>The use of plant machinery must cease immediately</u>'*. He said that if the concerns were *'proven to be a breach of conditions'* RSL may be *'liable to [sic] formal action and ultimately referral...for consideration of prosecution.'*.

9.27 He went on to say that it was clear that the business had flourished since moving to Heatherbrae Farm and that its operations were no longer possible within the 2005 conditions. RSL could seek to avert enforcement action prompted by the complaint, and thus move forwards, by applying to the Minister for reconsideration of the conditions. Consent to that might, of course, not be forthcoming. The letter was copied to Mr Taylor, and the question whether it should more properly have been addressed to him as the permit holder does not seem to have been considered. In an e-mail to Mr Yates

informing him of what he had advised RSL, Mr Porter addressed the former's demand for instant enforcement action to get the noise stopped by saying –

> *'The problem then exists that the Crown Officers Department will not normally consider those breaches for prosecution whilst there is an application to the Minister (or request for variation of conditions) in place.'*

9.28 As for the substance of the message conveyed by Mr Porter, we turn first to the question of working hours. RSL readily admitted that the company had been starting work earlier than 8.00 a.m. This was, it said, because construction industry customers expected skips to be on site before that time. The competitor company whose principal had been the sole objector to Mr Taylor's planning application for RSL, was, we were told, able to offer its customers such early starts without restriction because no working hours constraints had been imposed upon it through the medium of a planning permission. (At the time of publishing this report we understand, with concern, that that remains the position.) Mr Taylor may have erred in not having formally drawn the attention of his new tenants to the starting time restriction attached to the planning permission but a copy of the 2005 permit had been sent to RSL by Miss Baxter a year before, so the position should have been known. The Department's position on this was thus fair, as was Mr Yates', though the letter did not address a point raised by the latter as to whether a starting time for work of 8.00 a.m. meant that no lorries were to arrive before then. What, however, may not have been fair was the initial imposition of a restriction upon RSL that differed from what was required of or, rather, not required of all competitor skip companies.

9.29 The position adopted in Mr Porter's letter on 'intensification' needs some comment. First, we note that it concurred with what Mr Yates had forcefully indicated to the Department in the preceding ten days or so. It reflected what he had alleged from his own enquiries about operations at La Prairie. There is nothing on the file to suggest that the facts of the matter regarding La Prairie were checked within the Enforcement Section. Reliance was placed on Mr Porter's having, in Mrs Ashworth's words, established the intensification. This was based on his conversation with Mr Pinel who, on Mr Porter's admission, was very helpful in answering his questions. There is no evidence that Mr Pinel was made aware that what he said about his business might be used in evidence against him. And, as already noted, there was no evidence of any consideration of the planning principles underpinning the concept of 'intensification.' We are led to the view that it was just assumed by everyone that Mr Yates was right and that, based only on that, and on what Mr Pinel had said, the *'clear and precise'* 'in the same way' condition was regarded as having been breached. We do not have any evidence that the attitude in the Department we were told about, to the effect that RSL was seen as a 'nuisance', contributed to the rapid decision-making that followed Mr Yates' first complaint about RSL.

9.30 What is clear is that the concept of 'intensification of use' in planning terms was not widely understood in the Department (as it certainly should have

been). We established that there was no source of properly documented advice on this or other such subjects in the Department to which officers could turn.

9.31 We invited officers to explain to us the concept of 'intensification' and how it related to the RSL case. The answer we were given was, in essence, that the fundamental nature of the work done by RSL at Heatherbrae Farm had changed compared with what had been done at La Prairie. It was now a different and more intensive operation. In support of this it was said that a major increase in the number of skips processed at the site constituted a relevant intensification, which was impermissible given the relevant planning condition. This was in line with the letter of 10th May described above, and subsequent reports by the Department. But to us, it must be said, it was from first principles an extremely unconvincing line of argument that, in much of the evidence we received, came across more like an attempt to avoid admitting that the 'in the same way' condition and the approach adopted on it in May 2006 had been ill-judged and wrong.

9.32 In another 'enforcement' case in play in the latter part of 2006, which also involved a company that processed mixed skip loads, Mr Townsend, line manager to Mrs Ashworth and one of the officers apparently consulted by Mr Porter at an early stage, gave advice to an enforcement officer colleague on 'intensification' as follows –

> *'Intensification.*
>
> *'Whether that use has changed to a point where a change of use has taken place through intensification is more difficult to gauge. There is no clear way of assessing this. It is clearly a matter of judgment and fact and degree but the onus in my view is clearly upon the department to demonstrate that such a use has clearly taken place, if it considers any action is justifiable.*
>
> *'We have clearly accepted a long series of commercial uses on this site... Having accepted these commercial uses we in turn appear to have accepted a recycling use. Once the applicant was aware of that it seems reasonable to me that he allowed his business to expand within the constraints of the authorised area... if he happens to have the ability to produce material more quickly than he did at the outset I am not convinced that this can be said to be an intensification of use which constitutes a change of use. If someone operated a shop which at first only had 2 or 3 customers a day but then because they changed what they were selling increased the number of customers to 10 to 20 I would still regard the use of the building as being retail.'*

9.33 Had this lucid, and broadly contemporaneous, explanation of the point at issue been brought into play in all the discussions that we were told occurred before the letter of 10th May to RSL was drafted, events might well have taken a rather different, and better, turn. Instead, the views advanced on the subject by several officers (not including Mr Townsend) when we asked about it during and after one of our hearings undeniably seemed to be quite confused, including on whether there was or wasn't case law on the subject. This left us

not unconcerned about the exact nature and extent of the debate in the Department in the days before the formal letter to RSL was written on 10th May.

9.34 Alleged 'intensification' by RSL was, in our view, simply a straightforward increase in the business volume of already well-established skip storage and sorting activities. It was a return to full on-site sorting as had been the norm at RSL's first site, Home Farm, and after partial interruption of the same at La Prairie, where about half of the firm's sorting was contracted out owing to the size of the site. The fact that one mechanical digger was deployed to increase the efficiency and safety of the same established process was an irrelevant consideration in relation to the conditions of the 2005 permit, whatever its noise impact might have been; but in any event a digger had been used by RSL at La Prairie too.

9.35 In any event, the evidence base for the Department's position was not satisfactorily constructed. RSL's practice at Home Farm had been to sort all mixed loads on site, albeit that we do not know precisely how many loads were sorted during those early years. Evidence from RSL's business records that we have reviewed shows that RSL was receiving around ten mixed loads per week during its period at La Prairie. Approximately half these were sorted on site at La Prairie during 2004–05 and the other half subcontracted to Abbey Plant owing to the physical constraints of the La Prairie site. Other evidence we received corroborates both the sorting activity at La Prairie and the percentage of loads directed to Abbey Plant. In the period April – June 2006 RSL was processing an average of just over twenty-four mixed skip loads per week or four-and-a-half per day at Heatherbrae Farm, based on a five-and-a-half day working week. Furthermore, we are very clear that RSL had intentionally stopped using Abbey Plant upon relocating to Heatherbrae Farm because the company was no longer affected by a shortage of working space and because in-house sorting was the most profitable aspect of the business. This reflected the growth of a successful business in a then buoyant sector of the economy, RSL's flourishing, to use Mr Porter's term.

9.36 In light of the above, we consider that what officers decided to regard as 'intensification' amounting to a change of use was nothing of the sort. They had almost no La Prairie baseline save the anecdotal evidence from Mr Yates himself, which we think unduly influenced what was done. The same goes for the question of the digger. Instead the developments in question were the outcome of an established business model being amended and refined over time in response to changing circumstances and to economic imperatives, including those flowing from key States policies. Such growth, moreover, was entirely foreseeable when Mr Taylor's 2005 application had been initiated with the Department's encouragement. But it was *not* foreseen in 2005 because, having decided to get the application approved quickly, the Department did not take time to reflect on what it had decided to do or think to ask the questions that would have allowed it to form a proper understanding of the business it was helping to relocate. If it wanted to limit RSL to past levels of business (and if that was a legitimate objective of the planning regime) it failed to impose a requisite condition that might be aimed at achieving it.

9.37 Had conditions been imposed of sufficient specificity, perhaps, for example, regarding digger usage time or setting some limit on skip sorting volumes exactly in line with the evident position at La Prairie, the line of argument above might have been rather different. Importantly, Mr and Mrs Pinel would also have been able to make an informed decision as to whether a move to Heatherbrae was appropriate for their business or whether they should have looked elsewhere. Their later problems would then have been avoided. As things were, there was an entirely valid permission for skip storage and sorting at Heatherbrae, properly not limited as to volume or method. But the Department, faced with Mr Yates' complaints, unfortunately sought to argue that there wasn't.

9.38 The clear sense we get from this initial episode in the narrative is that, notwithstanding plenty of discussion among officers within the Department, as we were told, there was not much thinking done about the issues before Mr Porter wrote to RSL on 10th May. It is very striking to us that that was only the ninth working day after Mr Yates' first complaint and only the second working day after RSL first knew about it. (Mr Taylor, the holder of the planning permission, knew nothing of the intended action until it had been taken.) To us this implies serious systemic weakness in the Department, starting, but not ending, with the absence of formal procedures governing the enforcement process to which we have already drawn attention. It also implies to us that, whatever its merits or otherwise, Mr Yates' complaint was acted upon too precipitately, and in such a definitive manner, for the natural justice due by the authorities to Mr and Mrs Pinel, and to Mr Taylor, to be safeguarded. We return to the implications and consequences of this below. For those three individuals they were, we regret to say, far-reaching and costly.

9.39 By 18th May 2006 RSL had sought advice from its lawyer, Advocate Clarke of Messrs Le Gallais & Luce, regarding the action against it that had been put in train by Mr Porter's letter. This was RSL's first incurring of legal costs as a result of the Department's actions. Meanwhile, the pressure being applied by Mr Yates continued. He e-mailed Mr Porter on 17th May, in response to Mr Porter's message of 10th May about what RSL had been told to do, contending that failure to curtail RSL's operation would be '*plainly wrong and unjust*' and that there was '*a level of frustration creeping in.*' What followed suggests that the Department now seriously began to buckle under the force of Mr Yates' communications and arguments and in so doing began for sure, probably without realising it, to allow its duty of impartiality to be undermined.

9.40 Mr Porter sought further advice from Mr Le Gresley on Mr Yates' e-mail and a meeting was held. This was the first meeting between Mr Porter and Mr Le Gresley on this matter to which we found any reference on the Department's files. Mr Le Gresley endorsed the position already adopted by Mr Porter. In an e-mail of 19th May 2006 Mr Porter then told Mr Yates that RSL would probably submit a request for reconsideration of the 2005 permit conditions. Mr Yates would of course be able to object to this as if it were a new application. It was, we think, wrong for Mr Yates to have been told this. A decision on submitting a 'request for reconsideration' was for the holder of the

permission, in this case Mr Taylor, and it is not apparent from these various communications that that was appreciated within the Department.

9.41 It was such action, or inaction, that understandably gave rise to suspicions on the part of Mr and Mrs Pinel, and indeed of Mr Taylor, that the Department's actions were, no doubt unwittingly, seeming to favour Mr Yates, although it would be some time before they could get a clearer view in their own minds about this from the papers discovered for the *voisinage* case a year later. From the files we have seen there is certainly some telling evidence that, especially because of the extent of the information being passed to Mr Yates, the Department was already failing to ensure that impartiality was actively seen to be in place. Without its being overtly realised by those involved, the Department was, through shortcomings in due process and a failure to analyse the case and its history in the round, starting to impose a significant burden of cost and worry upon Mr and Mrs Pinel.

10 THE 2006 REQUEST FOR RECONSIDERATION

10.1 'Request for reconsideration', as a description of action taken on Mr Taylor's 2005 planning permission for RSL following Mr and Mrs Yates' complaints about noise, is a misnomer because there never was, in fact, any application by him, Mr Taylor, as permit holder making such a request. The Department, however, treated a letter from RSL's lawyers challenging the enforcement action put in train against RSL by Mr Porter's letter as a formal application for reconsideration in respect of Condition 1 (that the Heatherbrae Farm site should operate 'in the same way' as the La Prairie site) and Condition 4 (restricted working hours, notably a starting time of 8 a.m.). In order, however, to seek to avoid confusion for the reader in the paragraphs that follow, we have kept the phrase in the title of this section and will use the phrase 'reconsideration application' to cover events during, broadly, the second half of 2006.

10.2 Mr and Mrs Pinel passed Mr Porter's enforcement letter of 10th May 2006 to Advocate Clarke who, having taken instructions, wrote to the Minister on 19th May. He highlighted the difficulties RSL was experiencing in complying with Condition 4: clients expected skips on site by 8 o'clock in the morning when they themselves began work. He therefore said that RSL sought an extension to the permitted working hours to enable an earlier start in the morning, and occasional Sunday working. Advocate Clarke, however, went on to make it abundantly clear that the assertion of 'intensification' in Mr Porter's letter was not accepted and that use of the mechanical digger did not contravene Condition 1 of the 2005 permit.

10.3 The key part of his letter was as follows –

> *'RSL are aware of the terms of the planning permit issued to them. They are aware that no express provision was placed upon them to use only manual labour to sort the skips. The reference to the use of the premises in the same manner as they used La Prairie is rather illogical insofar as La Prairie was outside the reach of the Planning Department having last been alienated prior to 1964 and RSL were entitled to undertake such tasks as they wished on the land. Moreover, RSL did periodically employ such a mechanical digger to assist in the sorting of the skips [there].'*

10.4 It is readily apparent from his letter that Advocate Clarke did not even begin to consider that it was to be regarded as a formal application on behalf of RSL. It was a lawyer's letter on behalf of clients aggrieved by actions of a public authority. The planning permission in question was, in any event, not RSL's but Mr Taylor's. Even putting that to one side, Advocate Clarke's strong challenge of principle on alleged 'intensification' could hardly have been taken by any reasonable official or bystander to have comprised a request for 'reconsideration' of Condition 1 of the 2005 permission, which was entirely satisfactory for RSL in an untouched state. Reconsideration in the manner indicated in Mr Porter's letter was not warranted, he said in terms, because the planning permission already allowed what RSL was doing in pursuit of its

business, namely the sorting of skips. The Department, however, would not have been forward in treating the letter as initiating a request for reconsideration of hours of working in isolation, so long as Advocate Clarke had been properly and promptly notified that that was the intended course of action and had been able to comment on it, and so long as there had also been appropriate, prior, communication with Mr Taylor and his agreement secured. But absolutely nothing was said to either, or indeed to Mr and Mrs Pinel.

10.5 On 23rd May, Mr Le Gresley decided that Advocate Clarke's letter should be treated as a formal request for reconsideration of Conditions 1 and 4 of Mr Taylor's 2005 permission, notwithstanding Advocate Clarke's overt position in the letter that no change was needed or sought to Condition 1. We presume that this was done on the basis of his having conversed about it with Mr Porter and other colleagues. But the ignoring of, or failing to understand, what the letter actually said on 'intensification' and the not appreciating that the permit holder had not even played a part in the 'request' suggests that no-one had bothered to read the letter with care and act on it with deliberation. But the starting-point, as, for example, Mr Porter had noted in an e-mail of 18th May to Mr Yates was that, following his having discussed the matter at length with Mr Le Gresley, there was agreement that having considered all the facts of the case the most appropriate course of action at the present time was the 'request for reconsideration' route. So it was in the frame whatever Advocate Clarke's letter actually said.

10.6 We note in passing that but three months before the Minister had said in the States that the Department would henceforth require all planning applications to be endorsed by the landowner.[8] This was certainly not done in this instance. We note also that this failure was akin to that noted in paragraph 7.5 above.

10.7 Mr Le Gresley allocated the case to Mrs Ashworth as the Planning Officer for the Heatherbrae Farm area and the file was made available for public inspection at Planning reception, as was normal practice for any application received and accepted. This meant that Advocate Clarke's letter on behalf of his client RSL, whose legal privilege the Department should have most scrupulously respected, was now open to public inspection. Nothing of this was said either to Advocate Clarke, Mr and Mrs Pinel, or Mr Taylor. The only communication was a brief acknowledgment letter to Advocate Clarke dated 25th May 2006 (two days after Mr Le Gresley's decision to treat his letter as a 'reconsideration application') that revealed nothing at all of what had been put in train save for a planning application reference number in the top corner, whose significance, hardly surprisingly, was not noted at the law firm. It is hard to overstate what astonishingly bad practice this was on the part of the Department.

10.8 On 25th May, the Minister first became aware of the case. He wrote to Mr Thorne to say that Constable Dupré of St John had asked him to look into RSL's case. He knew of Heatherbrae Farm and noted that he was vaguely

[8] See Hansard Section 2.5 of 14th February 2006 concerning applications for telephone masts

acquainted with Mr Taylor, but did not really know about the case. Mr Thorne's response was that '*in a nutshell the use has intensified from that originally improved, and there has been a complaint*'. He said that Mr Porter was dealing with it and would advise further. Mr Porter briefed the Minister by e-mail later that day. Briefly describing the case, he said that all appeared to be going well for RSL until a complaint was received from the neighbour, Advocate Yates. He went on to say that '*Mr Yates has evidenced, through friends adjacent to the previous site, that the company has increased its rate of skip sorting from 2 to 3 a week at the previous site to 5 to 8 a day at Heatherbrae Farm..... To be fair to [RSL] they have ceased use of a mechanical digger... and have done everything in their power to pacify Mr Yates... [RSL] has submitted a request this week... to increase the start time... and to allow the use of a mechanical digger to sort their increased loads.*' This was not an entirely satisfactory brief for the Minister, not least because it made no mention at all of Advocate Clarke's challenge on the points of principle about 'intensification' and use of the digger. It is also not uninteresting to see that the complainant was regarded as the source of evidence for what happened at La Prairie.

10.9 The next day, 26th May 2006, Mr Yates went to the Department to inspect the 'reconsideration application', having been told about it by Mr Porter. (Mr Porter had said in his e-mail of 18th May to Mr Yates that he would advise him as soon as the 'application' was received.) Mr Yates thus saw, quite properly as far as he himself was concerned, the private letter of 19th May from Le Gallais & Luce submitted on behalf of its clients, RSL to counter what was seen as damaging and unwarranted enforcement action against the company.

10.10 Mr and Mrs Pinel, on the other hand, got to know of the 'reconsideration application' only almost a fortnight later when, to their amazement, they happened to see it in the Department's planning applications advertisement in the JEP of 6th June 2006. Advocate Clarke and Mr Taylor found out only when Mr and Mrs Pinel told them what they had seen in the newspaper. They, of course, did not know that Mr Yates had already been able to see, on a public file, the private letter from Le Gallais & Luce to the Minister.

10.11 Le Gallais & Luce wrote again to the Department on 8th June expressing concern about the advertisement and seeking an urgent, substantive reply to Advocate Clarke's letter of 19th May. Mr Porter responded by telephone the next day. He recorded in a note on the file that he had explained that a decision would '*be issued later in June.*' The issues of principle raised in and by Advocate Clarke's letter of 19th May were not addressed, notwithstanding the prompt supplied by the further letter of 8th June; all that had happened was that the Department had made the letter public! Mr Porter's intervention was not elucidated by any further communication by Mrs Ashworth to any of those involved and the Department continued 'processing' the 'reconsideration application' as it stood. We can describe this only as poor, thoughtless administration.

10.12 On 26th May 2006 Mrs Ashworth wrote to Mr Binet of Health Protection about the 'reconsideration application.' This letter did not mention RSL by

name and spoke in terms of a variation of a condition to allow mechanical sorting of skips and to extend working hours. Mr Binet, however, was by now well aware of RSL's operations at Heatherbrae Farm, having gone to visit Mr and Mrs Yates on 3rd May at their request. On 9th June he responded to Mrs Ashworth opposing the application, saying fairly unequivocally –

> '*... My views are as follows:*
>
> '*1. The existing commercial operation is of a type likely to cause problems with noise, possibly cause problem [sic] with smell and falls into the category of operation that should not have been permitted as per my comments on the application on the 7th April 2005.*
>
> '*2. The mechanical sorting of skips has increased the number of vehicle movements and number of skips sorted, to a point where the noise is a problem. The mechanical sorting of skips is opposed.*
>
> '*3. Any extension of business hours particularly early in the morning or on Saturday afternoons or on Sundays or Bank Holidays will increase those noise problems associated with the site and is opposed.'*

10.13 Mr Binet referred to his having visited Mr and Mrs Yates' residence on 3rd May but said that he had not taken noise measurements during that visit. He instead cited measurements held on Health Protection's files concerning other, non-specified sites that showed a high level of impact noise from skip sorting and he conveyed the view based on this that RSL's operations were likely to constitute a noise nuisance.

10.14 In the intervening period Mr and Mrs Yates, having taken due advantage of the opportunity that had arisen for them to see the letter from RSL's lawyers, submitted representations to the Department against the 'reconsideration application'. So did several other neighbours. Mr Taylor told us that he suspected that Mr Yates had encouraged his neighbours to commit pen to paper. We observe only that the representations made by those other neighbours were broadly consistent in their strength of opposition to RSL but that none of them had objected to the 2005 planning application or complained about activity at Heatherbrae Farm during the preceding year, despite the boundary of the property of at least one of those other neighbours being considerably closer to the actual site of RSL's operations than Mr and Mrs Yates'.

10.15 Mr Yates' representations, dated 14th June, were substantial: seven pages of closely argued text addressed to the Minister, covering not only his view of the planning history to date, as reflected in his complaints, but also the position in relation to several Island Plan policies. He also raised the question of substantial amendment or full revocation of the planning permission, under Article 8 of the 1964 Planning Law which was still, just, in force. Substantial amendment, he ventured to suggest, could involve express limitation to occasional skip sorting only and express prohibition of mechanical sorting.

Revocation, he argued, could be justified on the grounds that it was clear from experience on the site sorting rubbish could not, and never had been able to be, carried on in a way consistent with Island Plan policies. It was hardly unlikely that such a missive as this well-written letter, given its semblance of gravitas, would not be of some influence on the Department, particularly as it pointed in the same direction as officers involved had already overtly leant.

10.16 RSL and Le Gallais & Luce learned that the 'reconsideration application' was to be considered by the Minister on 28th June 2006. The involvement of the Minister in reconsiderations was normal practice and in accordance with the delegation of functions agreement in place at the time.[9] By this time Le Gallais & Luce had decided to embrace the request for reconsideration process instead of further challenging it. From Advocate Clarke's evidence to us we conclude that this was probably a pragmatic decision taken on the basis that, although there was a degree of suspicion at the firm regarding the effectualness of the Department's 'reconsideration' process, it did at least purport to offer a method of resolving RSL's problems and of diverting some of the pressure being applied by Mr Yates. As things turned out this was probably not in RSL's best interests. Had Le Gallais & Luce at this point pushed hard on the key issues of principle raised by Advocate Clarke, including the lawfulness of the Department's 'ban' on the use of the mechanical digger, and challenged in terms the extremely unsatisfactory way that his letter of 19th May had been handled, we cannot but believe that it would have obliged the Department to think at least a bit harder than it did about what it was doing. This might also have forestalled some of the difficult debate that ensued about noise levels and how they should be measured and interpreted. As it was, Mr Yates was able through his strong interventions, so it seems from the files, to make the running on principles and on influencing the officers involved.

10.17 On 22nd June 2006 Advocate Clarke wrote to the Department to rebut a number of the representations made by the neighbours against RSL and to comment on the correspondence to date including Mr Binet's letter noted at paragraph 10.11 above. In relation to the volume of sorting conducted, he said that the level of activity at Heatherbrae Farm would fluctuate in response to demand for mixed load sorting. He emphasised that the assertion – which was central to Mr Yates' line of argument and had been presumed in the recent briefing for the Minister – that the level of activity on the Heatherbrae Farm site was significantly in excess of that undertaken at La Prairie was unevidenced, and denied. He also strongly argued that the comparison with other skip sorting sites regarding noise that Mr Binet had drawn in his letter of 9th June had the potential to mislead the Minister because other skip operators were known to operate on a larger scale than RSL. He made the point firmly, in responding to Mr Yates' suggestion that the Minister should consider revoking the 2005 permit altogether, that the position in law was that the permit should be interpreted on the basis of the words written in it, with no reference to extraneous evidence. No response to this letter was prepared in the Department and, in the event, a decision on the 'reconsideration

[9] States of Jersey Law 2005: Delegation of Functions – Planning and Environment (R.5/2006)

application' was deferred. No reason for this was proffered either to RSL or Le Gallais & Luce. We draw from the files the conclusion that those concerned in the Department were simply not ready to proceed for various prosaic reasons, including the absence of certain members of staff on holiday. But perhaps, too, the difficulty of the case was showing through.

10.18 In the meantime, the restriction on use of the mechanical digger that had been 'imposed' by Mr Porter's letter continued to be observed by RSL. To minimise the impact on business, RSL hired additional staff. The cost to the company of doing so exceeded £9,000 before the 'reconsideration application' was finally heard by the Minister. Apart from leading to much uncertainty for Mr and Mrs Pinel, the Department's actions, including the mere delay on the 'reconsideration', were also impacting financially on RSL.

10.19 Looking at the course of events in July and August 2006 we do get the sense that the Department was beginning to realise, albeit belatedly, that it had a difficult case on its hands, although we do not think that those concerned really understood, or even stopped to give thought to, the real impact of their actions on RSL as a business. Mrs Pinel had contacted Mr Porter questioning whether Mr Yates had been given more information by the Department than he was entitled to receive. Mr Porter recorded in his notes that this was '*nonsense'* but, as already indicated, we fear that our thorough review of the evidence supports Mrs Pinel's intuitive view. The then Deputy A.D. Lewis of St John had also become involved. He felt that the suspension of mechanical sorting imposed by the Department should be lifted until such time as the alleged noise nuisance had either been proved or disproved. This prompted Mrs Ashworth to ask Health Protection to obtain specific noise readings from Mr and Mrs Yates' home with some urgency in order to enable her to complete her report on the 'reconsideration'. She e-mailed Mr Binet accordingly, who advised that he would visit Heatherbrae Farm on 26th July. Mr Binet, however, added, importantly, that Planning '*should not rely on measurements alone*' to prove or disprove the existence of noise nuisance.

10.20 During this same period the Minister sought to step back from determining the 'reconsideration application'. The file suggests that this was because he had been acquainted with Mr Taylor for many years, albeit not closely, as he had pointed out in his note to Mr Thorne on 25th May asking for information about RSL's case. On 21st July 2006 Mrs Ashworth wrote to Le Gallais & Luce to say that Senator Ozouf (then Minister for Economic Development) would determine the matter because of a conflict of interest affecting the Minister. In fact, Senator Ozouf played no part in determining the matter and he told us that he could not recollect the moment. By 25th August 2006 the supposed conflict of interest appeared to have been resolved and the Minister for Planning reassumed responsibility. This was, however, not before the change had lifted the spirits of Mr and Mrs Pinel, by whom Senator Ozouf was held in high regard. We assume that this toing and froing, and Mrs Ashworth's letter, were prompted by robust discussion within the Department that included the Minister, but nothing was documented. Particularly if it involved the Minister it should have been, if only to provide a reasonable explanation to RSL and other parties why the determination had been delayed.

10.21 One factor in the delay was the simple difficulty of orchestrating a site visit. Another was continuing exchanges with Health Protection with the aim, on the Department's part, of a definitive position being reached on whether RSL's operations constituted a noise nuisance. The correspondence on file suggests that the Department was looking for evidence that requiring a reversion to hand sorting by RSL (as Mr Yates had sought, among other things) would curtail the alleged problem. Such a response from Health Protection would no doubt have been seen to help not only to justify the 2005 permit's 'in the same way' condition but also the position on 'intensification' taken by the Department following the complaints. What came back from Health Protection was a view, supported by indicative noise measurements, that RSL's machine sorting activities certainly did constitute a problem, that reverting to hand sorting might still result in complaints and that the 2005 permit should not have been granted in the first place. The Department was being backed into an uncomfortable corner.

10.22 Mr Taylor told us that he believed he was misled about the status of the noise readings taken on his property by Mr Binet during this period. He said that Mr Binet had told him that the measurements he was taking were '*purely advisory*' and '*not to go to court with*.' This was not disputed by Mr Binet in his evidence to us and indeed it tallies with what Mr Binet had carefully indicated to Mrs Ashworth about the limitations on the use of such measurements. But, as we set out later in our report, the Department failed to take these qualifications into proper account and, instead, took Mr Binet's readings, without qualification, as proof of a noise nuisance. Nor did it clear with him how his views were presented in its formal report to the Minister on which decision-making would be based. (We were told by the Department that this was not normal practice.) The readings were also given by Mr Binet to the expert noise consultants engaged by Mr Yates in preparation for his legal actions and were eventually presented to the Royal Court as part of his case against RSL, albeit that they were supplemented by other measurements by the time the Court heard the case. The data was also supplied by the Department to Le Gallais & Luce so there was not a problem of 'balance' so to speak. We do, however, judge that the Department allowed a lack of clarity to develop about the purpose of the noise readings it was seeking from Health Protection, and imbued them with a sense of over-precision, so that more was perhaps read into them by the Department to seek to justify its position than was warranted by the evidence they presented. It was a subject area that by its very nature was hardly exoteric, thus requiring particularly high standards of analysis and précis where drawn or relied upon in documents of record.

10.23 Advice Mr Binet gave to the Department during this period at the latter's request referred in particular to the application of noise rating curve NR40. In written correspondence dated 13th July 2006, Mr Binet clarified his initial written response to the 'reconsideration application. His advice to the Department was consistent; that a 10dBA increase in noise levels when compared with the background noise level would indicate that noise nuisance was '*likely*' to be caused. He reinforced the point on 7th August 2006 when he told Mrs Ashworth –

'Noise from an industrial or commercial site where the background level is 40dBA should not exceed a noise rating curve of NR40 at 1 metre from the site boundary. There is no doubt that [t]his is exceeded by the existing operation.'

10.24 NR40 is one of a series of Noise Rating Curve measurements accepted in European countries for assigning a particular rating to a noise spectrum. It is, we understand, a measure applied regularly in the United Kingdom and elsewhere in respect of planning applications for restaurants, nightclubs and other light commercial uses on sites with adjacent residential properties. Less stringent Noise Rating Curves (which permit higher decibel readings) can be applied in areas with more intense commercial and light engineering uses or in other places where the background noise is greater to start with; more stringent ones would be applied to, say, rural areas where background noise was lower. Thus the test in relation to the impact of noise from a specific source, such as a skip sorting operation, would be related not to the absolute level of noise produced but to how a given noise impacted in the immediate or local environment. A distinction would be drawn between permanent sources of noise such as factories or plant and temporary sources such as construction sites. Health Protection advised us that the NR noise rating curve approach had a wide measure of general support internationally among its ilk.

10.25 This advice appears to have been in line with British Standard BS 4142: 1997 – "Rating Industrial Noise Affecting Mixed Residential and Industrial Areas," which would later be cited in the Royal Court during the *voisinage* case. BS4142: 1997, however, is not a definitive standard in terms of being used in identifying a potential statutory nuisance and, in fairness, Health Protection never claimed that it was. Instead, we understood, it was regarded as yielding background information to help assess the expected likelihood of complaint in a particular area. This may all be thought to help explain why the subject is a little esoteric, and thus why great care was needed in utilising it properly in regulatory decision-making.

10.26 Mr Binet's advice of 7th August cited in paragraph 10.23 above is worth careful note because the Department came to put considerable, probably untoward, weight on it in respect of RSL's case. His use of 'should' in the third person perhaps tended to invest the statement about not exceeding NR40 with more formal authority than it actually owned, not least since Mr Binet had told Mr Taylor that his readings were only advisory. The Department certainly saw the statement as authoritative. It follows that some qualification of Mr Binet's second sentence might have been desirable, to make clear that the opinion it expressed, while reflecting his best professional judgement as an Environmental Health Officer considering an industrial or commercial site with a background noise level of roughly 40dBA, was only that, an opinion, in a situation where no absolute or definite, adopted, standards were involved. Mr Binet had, however, indeed written to this effect earlier in his exchanges with Mrs Ashworth, and Mr Pritchard, his senior officer at Health Protection, echoed the sentiment perhaps more forcefully in subsequent correspondence with the Department. It is evident that the point bore constant repetition.

10.27 The comments we make above are not in any way intended to be aspersory about the advice offered by Health Protection, which we think was provided carefully and professionally; rather we make them in order to illumine our main point that the Department's assessment of the advice should have been more circumspect than it was, and its presentation of the same in reports cleared in final draft with Health Protection for the avoidance of any doubt, or simply lifted verbatim.

10.28 By 11th September 2006 Mrs Ashworth had completed her written report for the Minister on the 'reconsideration application'. Leaving aside the status of the 'application' itself, we have formed the view that this report, which was endorsed by Mr Le Gresley, was most extremely wanting, in a manner and to an extent that underlines our judgement that the Department at this time was simply not really thinking about what it was doing in pursuing RSL.

10.29 The body of the report had several main shortcomings –

(a) in maintaining the line that RSL was operating outside the terms of the 2005 permit because of a 'material intensification of use' it offered no analysis of 'intensification' as a planning concept and it did not adduce verificatory evidence to support the claim of alleged 'intensification';

(b) it failed to acknowledge that RSL had sorted skips at both the Home Farm and La Prairie sites, irrespective of whether that use was 'authorised' or not;

(c) Health Protection had not been given an opportunity to comment on the way its technical noise data was presented, and the conclusions drawn from that data were more definitive than the evidence allowed. The paper paraphrased a range of Mr Binet's comments and then concluded that *"these levels [were] certainly high enough to cause nuisance and to lead to complaints".....the reports of the Environmental Health Officer clear[ly] prove that there is a noise nuisance problem."*

(d) it omitted to mention that Mr and Mrs Yates' property was further away from the area of Heatherbrae Farm occupied by RSL than that of another neighbouring resident, who should have been more affected by any noise.

10.30 More generally the report did not present the planning history satisfactorily, in a way that would assist the Minister, or any other reader, to understand that the history was problematic and disputed, factually and conceptually. For example, it referred to the size of RSL's lorry and skip fleet tendentiously, and it presented the important points made by Advocate Clarke about the nature of the 2005 permission out of context, lining them only to a negative comment that '*it [was] not considered*' that the 2005 permission '*gave RSL carte blanche to operate in such a manner as to cause a noise nuisance to [neighbours]*'. That was, we think, a particularly unfair comment. There was not a glimmer of recognition that the Department may not have played its hand as well as it should in giving the permission in the first place.

10.31 In her evidence to us Mrs Ashworth revealed the extent to which she had relied on what Mr Porter had recorded about 'intensification' following his one initial conversation with Mr Pinel at Heatherbrae Farm on 3rd May 2006. This, together with the assertions made at that time by Mr Yates, was what the report relied upon to conclude that RSL had indeed intensified the use. No pros and cons were weighed, and, as noted, the concept of 'intensification' in a planning context was not in any way explored.

10.32 The report also said that Mr Taylor should have been aware in 2005 that *'the issue of noise had been raised as a potential problem'* by Health Protection. This was unfair and misleading. In 2005 Mr Taylor had reacted to the Department's approach to him, not the reverse. The report failed to acknowledge that Health Protection was informed only of a proposed 'commercial' use, with no mention of skip sorting, and that Health Protection's comments at the time were consequently generic. Nor, certainly, could or would RSL have known. Given the particular circumstances, Mr Taylor was fully entitled to believe that before his application was approved the Department would have properly considered advice received from consultees such as Health Protection before concluding, as it did, that RSL's use of the site would not cause a nuisance.

10.33 But we reserve our strongest criticism for the recommendation at the end of the report. This needs to be quoted in full –

> *'The reports of the Environmental Health Officer clearly prove that there is a noise nuisance problem to neighbouring residential occupiers, emanating from both the manual and mechanical sorting of skips combined with increased traffic movements.*
>
> *'Refuse the request for manual and mechanical sorting and extended operational hours and serve notice to cease the use of the site on the ground of unacceptable noise nuisance to neighbouring residential occupiers.*
>
> ***'Reasons***
>
> *'The hand and mechanical sorting of skips combined with increased traffic movements results in an unacceptable noise nuisance to neighbouring residential occupiers.'*

10.34 Mr Le Gresley signed this off on the same page, two or three inches below these words. Just above them, at the end of the report, it was noted that the Parish of St John was supportive of both mechanical operations and extended hours but that this became '*irrelevant*' if the use ceased entirely.

10.35 We have found it difficult to find the right words to describe our reaction to this recommendation and it is probably best that it speaks for itself. Had the report sought to argue that the 2005 planning permission be revoked, and brought into play the legal and financial consequences of that (to the taxpayer as well as RSL) in considered analysis, then at least one could have argued about the point on its merits. But this just appeared, so to speak, out of the blue. What on earth, we asked ourselves, was the Department thinking? What

bothers us, though, is that, if it was not simply a product of poor or no thinking, it might not have been unlinked either to the Department's view, which was freely admitted to us, that RSL was a 'nuisance' to it, or to the fact that Mr Yates had put forward, in his representations of 14th June, the idea of revocation. There was nothing else on the file to the same effect and it is quite hard not to presume that the Department simply adopted his idea because it was there in print, just a few sheets down.

10.36 The report was prepared for the Minister. We come to his robust response to the report shortly, and will comment further about the Department's recommendation in our conclusions.

10.37 Mrs Ashworth's prepared her report for the Minister's consideration ahead of a site visit booked for 20th September 2006, the Minister having agreed to a site visit as part of the 'reconsideration.' Mrs Ashworth worked on the assumption that, as normal, once signed off by the Assistant Director, her report would be made public on the Department's website and that following the site visit (which she had intended to cover both Heatherbrae Farm and Mr Yates' residence next door) there would be a public meeting at the Department to consider the decision to be made.

10.38 Publication of Mrs Ashworth's paper and advertising of the meeting at which it would be considered should have been a straightforward practice in accordance with the Code of Practice on Public Access to Official Information. Yet the report was not put on the States website, nor placed on a public agenda for a scheduled and advertised public ministerial hearing of the kind the Minister had voluntarily committed to hold following the introduction of the new Law (the first of which had taken place two months earlier). Nor was the site visit advertised. Le Gallais & Luce, whom the Planning Department had deemed to be RSL's agent, did not receive a copy.

10.39 Less than one week before the planned site visit Mr Yates e-mailed another complaint to the Department, this time asserting that the mechanical digger was back in use and complaining that the Department's enforcement activities were less than adequate. It is not evident that this complaint was investigated by the Department. Mrs Pinel told us that the mini-digger was not back in use at this point; RSL was concerned, she said, to obey Mr Porter's instruction not to use it. She believed that what Mr and Mrs Yates saw or heard was contractor's plant that was brought in once to remove a pile of rubble accumulated in part because the mini-digger had been out of action.

10.40 A point to be noted at this stage is that the Planning and Building (Jersey) Law 2002 came into force on 1st July 2002. This had various important procedural implications, including about limited powers to revoke planning permissions, but for immediate purposes its impact on the manner of Ministerial decision-making on planning applications is of some significance to our narrative. It certainly influenced the Minister's approach to the imminent site visit, to the extent that he felt well able to depart from the arrangements made by his officers. Mrs Ashworth indicated to us that she was not consciously aware at this time of the changes ushered in by the new Law, which, when read in isolation, gave the Minister rather greater freedom of manoeuvre in the way he

decided planning applications. We sense that the other parties involved were equally somewhat unaware of the change introduced by the new Law.

10.41 The Minister carried out the site visit as planned on 20th September 2006. Also present were Mr and Mrs Pinel, Mr Taylor, Mrs Ashworth, Mr Porter, Mr Binet and Mr Pritchard.

10.42 Evidence we received confirmed that the Minister's aim at the site visit was to seek to find a compromise solution to the satisfaction of RSL, Mr Taylor, and Mr and Mrs Yates. It comes over clearly that his aim was to be helpful. With his new powers in mind, he had not gone to Heatherbrae Farm with the intention of limiting himself only to ascertaining the features of the site and its surroundings, as would have been the case at a 'traditional' site visit of the kind for which Mrs Ashworth thought she was preparing. Nor had he committed to determining the two elements of the 'reconsideration application' on RSL's hours of work and use of the digger.

10.43 With the foregoing in mind we learned that during the visit officers gave oral reports on-site, various potential options were talked through and reference was made to the strength of opposition from Mr Yates. Indeed, three of those present at the visit said in their evidence to us that the Minister described Mr Yates as a '*moaner*'. The conclusion reached on-site by the Minister was definitely <u>not</u> to agree the untoward recommendation in Mrs Ashworth's report. In evidence to us, the Minister recollected, tellingly, in what was evidently a direct reference to the report, that he was very reluctant at all times *'to issue any orders that would prevent the Pinels from operating their business, to the frustration of officers.'* We utterly commend his rejection of the recommendation put before him by the Department.

10.44 His considered view was that the only viable way forward would be for a new planning application to be submitted for the roofing-over of the former silage clamp area from where RSL now operated. He said to us that he remembered emphasising that it would be important to ensure that such a scheme actually worked in terms of reducing noise to below what he termed the 'statutory' limits; and acoustic testing would be necessary to ensure this. This was hardly unrealistic, even if quite a tall order. Mr Taylor interpreted the Minister's saying this in a forceful manner as, in his, Mr Taylor's, eyes, an instruction: the Minister, he told us, said to him '*right, you will just have to roof it over*'. This was in response, Mr Taylor recollected, to the planning officers present being '*adamant that there [was] no other site on the Island for [RSL].*' Mr Taylor, having challenged the Minister on the high cost of his roofing-over suggestion, said that he was told by the Minister '*I am telling you to roof it over. That is what my instructions are.*'.

10.45 In a subsequent note to the Committee the Minister said again that he had made clear his support for roofing over was subject to '*an essential independent acoustic study being undertaken to confirm that the roof would bring the operation within the statutory limits of Environmental Protection* [sic]' Those were probably not the exact words used on the day but their gist is supported by Mr Pritchard's evidence to us of the discussion's focus on

different possible solutions, of which roofing-over was the one most prominently considered.

10.46 Mr Taylor told us that he regarded this as an assurance for him to proceed safely with what was evidently likely to be a controversial planning application as well as a costly project. The Minister laid stress in his evidence to us on the caveat he had given about the need to ensure that noise requirements were met but also said –

> *'...I do remember giving a very clear indication that if it was going to resolve the problems I was perfectly happy to give a consent and I would take responsibility myself.'*

This was a more than good enough basis on which for Mr Taylor to proceed.

10.47 The proceedings at the site visit were interrupted when Mrs Ashworth, so it was thought by others present, was rung up on her mobile telephone by Mr Yates. Mrs Ashworth, however, thought it was probably a call from someone at the office passing on a message from, or concerning, Mr Yates. She reported to the Minister in the hearing of those assembled that Mr Yates wished the Minister to visit his residence too as part of the site visit. This was in fact part of the plan for the visit, being noted at the head of Mrs Ashworth's report. The Minister declined to do so, firmly we are told, but once he had departed Mrs Ashworth and Mr Porter themselves went to call on Mr Yates in substitution.

10.48 As noted, the Minister did not accept the recommendation in Mrs Ashworth's report. Far from it. Mr and Mrs Pinel though, unknowing of the recommendation in the unpublished report that all RSL's skip sorting should cease, said to us that after the Minister had left Mr Porter remarked to them that he was surprised by the outcome because he had thought the Minister would '*close them down*' (the implication being that he was aware of the recommendation). But the Minister did make some decisions on the spot. Our best interpretation of these is that he partially refused the 'reconsideration application' by declining to agree to an extension of RSL's operating hours. But equally he declined to confirm refusal of the 'phantom' request to vary Condition 1 of the 2005 permit. Instead he called a halt to any further enforcement action against RSL for three months provided that RSL, in conjunction with Mr Taylor, sought professional acoustic advice and reported the outcome of that advice to the Department. This was in line with the view he had expressed about the roofing-over option. Three conditions were effectively imposed –

(a) RSL would be deemed authorised to sort skips mechanically between 10.00 a.m. and 12.30 p.m. on Mondays to Fridays only;

(b) the Minister retained the right to withdraw permission to sort skips mechanically in the event that he identified a need to do so;

(c) RSL's vehicles would be permitted to enter and exit the site using only a specific route between two storage sheds, thereby diverting lorries away from the boundary with Mr and Mrs Yates' property.

10.49 Mr and Mrs Pinel, and Mr Taylor, all said to us that they found the site visit rather troubling. All three were somewhat surprised that Mr Yates knew Mrs Ashworth's mobile telephone number (if that was indeed the case). Mr Taylor was also quick to realise that the Minister's 'instruction' had a very significant financial implication for him and for RSL in terms of application fees, acoustic advice and construction costs. What, however, the three did not know was that the Minister had acted positively in their interest by ignoring the Department's recommendation to him that all skip sorting should cease, whether manual or mechanical, a decision which, if taken and if it could have been implemented, would have destroyed RSL's business at a stroke and given advantage to its competitors.

10.50 We started by also being not entirely untroubled about the site visit. As already noted, it was not a standard visit. It was not advertised, the report for it was not made public, and the conduct of it breached just about every rule in the Department's existing (pre-2002 Law) book relating to site visits. Importantly, moreover, the 'decisions' arising from it were not recorded, although we learned that there had been a brief meeting with the Minister, later, back at the Department to ratify, so to speak, what had been decided.

10.51 We were a little less troubled when we realised that the Minister had approached the visit from the perspective of his new powers, which, broadly, gave him the power to set down procedure for deciding planning applications. The problem perhaps was that not only had officers not quite caught up with this change (save for Mr Porter who creditably, as emerged from his evidence, had appreciated that the Minister was entitled to make decisions there and then), but also that no guidance had been proffered by the Minister or set down by the Department as to the significant changes in decision-making procedures ushered in by the new law. So uncertainty reigned, at least among everyone except the Minister himself, as to what was meet in such a situation because standards of conduct for the Minister and the Planning Applications Panel (PAP), which had superseded the PSC at the commencement of Ministerial government, appeared to remain regulated by the Members Code of Conduct for Development Control. The version of this that remained in force at the time (insofar as it had not been updated or withdrawn) had, we were told by the Department, been adopted by the Minister and the members of the Panel at a meeting on 19th January 2006, and it had not been reviewed after the new law came into force on 1st July. We note, however, that the decision to adopt it had not been formally recorded as a Ministerial Decision or mentioned in the minutes of the Panel. Moreover, and in contrast to that which had been approved by the preceding EPSC of which Senator Ozouf was President, we are not clear that the most recent version of the Code of Conduct was ever made public.

10.52 Paragraphs 10-19 of the Code of Conduct say that –

(a) the purpose of a Planning site visit is principally fact-finding;

(b) officers will keep written records of site visits;

(c) no discussion of the merits of the case is permitted;

(d) the Minister or the PAP may invite oral presentations by applicants or objectors;

(e) the Minister or PAP should refrain from making comments that could create an impression, if observed by an outside party, that he had already formed a view on the merits of an application; and

(f) a decision should not be made at the site visit.

The Minister put it to us that, as a single decision-maker under the new law, he was not bound by the Code of Conduct once that law had come into force. We cannot disagree with that. But he recognised the uncertainty as to the status of the Code of Conduct and the need for best practice during site visits.[10] He told us that he was going to create a new code, specific to the Minister. That seems to be a very good idea.

10.53 There do remain two other procedural points arising from this episode on which we should briefly comment. First, we posed the question whether the Minister was empowered, in the context of the site visit, to decide to refuse to vary RSL's hours of work. He replied that he was, by virtue of Article 21 of the 2002 Law, which provides that the Minister may consider an application to vary conditions attaching to an extant planning permission. We accept that. But the power under Article 21 does not appear to us to be unfettered, since it applies, per Article 21(1), only where a person would *'like'* a condition removed or varied. Thus, had the Minister made a decision in respect of the 'phantom' request for reconsideration of Condition 1 of the 2005 permission, because Mr Taylor or RSL would not have 'liked' it he might not have been so empowered. It does not seem that any attention was given to this in the preparation of Mrs Ashworth's report, and we strongly suspect that the Department simply had not thought about it.

10.54 Secondly, the decisions taken by the Minister on 20th September were not recorded as a Ministerial Decision under rules presented to the States in October 2005 (R.C.80/2005). These included the provision that while a Minister might indicate her or his intent verbally, a decision was made only when the Ministerial Decision itself was signed. This important element of procedure was overlooked at the time, the additional negative consequence of which was that Mrs Ashworth's report to the Minister remained unpublished.[11] The position, moreover, has never been rectified, although we did find a rough draft of a decision document on file. So one might ask hypothetically what indeed were the proper decisions made on 20th September, even though we believe we know what it was actually decided to do. We raise this not only because of its obvious importance for good administration, but also because the same problem occurred again in RSL's case a few months later, more seriously (paragraphs 12.12–12.13 below). By that time, the States had

[10] In this regard, we note that the then Assistant Minister appeared to be following the 2006 Code of Conduct when she conducted her own site visit to Heatherbrae Farm in April 2008

[11] Ministerial Decisions not classified as exempt from publication under the Code of Practice on Public Access to Official Information are published on www.gov.je together with, in most cases, the officer report on which the Minister based his or her decision

received a further report on this subject (R.C.93/2006, 4th December 2006) which tightened the procedures a little further, including placing personal responsibility on Ministers for ensuring that the rules were followed as well as on Chief Officers for their proper implementation.

10.55 The Minister's decisions were communicated to both Mr Yates and Le Gallais & Luce acting for RSL. Mr Yates got to know of them first when Mr Porter e-mailed him the following day, though we think he was apprised of the main elements by Mrs Ashworth and Mr Porter when they called on him during the site visit. Paragraph 31 of the Members' Code of Conduct declares that decisions '*will be communicated first to applicants.*' RSL's lawyers were, however, made to wait a further 6 days before Mrs Ashworth sent a letter. Her reporting of the decisions included additional provisions not cited in the e-mail sent to Mr Yates. This was because she had by then received subsequent advice from Mr Pritchard of Health Protection, who had urged the Department to prohibit certain additional activities, including the burning of waste on site. There is nothing on file to suggest that these additional conditions were put to the Minister for his agreement or that Mr Taylor received any communication on the matter from the Department, and we question why it acceded to this marginal request after the event. It was also unsatisfactory that once again, even if unwittingly, preference was given to informing Mr Yates as a third party over the actual permit holder and RSL, to whom and which the Minister's decisions were directed.

11 THE PRELUDE TO THE ENFORCEMENT NOTICE

11.1 It is evident that following the site visit and decisions taken on 20th September 2006 there was aggrievement all round.

11.2 Mr Taylor was, with some justification, becoming increasingly annoyed. His neighbour, Mr Yates, was complaining vehemently about a tenant on his, Mr Taylor's, land who was there only because the Planning Department had asked him to facilitate it. Moreover the Department seemed to him to be particularly receptive to Mr Yates' complaints, a view that was not in our opinion without substance. He was now faced with potentially large costs for roofing-over works pursuant to the Minister's 'instruction' during the site visit, adding to other costs arising directly from the case such as for obtaining professional acoustic advice.

11.3 Mr and Mrs Pinel, equally with some justification, were both puzzled and cross. They had moved from La Prairie to Heatherbrae Farm in good faith with the full and active support of the Department; they knew that they had a legitimate planning permission to sort and store skips but nonetheless found themselves obliged by the Department to go through a 'reconsideration application' for which neither they nor Mr Taylor had ever applied, but on which the future of their business depended. It seemed to them as if they had unfairly been cast in the role of villain through an 'enforcement' process that to start with they had accepted in good faith but which was now beginning to seem arbitrary. They too sensed that the Department was not being wholly impartial in its separate dealings with them and Mr Yates (although they did not at this stage have the full picture on this). They were also now beginning to incur quite sizeable legal costs from having to rely on Le Gallais & Luce to respond to the pressure that both the Department, and Mr and Mrs Yates as complainants, were bringing to bear on them.

11.4 Mr and Mrs Yates, again not without some justification from their perspective, had clearly become exasperated with what they perceived to be the failure of officialdom to do anything about the alleged nuisance of which they had now been complaining for six months or more. Indeed, their earlier 'success' when Mr Porter acted promptly on their complaint and the Department obliged RSL to stop using its mini-digger had been overturned, so to speak, by the Minister's decisions taken during the site visit to defer any action for three months and to 'authorise' use of the digger again for skip sorting during weekday mornings.

11.5 Mr Yates challenged the lawfulness of the Minister's decisions when, very shortly after the September site visit, he spoke to and e-mailed Mr Porter. He posed some hard questions about the process that had been followed, although even he did not bring the new Law into play. Mr Yates also sought a meeting with the Minister for him to explain in person why he had come to the decisions he had. E-mail exchanges between Mr Porter and Mr Yates indicate that the latter had been advised of the existence of Mrs Ashworth's written report to the Minister when the officers visited his home immediately the site visit had concluded. Mr Yates asked for, and received, copies of both

Mrs Ashworth's report on the 'reconsideration application' and Mr Binet's correspondence to the Department summarising his observations on noise pollution, whose citation Mr Yates noticed in the report.

11.6 We note that neither Mrs Ashworth's nor Mr Binet's report had been offered or supplied to Mr Taylor, either before or after the site visit, or to RSL or Le Gallais & Luce. Ordinarily officer reports would have been published before the date of the relevant meeting; however, the September site visit occurred in circumstances outside the normal public process and so that didn't happen with these reports. We therefore think that Mr Porter should either have reflected and taken advice before revealing the documents to a third party (especially given the 'explosive' nature of the recommendation that RSL should not be allowed to sort skips at all and also Mr Yates' implicit threat of legal challenge) or have supplied copies of the report to <u>all</u> the parties who should have been given access to it before 20th September 2006. By forwarding the report to Mr Yates only he was in practice giving, and being seen to give, preference to Mr Yates over Mr Taylor and RSL, thereby undermining the Planning Department's requisite impartiality. Although the Minister had rejected that report, in essence by ignoring it, it remained the official view of the Department, duly signed off by the Assistant Director.

11.7 Mr Yates e-mailed the Minister directly on 29th September asking for an '*early appointment*' with him at which the Minister might confirm the rationale for his decision the week before. Mr Porter was subsequently instructed by the Minister to make arrangements for Mr Yates to meet with the Minister and Mrs Ashworth. He was subsequently asked to arrange for a Crown Advocate to be present. This latter request appears to have been out of the ordinary in that it caused Mr Porter to seek immediate advice from Mr Thorne and Mr Webster. Mr Porter then telephoned Mr Yates on 2nd October 2006 and notified the latter that a meeting would be offered. Not, however, having received prompt confirmation from the Department of the date and time for the proposed meeting, Mr Yates again e-mailed the Minister directly some three days later to press for a date. The Minister then e-mailed Mr Yates indicating that he would indeed arrange a meeting for after his return from holiday. A further e-mail was sent by the Minister's Personal Assistant offering a meeting a month thence; this reflected the Minister's full diary and his being on holiday for some days. But in a subsequent e-mail of 9th October, the Minister himself stood this down, saying –

> *"On reflection I feel this meeting would achieve little. I am already committed to a course of action designed to resolve this matter on a basis that is fair to both parties. As you will be aware, through the letter sent to you from the Department, I have decided to allow Reg's Skips to investigate... whether or not it is possible to reduce the noise... to a level that falls within reasonable levels of acceptability. I have also asked them to move their operation to a position better shielded by the shed. In reaching this decision I was very aware of your concerns. However, I have to be fair to Reg's Skips as their operation is an important environmental one and to close it down without giving them a chance to improve would be*

unreasonable... I can assure you that the matter will be resolved one way or the other in late December 2006 as I have only deferred my decision until that date"

11.8 This note was copied to Mrs Ashworth and to Mr Nichols, the then Chief Officer. Its level of detail and reference to '*the letter from the Department*' suggests that it was, properly, based on advice from officers. There is no written record of that advice but its tenor was no doubt that a meeting at this juncture might make a difficult situation for the Department even worse.

11.9 It would have been strange if Mr Yates had not been more than a little vexed by these exchanges. Moreover, the saga of the meeting itself – on one minute and off the next – would have been an indication to any thoughtful protagonist that the Department was perhaps getting unsure of its ground. For Mr Yates, now armed with the Department's official view on what it really wanted to do to RSL's business, it was an opportune moment to raise the stakes. He moved to stronger tactics by instructing Advocate M. O'Connell of Messrs Appleby to tackle the Department on his behalf.

11.10 Advocate O'Connell wrote to the Minister on 12th October 2006. His letter crystallised Mr Yates' understanding of the circumstances by which RSL had come to occupy Heatherbrae Farm, although the account given was somewhat skewed by the fact that Mr Yates was unaware of the degree of proactivity exhibited by the Department in facilitating that almost two years previously. It put forward the opinion that RSL's activity had '*already been identified as an unauthorised use of the land*'. This was presumably derived from Mrs Ashworth's report of 11th September that he had been sent by Mr Porter; it was a line of argument extremely helpful to Mr Yates' cause at that time but, as we have already sought to show, the reasoning behind it was entirely flawed. The letter concluded by inviting a response to the following observations –

'Our clients do not understand the rationale underlying your decision to allow the resumption of this activity, even on an interim basis...

'Further, we have considered your interim decision and we are not currently able to identify what power you were exercising when you gave permission for the resumption of these activities, albeit on a reduced and temporary basis.'

11.11 This was an incisive letter asking very pertinent questions. Moreover, the Department did not know the answers, which might not have been too hard for anyone in the know to presume. In particular it appears that it had not taken on board at all the new Ministerial powers in the 2002 Law. It might have been a little comfort, though, if it had known that it seemed that Mr Yates and Appleby did not know either.

11.12 In order to seek to address Advocate O'Connell's letter, Mr Porter wrote to HM Solicitor General on 17th October 2006. He sought her advice on what he termed the Department's 'view' that requests for reconsideration processed

before the entry into force of the new Planning and Building Law in July 2006 were not governed by statute; and that consequently the Minister's discretion to revisit the 2005 Heatherbrae Farm application in the manner that he had done was unfettered. We fear that this rather seems to us like an attempt to justify things after the event; there was a much earlier point in the first week of May 2006, before any 'enforcement' was put in hand, at which legal advice should have been obtained. In the event the questions raised by Mr Porter on behalf of the Department were probably the wrong ones given the new Law under which the 'reconsideration application' was now deemed to fall, and they were not pursued by the Solicitor General because a further request from the Department for advice superseded Mr Porter's letter.

11.13 On the same day as his letter of 12th October to the Minister, Advocate O'Connell also wrote a lengthy letter to RSL. This also clearly drew on, and drew comfort from, Mrs Ashworth's report for the site visit, of which RSL had no knowledge. He requested that RSL should '*forthwith desist from the use of mechanical diggers...*' and '*desist in due course (say 3 months....) from all and any sorting of skips from [the Heatherbrae] site.*' This was essentially what Mrs Ashworth's recommendation had said. Although it was put as a request, legal proceedings for a permanent injunction restraining RSL's use of its site were threatened without further notice absent a response within 14 days satisfactory to Mr and Mrs Yates.

11.14 Advocate Clarke, acting for RSL, responded within the peremptory timeframe. He noted measures to reduce noise that had already been taken (see below) and that RSL had voluntarily decided not to resume use of the mini-digger, even though now 'permitted' to do so by the Minister's recent decision, until the suggestions of the acoustic engineer lately hired by Mr Taylor had been fully considered or implemented. He strongly rebutted the Yates' claims and denounced the threat of injunctive proceedings, not least as premature given the three months 'window' decided by the Minister. But Advocate Clarke was at a considerable disadvantage in not being privy to Mrs Ashworth's report of 11 September which gave such considerable succour to the Yates' case.

11.15 We have already had cause to criticise that report for its fundamental misunderstanding, from the planning policy perspective, of the intensification issue and for other unwarranted statements of potential detriment to Mr Taylor and RSL, including a significant overstatement of the veracity of Health Protection's noise readings; and for its unwarranted recommendation. Quite apart from these serious shortcomings, it was very wrong indeed for this report to have been given to a complainant but not also to Mr Taylor, about whose interests and rights as landlord and permit holder it was concerned, and to RSL. Mr Taylor in fact got to know of the report's existence only when it surfaced in the court bundle for the judicial review case, whereupon he challenged Mrs Ashworth on several key aspects of what she had written, including what she said about the traffic movements at Heatherbrae Farm, which Mr Taylor felt relied unreasonably on material supplied only by Mr Yates. Again Mr Taylor felt he had cause to suspect unfair treatment and, yet again, poor administration and report writing made that suspicion that much easier to be entertained.

11.16 Advocate O'Connell did not wait for a reply to his letter of 12th October to the Minister. He would have been very conscious of the time pressures involved in any application for leave to apply for judicial review. As soon as the requisite 14 days allowed in his letter of the same date to RSL had expired, and notwithstanding Advocate Clarke's response, on 27th October he filed in the Royal Court on the Yates' behalf a notice for application for leave to apply for judicial review. Relief was sought in respect of –

(a) the decision of 23rd May 2005 to grant planning permission to Mr Taylor for RSL. (This was the EPSC's decision, not the Minister's.),

(b) the Minister's decision(s) between April and September 2006 that had the effect of not preventing breaches of the conditions of the 2005 permission, and

(c) the Minister's 'decision' [sic] on 20th September 2006 to defer for three months his making a decision on the 'reconsideration' of the 2005 permission and in the meantime authorising limited mechanical sorting and the construction of enclosures/structures on site that amounted to development.

The statutory test for judicial review in Jersey is that before the Court will quash a decision it must find that the decision was so unreasonable that no reasonable body could have taken it.

11.17 While for most citizens in Jersey the pursuit of civil or administrative law remedies in the Royal Court is a fairly theoretical right, it was a much more practical possibility for someone like Mr Yates as a senior man of law. We surmise also from the depth of Advocate O'Connell's letter of 12th October 2006 that Mr Yates had been contemplating going to law for some time, probably at least since 21st September when he questioned the lawfulness of the Minister's decisions of the previous day. From his evident determination to pursue the case to the uttermost in order to remove the alleged noise nuisance, one doubts that his approach would have been different had the proposed meeting with the Minister stayed in the diary.

11.18 Going to law can be quite speedy in Jersey and the hearing was scheduled for 13th November 2006, less than three weeks later. In the event the reasonableness of the various decisions was not addressed by judicial review since the leave sought by Advocate O'Connell was not granted.

11.19 Sympathy for RSL was building at the political level. Deputy J.G. Reed of St Ouen had begun to make enquiries on RSL's behalf seeking a way forward with the Department and with Health Protection.

11.20 Also meanwhile, Mr Taylor and RSL were addressing the consequences of the Minister's decisions during the September site visit. Mr Taylor, quite rightly from his business perspective, wanted to retain his tenants, who were anyway in wholly lawful occupation. He therefore set about addressing what he regarded as the Minister's instruction to seek professional acoustic advice. Notwithstanding the costs that would arise from this he was comforted by the

Minister's words of assurance that he would support a roofing-over solution, subject to satisfactory independent advice on its bringing noise levels within what he, the Minister, termed 'statutory limits'. Unfortunately the Department never sought to qualify what this meant. Instead, Health Protection would continue to give indicative advice on the level of noise reduction that a scheme should aim to achieve while the Department would begin to set a target of proof beyond reasonable doubt that any noise nuisance would be eliminated. This was not a 'statutory limit' as such but more one particular, not terribly cognizable, interpretation of that phrase. It was not cognitional because it implied a test so high that it would in practice be impossible to demonstrate or meet, especially without the planned structure having been built. The test was chosen, we believe, in a sense arbitrarily, in that the words used to describe it were plucked from Health Protection's responses and not deliberated carefully in order to ensure reasonableness. We understand anyway that there are no such things as overarching statutory limits on noise levels to be tolerated at such commercial sites.

11.21 Mr Taylor engaged Messrs Amalgamated Facilities Management (AFM) and various options to attenuate the noise were explored. These ranged from the erection of a wall of straw bales across the front of the silage clamp to the roofing-over of the site, as had been favoured by the Minister during the site visit, and installation of acoustic panelling. A substantial straw bale wall, 10 feet high (the same as the silage clamp walls) by about 16 feet long, was constructed by Mr Taylor to see if it made any difference. Other measures, such as the installation of rubber tracks on the digger and encasing lift chains on the skip lorries with rubber hosing, were also recommended and introduced promptly.

11.22 On 18th October 2006, the temporary straw wall having been built, Mr Taylor instructed AFM to take sound level measurements. Mr Binet of Health Protection was in attendance, and he also took measurements. He concluded that the wall would not mitigate the level of noise to any significant extent and he again recommended that any measures pursued by Mr Taylor should demonstrate compliance with Noise Rating Curve NR40.

11.23 Advocate O'Connell, on behalf of Mr Yates, had already complained in writing to the Department about the straw bale wall before Mr Binet's measurements were taken. Mr Yates was told by Mrs Ashworth in reply that the wall was a temporary arrangement, pursuant to the Minister's instructions as had been explained to him by Mr Porter, to enable various possible mitigations of the noise to be assessed, but it was, nevertheless, one of the 'structures' on the site removal of which Mr Yates aimed to seek soon afterwards through his judicial review application on 27th October. While Mr Yates had some legitimate complaints to make we consider that on this occasion he rather touched the margins of a complainant's reasonable behaviour, notwithstanding the exasperation he no doubt felt after the Minister's September decisions. It is possible that he felt compelled to make this particular complaint, or was so advised, in order to buttress his arguments for leave to apply for judicial review, not least because the wall represented a suitably recent event. By contrast we were impressed by the seriousness with

which Mr Taylor had now embarked, at considerable expense, along with Mr and Mrs Pinel, to seek to mitigate the problem, which we feel Mr Yates either failed or felt no need to recognise. Later on, it must also be said, the Department chose to take Mr Taylor's serious attempts at mitigation into no account when the Minister was advised to issue the Enforcement Notice in January 2007.

11.24 Mr Yates also sought professional advice in support of his position. He engaged a UK firm, Messrs 24 Acoustics. It began its assignment by obtaining noise measurement data that had been assembled by Health Protection, whereupon it reviewed the methodology applied.

11.25 On 10th November 2006 24 Acoustics produced a report for Mr Yates. The report challenged Health Protection's methodology in measuring and commenting on noise levels in the vicinity of RSL's site at Heatherbrae Farm. 24 Acoustics stated that it had carried out its own analysis by following BS4142: 1997 'Rating Industrial Noise Affecting Mixed Residential and Industrial Areas' and had thereby concluded that noise levels from skip sorting at Heatherbrae Farm were 'likely to generate complaint' and to constitute 'a justified statutory nuisance.'

11.26 On 17th November 2006 the Royal Court rejected Mr and Mrs Yates' application for leave to apply for judicial review of the former Committee's, and the Minister's, various decisions. In large part this was because they were out of time, but two other reasons were stated by the Bailiff. First, he said that the Court took careful note of the Solicitor General's argument that whether or not the Minister had enforced the conditions attaching to the 2005 permit was not apt for judicial review because it involved disputed questions of fact and would involve, among other things, a determination as to whether there had been an intensification of use such as to constitute a material change. In other words, and in fact quite contrary to the stance the Planning Department had taken from the start, whether there had or might have been material 'intensification' (amounting to a change of use and thus requiring a fresh planning permission) was certainly not a given as far as the law was concerned. The Department had never sought legal advice on this crucial point, and it is not apparent that anyone in the Department noticed the significance of what the Bailiff said in relation to its case against RSL. (The point was certainly not drawn to the Minister's attention and the 'intensification' argument, the word itself being ill-defined, continued unabated to be the crux of the Department's position against RSL.)

11.27 Secondly, the Bailiff said that under the Royal Court rules an applicant for leave was required to state any available alternative remedies and, if they had not been pursued, the reasons why. The Solicitor General helpfully explained in her memorandum of 30th March 2009 to the States that judicial review is a last resort and leave will invariably not be granted if an adequate alternative remedy is available. The notice filed by Mr and Mrs Yates said, the Bailiff observed, that a private law nuisance claim against RSL was being considered but failed to give reasons why that remedy had not been pursued. A private law action, the Bailiff said it seemed to him, was the appropriate remedy for

the applicants to pursue. He characterised that alternative as a claim not in '*nuisance*' but in '*voisinage*'.

11.28 By 30th November 2006 Mr Taylor had concluded on advice from AFM that the only realistic way of aiming to resolve matters would be to do that for which the Minister had expressed such a strong preference during the site visit. Accordingly, on 5th December 2006 he submitted a planning application to roof over the RSL site area at Heatherbrae Farm. He paid an application fee of £1812 for this and in a covering letter he wrote, having regard to what the Minister had said during the site visit, saying –

> *'I would ask that if this does not meet the Minister's approval that the application is not progressed because of the high application fee.'*

11.29 As had been the case in 2005, Mr Taylor believed that he was once again reacting to the wishes of the Department. He explained to us that he believed, and felt entitled to believe, that in view of what the Minister had said on site the latter was driving the process directly. He also relied on what he told us that Mrs Ashworth and Mr Porter had clearly said during the site visit, viz. that there was nowhere else in the Island for RSL to go. We think that in the circumstances his was an entirely reasonable position to have adopted. There was no formal reply to his covering letter. So, as events developed, Mr Taylor continued to presume, not at all unreasonably but, as it turned out, wrongly, that the Department was viewing his response to the Minister's suggestion positively.

11.30 Mr Taylor's application was not accepted for processing straight away. Mr Porter handled matters initially, albeit that the file does indicate that he was acting on instructions. He treated it as a provisional application only, apparently in accordance with Mr Taylor's request referred to at 11.28 above, and forwarded it to Health Protection for comment. The information provided was substantially more detailed than that which had been submitted to Health Protection regarding the original 2005 application. Mr Binet responded within 10 days by suggesting that the entrance to the proposed new roofed-over area should be moved from the north to the west side, in order to face away from Mr and Mrs Yates' property. He added a careful opinion –

> *'I would expect the proposal to go some way to lessening the impact of the business on the neighbours but I doubt if it would achieve levels that would eliminate the likelihood of complaint.'*

11.31 The advice regarding the entrance was constructive, as was the 'informal' comment reproduced above. It was given before the application had even been 'accepted', and no doubt reflected the reality, reflecting all that Mr Yates had by now put on the record, that nothing short of RSL's leaving Heatherbrae Farm altogether could 'eliminate the likelihood of complaint'. But total 'elimination' was hardly a proper goal of planning policy, which requires 'balance' at every turn, notwithstanding the Department's bad report for the site visit in September 2006. It was therefore with dismay that we realised that Mr Binet's informal comment, which had, moreover, been elicited outwith

normal due process because the planning application was still provisional, was used by the Department a few weeks later as the sole justification for refusing the 'reconsideration application', which was a totally separate application and not what Mr Binet had been writing about.

11.32 The three month deferral of a decision on the 'reconsideration' application signalled by the Minister during the September site visit was due to end on 20th December 2006. Shortly before this, when Mr Taylor's application was still being treated as 'provisional' and had thus not been advertised, Mr Yates got to know from the Department (we know not precisely how) that Mr Taylor had 'submitted' it, although he did not see the documentation submitted.

11.33 On 15th December 2006 Mr Yates wrote to the Minister contending that the manner in which the 'reconsideration application' was progressing was likely to produce an unlawful decision. He added that Mr Taylor's new application should be considered in the context of all the policies regulating such development 'in a rural area on land adjacent to redundant farm buildings.' Mr Yates was no doubt of the view that the weight of the Island Plan policies would preclude the success of an application to roof over the former silage clamp. His assessment might not have been wrong but he was, we believe, unaware that the proposed application flowed directly from the Minister's intervention during the site visit.

11.34 In the week beginning 15th January 2007 (and several days after the Enforcement Notice had been served on RSL, as outlined in the next section) Mr Taylor went to see Mrs Ashworth and was advised by her that his proposed application to roof over the silage clamp had been reviewed by Health Protection. Having learnt of the opinion offered by Mr Binet, Mr Taylor promptly submitted a revised application with a relocated entrance and higher blockwork.

11.35 Mr Porter continued to report developments concerning the roofing-over application to Mr Yates. He should not have said anything at all at this point about someone else's planning application, especially one that the Department had chosen to regard as provisional. But what he did say caused confusion. On 18th January 2007 Mr Porter e-mailed Mr Yates, saying that Mr Taylor's application of 5th December 2006 had not been made on a 'formal' basis and that there was no pending application by Mr Taylor. The lawyers acting for both Mr and Mrs Yates, and for RSL, did not quite know what to make of this. A heated exchange of letters followed, with financial consequences for both sets of clients. As far as he was concerned, Mr Taylor certainly submitted a 'formal' application on 5th December and had paid the requisite, substantial, fee. The issue was that Mr Taylor's application was being subjected to an irregular informal screening process.

11.36 The one correct element of the information given to Mr Yates was that the Minister had finally determined the 2006 reconsideration application and that an Enforcement Notice had been served against RSL. The circumstances leading up to the serving of that notice, and then its withdrawal shortly afterwards are next for review in this narrative.

12 THE 2007 ENFORCEMENT NOTICE

12.1 First, we consider the decision eventually taken on the 2006 'reconsideration application' after the pause put in place by the Minister in September 2006. To recap, the reconsideration application was, in the Department's eyes, to allow 'mechanical sorting and to extend working hours'. The decision on this was taken by the Minister on 9th January 2007, just outside the three month window he had set at the site visit. His decision was to reject the application. For the purposes of this report we shall treat this decision to as a *fait accompli* although we are inclined to think that if it had been tested in a court of law it might well have been declared *ultra vires,* at least as regards mechanical sorting, because there had never been such an application by the holder of the permit and the original permission already explicitly allowed sorting of skips with no restriction on the means of sorting.

12.2 The Minister also decided at the same time to issue an enforcement notice to prohibit mechanical sorting by RSL. This is dealt with at paragraph 12.10 below. It needs to be remarked, however, that the formal decision went unrecorded for some five months. When, finally, it was recorded it was actually written up wrongly, as if the Minister had accepted the recommendations in the Department's site visit report of 2006 that he had already rejected and which we have already excoriated! This was not observed either when the document was put to the Minister or was signed by him. The decision on the enforcement notice, moreover, was taken in what we were told was an informal setting, with no papers put to the Minister beforehand, which suggests that the process was not in line with the procedures on recording Ministerial decisions that had been presented in revised form to the States only a month before. All this points, at the very least, to some very serious administrative weaknesses in the Department.

12.3 The reasons for the rejection were set out ten days later in a letter from Mrs Ashworth to Le Gallais & Luce (which, it must be noted, did not act for Mr Taylor, whose company held the 2005 permit). We were uneasy at the relative scantiness of this letter and its containing several irrelevant considerations. It said that the 'applicants' had been given three months to demonstrate that RSL's site could be operated without causing a noise nuisance to neighbouring residents but had failed to do so. No reasons for this conclusion were given. No credence whatsoever was given to the various, seriously intended, noise mitigation initiatives trialled by Mr Taylor and RSL since the site visit on the advice of AFM, and to which we have already referred; they were not even mentioned in the letter, let alone weighed. Nor was any reference was made to Mr Taylor's 'roofing-over' application that had been submitted the month before and which explicitly took into account the very views expressed by the Minister during the site visit. These shortcomings are hard to credit.

12.4 More seriously, the sole reason for the Minister's rejection was, astonishingly, given as being Mr Binet's informal observation referred to at paragraph 13.5 below. Not only was this informal but it was in respect of a different planning application! Under the new Planning Law 2002 the Minister could only

consider the application that was before him, so he was advised, unfortunately, to have regard to an irrelevant consideration. Notwithstanding, Mr Binet had chosen his words carefully when making his first comment on Mr Taylor's roofing-over application: there would, he wrote, be a lessening of noise impact but it was doubtful that would be enough to "*eliminate the likelihood of complaint.*" That was a reasonable thing for him to say but it was a completely inappropriate test for the Department to apply to the 'reconsideration application' where, putting aside for the moment the bad process we have revealed, it was its duty to seek to find a balance between the parties regardless of Mr Yates' by then apparent determination to pursue legal action against RSL. Mr Binet, to his credit, sought that balance when, upon Health Protection's being formally consulted on Mr Taylor's 'roofing-over' application, he did <u>not</u> oppose it, on the grounds that, whatever its limitations, it would be bound to make things better. We add that we found no evidence that Mr Binet was ever consulted by the Department on the use of his words, or other relevant words, to justify the decision to reject the 'reconsideration application'.

12.5 We cannot believe that the Minister was aware of these significant weaknesses of approach when he was invited to make his decision. We are particularly critical of the fact that he was not formally apprised of all that Mr Taylor and RSL had sought to do in the four months since the site visit to seek to mitigate noise pollution, and reminded accurately of the background and his earlier involvement. He was reliant on the Department for such advice. It would obviously have been much better had the important decision in question – the only case in his experience, Mr Porter told us, where enforcement action was 'required' to reduce an intensification of use – been considered, after due notice, in a proper setting, with papers and someone to take a note. Everyone involved, including the Department's senior management deserves some criticism for allowing such a decision, affecting people's rights and livelihoods, and with financial implications for the company concerned to take place on the hoof, so to speak, and with such absence of due process and record.

12.6 We turn now to the Enforcement Notice itself. The process by which the Minister was advised to issue an enforcement notice against RSL, and the contents and issuing of that notice, without doubt in our opinion amounted to maladministration. Given the failings described above, the legal status of the Minister's 'decision' was, at the time it was issued, less than clear, to say the least. This was unknown to Advocate Clarke who proceeded to lodge an appeal in the Royal Court against the Notice as it stood. It was in a sense fortunate that the substance of the notice was wanting to such a degree that the appeal did not need to be buttressed on process grounds too.

12.7 In his evidence to us Mr Porter said that he had formed a clear view that RSL should be served with an enforcement notice restricting the ability of the company to operate at Heatherbrae Farm. He had done so, he said, having taken advice frequently from qualified planners, including Mrs Ashworth, Mr Le Gresley and, eventually, Mr P. Nichols, the then Chief Officer of the Planning and Environment Department. We accept this, albeit that, as we have

already said, we have found no evidence that any such advice or requests for the same was written down. The advice Mr Porter gave the Minister certainly tallied with the views he had expressed previously in correspondence with Mr Yates and with RSL.

12.8 The sense we have formed is that communication on such matters between Mr Porter, Mrs Ashworth and senior management at this time appears to have been limited. If it were not, then it was for sure poorly documented, notwithstanding the serious business and financial implications for both Mr Taylor and RSL of the events now being set in train by the Department. Mr Porter emphasised to us that he was not in the lead on these things but, rather, took his cue at all times from the planning officers. We note this, but also note that there seems to be little evidence on the files to back it up, such as, for example, analysis initiated by planning officers. We were told that there was a team but we have to say it does not feel as if there was.

12.9 The Department did not seek legal advice before initiating such a significant statutory process. We find this somewhat disturbing given that, as already noted, this was quite probably the first enforcement notice to be issued in memorial time whose aim was to reduce an alleged intensification of use. Moreover, as also already noted, the Department had no written procedures or guidance for staff whatsoever governing the issue of enforcement notices, approximately 40 of which were, we were told, issued every year. However duteous the officers concerned may have been, there was evident scope here – too much scope in our opinion when coupled with evidence of failure of due process – for arbitrary action against citizens.

12.10 On 9th January 2007 Mr Porter and Mrs Ashworth secured, at short notice, a brief meeting with the Minister. This was described to us by Mrs Ashworth as 'an informal meeting' attended also by Mr P. Nichols, the then Chief Officer. Although later on Mr Porter told us that a meeting with the Minister was never 'informal' as such, we were not at ease with the description given by Mrs Ashworth, precisely because it seemed to be apt. No papers were prepared for the meeting, although Mrs Ashworth told us that she took the file with her to it. No advance warning was given to the Minister that he was to be faced with an important decision. Draft reasons were not placed before him to aid decision-making. It is not apparent that he was told about Mr Taylor's recently submitted 'roofing-over' application and his endeavours since the September 2006 site visit to test various possible ways of reducing noise, or that he was reminded how that application flowed directly from his, the Minister's, own stance during the site visit. In his position it was not, in our opinion, his duty to remember unaided what had transpired three or four months before so much as officers' to ensure that he was well reminded. It was improper of the Department to put him in such a position. It was, however, also unwise of him to accept that such arrangements were or could be satisfactory for decision-making. We were told, though, that they were not entirely uncommon.

12.11 The absence of due process around such an important statutory action, the absence of any assessment of the concept of intensification of use (the key policy issue on which the matter turned), the want of description of the existing

permission's containing no restrictions on the means of skip sorting, and the lack of any review of the case's complex history, including the Department's encouragement to RSL to relocate to Heatherbrae Farm and to Mr Taylor to accept the company on his land, were really very bad indeed and led directly to unjust and costly outcomes for both Mr and Mrs Pinel, and Mr Taylor. It was the unfortunate culmination of some eight months of 'enforcement' activity that was in our view insufficiently founded in planning law or supervised by senior management, and which comes over as having been, or having given the appearance of being, over-receptive to the views of, and pressure applied by, one forceful complainant and under-receptive to the interests of the company and landowner involved.

12.12 In view of the failure to record the Minister's decisions made on 9th January 2007 to reject the 'reconsideration application' and to issue an enforcement notice against RSL, we can only presume that what was recommended to him was what was done afterwards. We think it probably was. But we do not see how he could have truly been clear about what he was being asked to do, the reasons for it, and its consequences. There is no indication that the Minister was afforded an opportunity to reflect upon the advice given and there is no evidence that the advice he was given reflected the obvious requirement of the rules to be 'complete and balanced'. Rather, what seems to have happened is simply that an opportune moment was spotted to catch the Minister in the office and to ask him for a decision on the spot. This is the more significant a point given the Minister's robustly reasonable approach at the time of the site visit.

12.13 We were surprised – or perhaps, by now, not surprised – to discover that it was only on 7th June 2007, five months later, that the Minister was asked to sign a formal decision that set out what he had decided the previous January. There was, however, no substantive supporting documentation attached to this although the States guidelines said that 'the decision form must as far as possible be fully completed and supported by appropriate information and a trail to relevant documents.' This belated action happened to follow immediately, but only, upon a request by Mr Taylor for sight of all the case papers. The written decision, moreover, was clearly produced in a rush and without care: it 'approved' the untoward recommendation in Mrs Ashworth's report for the site visit that RSL should not be allowed to undertake any skips sorting at all at Heatherbrae Farm, notwithstanding the extant 2005 planning permission, whereas the Enforcement Notice had said only that mechanical sorting was to be prohibited and that a 'reduction' in sorting volumes was required. This looks to us, we fear, like evidence of utter muddle, which might almost have been laughable had it not generated such detriment to citizens.

12.14 The Minister is entitled to feel let down by the advice, or lack of it, that he received but he was his own worst enemy by choosing to be content to handle important business, that impacted legally and financially on ordinary people, in an informal, perhaps even casual manner. Mr and Mrs Pinel, and Mr Taylor to a slightly lesser extent, had to bear the brunt and cost of these shortcomings.

12.15 Mr Yates contacted the Department the following week seeking to know the Minister's decision on the 'reconsideration application'. He was told that it

had been refused and that with effect from 8th February 2007 RSL would be required '*to operate in the same manner as at the St. Peter's site*.' Mr Yates told us that, had the Department been able to enforce that position, he and Mrs Yates would have considered that the end of the matter.

12.16 On 6th February 2007, Advocate Clarke, and Mr and Mrs Pinel, went to the Department to review the enforcement notice file. Mr Porter oversaw proceedings and recorded that he *'refused to allow free access and removed material relating to the Judicial Review.'* That which remained in the file, however, was sufficient to convince Advocate Clarke that there were legitimate grounds to challenge the Enforcement Notice.

12.17 His letter was passed by Mr Nichols to Mr Thorne, who referred it to Mr R Webster, the Principal Planner responsible for handling appeals. Mr Webster had had no previous association with the case, though he had led for the Department in January 2004 when a Board of Administrative Appeal did not uphold an appeal by the owner of Home Farm for storage of (RSL's) skips on a site there.

12.18 When Mr Webster reviewed the file concerning the 2005 permit, he quickly realised that the 'in the same way' condition the Department was attempting to enforce was wholly defective. Having discussed the matter with Mr Thorne and Mr Le Gresley he wrote to the Solicitor General on 26th February 2007, saying –

> *'...although I have still only read part of file [sic], my own view on the basis of what I have seen (and indeed on the basis of the existing permission/conditions and requirements of the Notice) is that we have nil chance with this appeal and should withdraw the notice.'*

12.19 Mr Webster explained his reasoning to us in the following way –

> *'Immediately I received the appeal ... I had other work on as well at the time but I would go and dig the file out from the system or the case officer who had been dealing with it ... What happened in this instance was as I was going through the file it became increasingly apparent to me that there was going to be little chance of successfully defending this appeal. As I looked at the permit, the condition of the permit, the actual notice which had been served and the grounds of appeal I rapidly came to the conclusion, and there is a note on the file... that in my opinion I thought there was nil chance of successfully defending the appeal.'*

12.20 Mr Webster explained to us pellucidly that there were well-established principles and tests relating to planning conditions that every budding planner learned in her or his training. Conditions had to be reasonable, clear, precise and unambiguous – and thus enforceable in the sense that compliance becomes a 'black and white' issue. The relevant condition on Mr Taylor's 2005 permit, that RSL had to operate *'in the same way as a skip sorting yard only'* at Heatherbrae Farm, as it had (been supposed to have) done at La Prairie, failed these tests comprehensively. It was unclear and thus unreasonable. So was the

requirement in the Enforcement Notice for RSL to cease use of its mini-digger, because there was no condition to start with that said it could not be used. The permit was for sorting and storage of skips, which was exactly what RSL was doing, quite lawfully. Even if skip sorting was not a permitted use of the La Prairie site, sorting was specifically included in the Heatherbrae Farm permit, so the *'in the same way'* condition was unreasonable. And anyway it was unenforceable because the Department had no records or other evidence that would be admissible describing the position that had obtained at La Prairie.

12.21 We were impressed by Mr Webster's refreshing and realistic assessment of the Department's approach to RSL up to that point. He was, in fact, doing exactly what should have been done at the outset in 2005, that is, considering whether the conditions proposed to be imposed on RSL were relevant, reasonable, precise and unambiguous. It should have been abundantly clear to any experienced planner who reviewed them that they were not. Mr Porter, however, after discussion with colleagues (but not Mr Webster), had started off the whole misguided enforcement process by asserting to Mr and Mrs Pinel in his first letter to them that the Department's view was that the conditions were *'clear and precise'* when in fact in this one crucial respect, the 'in the same way' condition, they were exactly the opposite.

12.22 Mr Webster told us that when he first spoke to Mr Thorne and Mr Le Gresley his views were met with some concern. Once, however, he had explained his reasons both, he said, agreed with his assessment while also being well aware that the withdrawal of the Enforcement Notice would leave the Department facing an unresolved planning issue at Heatherbrae Farm and, as he put it, an extremely agitated complainant.

12.23 Legal advice was duly received by Mr Webster from the Solicitor General on 28th February 2007. We have seen this legal advice. It entirely supported Mr Webster's view. He then immediately secured a meeting with the Minister. His advice to the Minister was that the Enforcement Notice served on RSL should be withdrawn without delay. The Minister agreed. Although this Ministerial decision too was not formally documented at the time, as it should have been, Mr Webster did prepare thorough, hand-written notes (including a template for the necessary decision) and he ensured that these were placed on the relevant file.

12.24 The decision to withdraw the Enforcement Notice was not put into effect straightaway. Mr Webster first sought the Solicitor General's advice on a draft letter to Advocate Clarke confirming the Minister's decision.

12.25 While Mr Webster was engaged upon all this, a meeting between Planning and Health Protection officers had been arranged for 5th March 2007 by Mr Porter, with the desirable intention of discussing '*the most appropriate way forward for both ... departments.*' Those present at the joint meeting were Mr Webster and Mr Porter for Planning, and Mr Pritchard and Mr Binet for Health Protection. Mr Webster's note of the meeting indicates that possible action under the Statutory Nuisances (Jersey) Law 1999 was actively discussed, as was the relative likelihood of RSL's being relocated by negotiation. Mr Webster showed his draft letter to Advocate Clarke to his Health Protection

colleagues. This included reference to possible action under the Statutory Nuisance Law. They raised no objection to it. It seems, though, that at the meeting reservations were nevertheless expressed about such a course of action, from which we infer that it would not have been straightforward for anyone to seek to have had RSL's operations declared a statutory nuisance.

12.26 Article 5(1) of the Statutory Nuisances Law governs the serving of abatement notices. It says that where the Minister for Health and Social Services is satisfied that a statutory nuisance exists, or is likely to occur or recur, he shall serve a notice imposing all or any of the following requirements –

(a) the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence; and

(b) the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes.

12.27 Health Protection reportedly considered that it would need to collate evidence over a three month period in order to satisfy the Minister (and, if necessary, the Court) that serving a Notice under the Statutory Nuisances Law could be justified. In relation to option (b) above, Mr Pritchard is recorded as having raised concerns about making his department a party to any particular noise mitigation solution. Given that Health Protection performed the function of regulator on behalf of the Minister for Health and Social Services, this would have been an understandable concern. In this regard, the meeting felt that some liaison between Senator Cohen and former Senator S. Syvret, the then Minister for Health and Social Services, would probably have been beneficial but nothing came of it.

12.28 Mr Webster's file note also reveals that at some point during the 5th March meeting the option of a civil action by Mr and Mrs Yates was raised as a potentially viable method of achieving an early and definitive conclusion to the matter.

12.29 Mr Webster wrote to Le Gallais & Luce on 6th March 2007 withdrawing the Enforcement Notice, saying (in words agreed by the Solicitor General) –

> *'Having given further consideration to the wording of condition no. 1 of the permit and issues regarding the enforceability of this condition vis-à-vis the use as currently operating compared to that on the Beaumont site, and having also taken into account the measures recently undertaken by the site owner and Reg's Skips to reduce noise and dust nuisance, the Minister has decided to withdraw the notice.*
>
> *'In making this decision, the Minister is aware that, despite the measures which have been taken to reduce noise and dust nuisance, there remain on-going complaints from neighbours regarding these matters. The Minister is also aware that an application has recently been submitted by the site owner to enclose the skip storage and sorting area in order to mitigate noise and dust nuisance, and yet the Environmental Health Department, in commenting on this*

application as part of the normal consultation process, still has doubts as to whether the proposed mitigation works will satisfactorily resolve the said nuisance and eliminate the likelihood of complaint. Given the particular circumstances of this case, the Minister considers that the issues of noise and dust nuisance should more appropriately be dealt with under the Statutory Nuisances (Jersey) Law 1999.'

12.30 We are a little critical of this letter, although not of its purpose. Reference was again made to Mr Binet's informal advice on the 2007 application, the Department incorrectly indicating that the goal of that advice was to require RSL and Mr Taylor to '*eliminate the likelihood of complaint*'. This was not the test that Health Protection had stated should be applied and, in any case, it was never put into a reasonable context for RSL or Mr Taylor because the Department had never explained what the Minister's '*statutory limits*' test, which he had specified at the site visit, might actually mean in practice. Also worth noting is that the letter acknowledged the measures put in train by Mr Taylor and RSL to reduce noise, measures that had been ignored when the Enforcement Notice was issued.

12.31 Advocate Clarke saw through the letter and advised his clients accordingly. He also felt it appropriate to comment to RSL on the extent to which the Department appeared to him to be working to ensure that Mr and Mrs Yates would not cause it, the Department, as he put it, any more trouble.

12.32 On the same day, 6th March, that the letter to Le Gallais & Luce would have been posted, Mr Webster and Mr Porter arranged to visit Mr Yates at his place of work to brief him about the withdrawal of the notice. Mr Webster and Mr Porter told us that they regarded this as an appropriate courtesy in the circumstances. Mr Yates told us that he was unsurprised at the news, not least having regard to RSL's grounds of appeal. We have no problem with the courtesy involved in this but it did mean that Mr Yates, as complainant, learnt about the decision before Mr and Mrs Pinel, or Mr Taylor. In practice maybe that did not matter but it is another example of an action by the Department that had the potential to give the impression that more attention was being given to one party than to the other whose interest was even more direct. Mr Webster wrote a file note of the meeting with Mr. Yates, saying –

'RTW explained that ... it was clear that, having regard to wording of conditions and all circumstances (and having also taken legal opinion) there was no prospect of success in defending appeal... As a result of this conclusion, Minister had decided to withdraw the Notice. Had come to explain in person out of 'courtesy'!

'MP advised that only further course of action to address ex. noise and dust nuisance problems is under Stat. Nuisance Law. Mr Yates would need to contact/write to Env. Health (Mr A. Pritchard) to discuss this. MP explained that meeting had been held with Env. Health and not a "straightforward" issue. Also that an alternative/ additional course of action would be for Mr Yates to take "civil" action against co. re nuisance problems.'

12.33 This was not entirely satisfactory. It indicates, first, that Mr Porter passed on the advice given privately by Health Protection to the Department (advice that might have been a prelude to a meeting between Ministers) regarding the relative difficulty of a prosecution under the Statutory Nuisance Law. This was, moreover, before Le Gallais & Luce, or RSL, even knew about the withdrawal of the Enforcement Notice. Whether or not Mr Porter mentioning this had any influence upon Mr Yates' own thinking, and from what the latter told us it did not, it does not seem to us that this was an appropriate thing to have raised with one party to a planning dispute by an officer representing the Department. Mr Webster's file note also indicates that Mr Porter touched on the alternative or additional suggestion of a civil action by Mr Yates, which officers of the two departments had discussed the previous day. It is fair to say that this was not 'news', in that Mr Yates himself in his notice to the Court regarding his application for leave had said a private law claim against RSL was being contemplated, and indeed the Bailiff had referred to the availability of his pursuing such a remedy. Nonetheless this was capable of being perceived as more supportive to one side in the dispute than the other and we think it should have been left unsaid.

12.34 We commend Mr Webster for his swift and diligent action in cutting through all the previous administrative sloppiness, lack of due process and want of grip that had characterised much of the handling of RSL's case since Mr Yates had first complained about the company in April 2006.

13 THE 2007 APPLICATION TO ROOF OVER

13.1 By February 2007, and while the process that would lead to the withdrawal of the Enforcement Notice was in train, the Planning Department had set about processing Mr Taylor's roofing-over application. Over a period of more than a year, this application was, we fear, handled in a flawed manner that created real, further, detriment both to RSL and Mr Taylor. It was as if the Department was unable to take on board what had previously been misdone on RSL's case, taking into account Mr Webster's effectual, but actually quite elementary, input on the enforcement notice.

13.2 It is, however, also not unfair to say that, at this juncture, the Department was faced with what, had it been thought through, must have seemed like a modern version of Morton's fork. On the one hand, it was confronted by a resourceful and determined complainant who had already gone so far as to seek leave to apply for judicial review of previous decisions. (That alone should have kept every administrative alarm bell in the Department ringing.) On the other, and as a direct consequence of its approach to handling Mr Yates' complaints, it now had to deal with a new planning application, whose genesis lay in the Minister's clearly expressed (albeit caveated) preferences during the site visit and whose purpose was, for Mr Taylor as the applicant, to keep a tenant we doubt he, the latter, would have taken on in the first place had the Department not actively encouraged him to so do two years previously. Moreover, and notwithstanding, the new application represented something of a challenge (but not, we think, an impossible one) purely in relation to the balance between Island Plan policies and the practical matters that had already arisen or which existed, notably RSL's valid planning permission for skip storage and sorting.

13.3 The judgement was made in the Department, we perceive from the file, that Mr Taylor's new application could be approved only if the Department could rely on advice that roofing over the skip sorting yard would bring about an appropriate level of noise reduction. This indeed was the position the Minister believed he had made clear during the September 2006 site visit. In this regard we repeat for ease of reference what he told us –

> *'I remember saying, in effect, that: "I would suggest that if you are to cover the area you need to make absolutely sure that it is going to work. Do not go to the effort of paying to cover the area unless you have pre-acoustic testing to ensure that you are going to meet the requirements." Because, as I understood it at the time, these were statutory limits.*
>
> *'I do remember giving a very clear indication that if it was going to resolve the problems I was perfectly happy to give a consent and I would take responsibility myself.'*

13.4 Considerable difficulties flowed from this stance despite its reasonableness. Mr Taylor told us, credibly, that he was quite clear he had been recommended by the Department to seek permission for an enclosed structure in order to achieve a reduction in noise, and what the Minister said on this during the site

visit created, we think, a fairly legitimate expectation on Mr Taylor's part that the Department would facilitate the process of his gaining permission accordingly. Put another way, he certainly had no reason to expect that the Department might hinder the endeavour. The Minister, however, had not specified with any precision at all at what noise reduction target Mr Taylor was expected to aim. Mr. Pritchard of Health Protection was very clear that there was no question of absolute precision. He told us –

> *'...nuisance is somewhat subjective and there was an expectation on some part that you could determine what could or could not be a nuisance by virtue of what level it was on a meter reading. That is not the case... Each case is different.'*

13.5 Mr Binet had written back to the Department on 15th December 2006, Mr Taylor's application having been referred to him informally by Mr Porter. He referred to the application of the NR40 standard, although he stopped short of recommending that the Department impose a condition requiring compliance with it. This remained his position when he later commented formally after the 2007 application was accepted for processing. The Department copied his letter and the subsequent formal response to Mr Taylor for his information but no further guidance or clarification of the Minister's expectation – or indeed the Department's flowing from it – was given to him. The impression, therefore, with which Mr Taylor was left was that he needed to get the noise impact down to *'50 decibels, a figure of that region.'* His belief was that if he could *'get an acoustic report that clearly showed that, then Planning would accept it.*' This, in our view, was entirely reasonable on his part. Mr Binet also suggested a repositioning of the proposed entrance to the proposed new structure, so that it faced west, away from Mr Yates' property. Mr Taylor took this constructive advice on board and submitted revised drawings.

13.6 Both Mrs Ashworth's letter of 19th January to Le Gallais & Luce rejecting the 'reconsideration application' (paragraph 12.4 above), and Mr Webster's subsequent letter to the same withdrawing the Enforcement Notice (paragraph 12.29 above), could be said to indicate that the Department had already formed the view that the roofing-over application would not achieve the objective being set for it. But the application was nonetheless formally accepted on 23rd January 2007 and designated P/2007/0195. No response was offered or, it seems, consideration given to Mr Taylor's entreaty when he had first submitted the application a month before (paragraph 11.28 above). It was advertised in the JEP and Mr Taylor had to display notices around the site to meet the requirements of the new Planning and Building (Jersey) Law 2002, now in force.

13.7 Mr Yates promptly instructed 24 Acoustics to support his making representations against the application. By 31st January 2007 the company had made contact with Mr Binet seeking his advice on an appropriate place to leave a meter to assess the level of noise arising from RSL's operations. Mr Yates then wrote to Mr Binet to say that he intended to oppose the application and requesting that Health Protection *'help from the point of view of sharing data relating to the site with [24 Acoustics]'*, on the basis that any

data collected by 24 Acoustics would be shared with Health Protection. Health Protection, however, did not respond to this request and the report subsequently produced by 24 Acoustics does not cite Health Protection as having contributed to it.

13.8 Only the Environment Department and Health Protection were formally consulted on the application. The Public Services Department was not consulted regarding highways or traffic implications and Jersey Water was not consulted in respect of the Water Pollution Safeguard Area.

13.9 Mr Binet replied to Mrs Ashworth on 2nd February 2007. His key advice was that Health Protection would '*not oppose the application as it [would] improve the existing unsatisfactory situation*.' By way of additional guidance, he again implied that the 2007 application should be considered in terms of its compliance with noise rating curve NR40, as he had done with the 2006 'reconsideration application'. Mr Binet explained that in order to fall within NR40, the proposed building should be expected to deliver at least a 25dBA reduction in noise against existing measured noise levels recorded at the boundary of the property belonging to Mr and Mrs Yates and that, in his view, a reduction of that magnitude was '*not easy to achieve even with a totally enclosed structure'*.

13.10 Mr Binet's words were chosen with care. Health Protection continued to maintain that the Department should not have approved the relocation of RSL to Heatherbrae Farm in the first place. Now that the relocation had occurred and complaints had followed, Health Protection had, we surmise, begun to think that the Department wanted it to come to its rescue, so to speak, by warranting the design of the proposed new structure as a viable remedy to the problem identified. Health Protection considered that its job was to advise on the risk of nuisance but not to the extent that it should, in effect, be expected to make the decision on the application; hence its cautious advice. The degree of caution was perhaps equally understandable given that expert witnesses had been heavily engaged on the case for some months. But, and it is an important but in the light of later events, Health Protection's view was an expression of support for the application, not the reverse.

13.11 Concise letters of representation were again received from neighbouring residents Mrs S Laurence and Mr R Benest. The former complained of anticipated traffic implications and the latter complained that Heatherbrae Farm was becoming an industrial estate. As we have previously indicated, this latter comment was perhaps not without some justification although it attracted no comment or analysis from the Department in response.

13.12 On 12th March 2007 Mr Yates submitted a lengthy letter objecting to the roofing-over application. His letter was supported by a report from 24 Acoustics, which concluded that RSL's operations would still constitute a '*justified statutory nuisance*' even if the application were approved. 24 Acoustics also commented that, in its opinion, the original 2005 application should have been refused on noise impact grounds '*...had due process occurred*.'

13.13 One day later, Mrs Ashworth asked Health Protection to comment on the representation made by Mr Yates. A copy of the supporting report by 24 Acoustics was supplied. She would later press Health Protection to give '*a definitive answer*' as to whether the application should be approved or not; however, Health Protection chose not to amend the cautious advice it had given on 2nd February.

13.14 At the conclusion of the meeting on 6th March meeting when he had been told that the Enforcement Notice was to be withdrawn, Mr Yates advised Mr Porter of his belief that other tenants of Mr Taylor were operating beyond the terms of the latter's 'dry storage' planning permission. Mr Porter responded by reportedly visiting Heatherbrae Farm on several occasions, albeit that he did not complete a file note confirming the dates and times of these visits. He then e-mailed Mr Yates a week later advising that he had found evidence of activity akin to that of a carpentry workshop and that he had pointed out the activity to Mr. Taylor, who had been on site at the time. Mr. Porter subsequently telephoned Mr Taylor to tell him to ensure that his tenants complied in full with the terms of the relevant permit and he followed this up with a stern warning letter to Mr Taylor.

13.15 Soon afterwards Mr Yates gave further instructions to Advocate O'Connell of Appleby, who wrote to Le Gallais & Luce on 23rd March 2007 and supplied a copy of the 24 Acoustics report already submitted to the Department. The letter said –

> *'... our clients require your clients to confirm and undertake within 14 days of the date of this letter that all activities at the site which constitutes the nuisance will cease within a further 28 days. In simple terms this means that your clients should stop operating their skip business. The location they have chosen for this operation is wholly unsuitable for it and will never be capable of being adapted so that its use does become suitable.*
>
> *'If you are not instructed to provide the confirmation and undertaking requested herein, then we are instructed to issue proceedings without further notice at the expiry of the above deadline to secure a permanent injunction restraining the nuisance. If successful our clients will also be seeking an order for costs.'*

13.16 Advocate Clarke responded with an immediate rebuttal and he then wrote to Mr and Mrs Pinel advising them to meet with him to discuss the letter. A meeting was arranged for the beginning of the following week. But in the meantime, Mr Pinel suffered a stroke and was admitted to hospital. Appleby was advised of this most unfortunate development, whereupon the deadline set in Advocate O'Connell's letter of 23rd March was extended by a fortnight. Mr Pinel later recovered and was able to return to work, albeit that he was unable to drive for a number of months.

13.17 On 25th March 2007 Mr Taylor wrote to the Minister refuting the contents of Mr Yates' letter of objection to the roofing-over application. He said that the letter contained a number of factual errors and, in particular, that it sought to

misrepresent the noise readings taken by 24 Acoustics by skewing background noise level readings to the detriment of his tenants. Mr Binet was not asked by the Department to comment on what Mr Taylor said and the comments do not appear to have been subjected to any analysis.

13.18 By 20th April 2007 Mrs Ashworth had concluded her work on the application and had referred the matter to Mr Le Gresley for a decision. She submitted an assessment sheet, saying –

> *'There is a huge amount of technical info from both sides but what this essentially boils down to is that the report from EHO does not definitively state that roofing over this large area will alleviate the problem of noise from the sorting operation. There are also likely to be continued problems with traffic noise although Mr Taylor has stated that Mr Yates (neighbour) has not allowed him to resurface the access road due to boundary disputes. Because the proposal is not for agriculture the proposal cannot be supported (It would be if this could be the solution + could be agreed as an exception.)'*

13.19 Mr Le Gresley endorsed the decision to refuse the application. We were surprised that it was not felt necessary to secure a political decision. It was hardly an ordinary application that was on the table. On the contrary, it had been submitted in the most unusual circumstances, in order to comply with advice given by the Minister himself at the site visit the previous September. There was also the backdrop of pending legal action by a persistent complainant. It was known to the Department that both Mr Taylor and RSL had taken active steps to seek to mitigate noise following the September site visit. And the Department knew that, notwithstanding caveats about the likely impact of the proposal, Health Protection was not opposing the application. The case, moreover, was now politically contentious, not only because of the Minister's involvement but also because the Deputies of both St John and St Ouen had engaged with the Department and with Health Protection about it. If ever there was a case that warranted a full report to the Planning Applications Panel, this was it.

13.20 We asked Mr Le Gresley about this. He replied, saying –

> *'The third section of [the Delegation Code of Practice] refers to matters on which the staff may make decisions in the name of the Committee. The fourth bullet point states, inter alia, that officers may make a decision "on other applications where that decision is in accordance with the Committee's policy, or accords with an earlier decision of the Committee or the Planning Sub-Committee."*
>
> *'The decision to refuse the 2007 application for the covering over of the silage clamp was taken under the same bullet point of the Delegation Code of Practice. On this occasion, the proposal was regarded as contrary to presumption against development set out in Countryside Zone policy C6, and as this decision was in line with the policy of the day, we would submit that the officer was entitled to make it.'*

13.21 This was in our opinion a somewhat inadequate explanation. The 2005 permit for RSL existed, and Mr Gresley's oversight of the decision to approve it had already tested the margins of Policy C6, it being decided by him then that C6 was not a constraint on the use of the site for skip storage and sorting. The series of events since then had been positively extraordinary, not least the extent to which the Minister's personal intervention had triggered the very formulation of the application. The decision should have gone to the Panel with a full report.

13.22 Mrs Ashworth wrote to Mr Taylor four days later confirming that his application had been refused, saying –

> *'The proposal is of a size that would result in an adverse visual impact within the landscape and as it is not required for agricultural purposes, is contrary to Policy C6 of the Island Plan 2002. Furthermore, it has not been demonstrated, beyond reasonable doubt, that the works would eliminate the noise nuisance that exists. The Environmental Health Officer's Report dated 2 February 2007 states that the proposals would lessen the impact of the business on neighbours but expresses doubt that it would eliminate the likelihood of complaint. On that basis there are no grounds to allow the roofing over of a large area of the former silage clamps, which are presently used for the storage and sorting of skips.'*

13.23 Three aspects of this statement give cause for concern –

(a) it was said without any qualification or saving that the application contravened Policy C6;

(b) tests of '*beyond reasonable doubt*' and '*eliminating the likelihood of complaint*', that were impracticable to demonstrate were being applied to the noise issue; and

(c) it was stated as a fact that RSL was causing a noise nuisance.

13.24 Regarding the first of these, we referred in Section 7 above to the terms of Policy C6 and we shall refrain from doing so again here. We simply observe that while it would have been correct to say that Policy C6 had to be weighed carefully for such an application in the Countryside Zone, it should also have been said that C6 did not preclude such a development outright. The balance of argument on this, taking into account the case history, was not addressed.

13.25 As for the second, the test of '*beyond reasonable doubt*' imposed such a high, undefinable bar to clear that we cannot easily comprehend what Mr Taylor and RSL could possibly have done to satisfy the Department on it. It went far beyond anything Health Protection had said as the Department's expert advisers. The latter, through Mr Binet, had not opposed the application. Mr Binet had indeed offered the reasonable opinion that he doubted anything would '*eliminate the likelihood of complaint.*' The report erred in bringing this concept of 'elimination' into the forefront. The notion was not subject to any analysis as to practicability or reasonableness. It was not a test that should

have been applied; it was a sloppy carrying over of one key word – '*eliminate*' – from Mr Binet's comments that was then taken out of context, its juxtaposition with the concept of '*likelihood*' going unmentioned. The actual planning issue, as promulgated by the Minister himself, was not the seeking or setting of an absolute standard but reasonable balance between the parties having regard to all relevant factors.

13.26 Turning to the third point, we think it was wrong of the Department to consider it necessary or appropriate to make such a declaration given all the advice it had received from Health Protection both in correspondence on both the 'reconsideration' and the 'roofing-over' applications, and at the 5th March meeting with Health Protection when the genuine difficulties in pursuing a prosecution under the Statutory Nuisances Law were averred.

13.27 Mr Taylor told us that he felt thoroughly dejected by this decision. Having reflected on the full series of events and having spent a significant sum in an unsuccessful attempt to retain the tenant that Planning had initially invited him to take on, he did not feel inclined to appeal the decision. He felt instead that he should regard the matter as Planning's mess and let them sort things out from that point. Then, a month or more later at the beginning of June 2007, Mr Taylor said that he conversed with Mr Porter who suggested that he should consider an appeal. We accept that Mr Porter has a subtly different recollection insofar as he recalls Mr Taylor having complained to him about the delegated decision to refuse during the course of a site visit at Heatherbrae Farm and that he advised Mr Taylor of his right to appeal to the Minister.

13.28 In order to help himself decide, Mr Taylor wrote to the Department asking for copies of '*all reports, letters and documents'* that had led to decision to refuse the roofing-over application. The Department properly sought to comply with this request. Just two days later, it happened that the Minister was asked to sign the two Ministerial Decisions covering the serving and the subsequent withdrawal of the enforcement notice against RSL that should have been done between three and five months before. We presume that this was not coincidental to Mr Taylor's request for papers from the file. It was a serious breach of procedure that the decisions had not been recorded at the time in the requisite form (and it remains the case today that the wording of the signed Ministerial Decision that authorized the serving of the Enforcement Notice wrongly purports to approve the recommendation at the foot of the 2006 site visit report) but at least it meant that someone was now looking at the file.

13.29 Meanwhile, in preparation for the legal action instituted by Mr Yates, an affidavit of discovery was filed by Appleby, and Le Gallais & Luce filed an answer. Matters progressed swiftly and by the end of June 2007 RSL had engaged Southdowns Environmental Consultants Limited to help rebut the findings of the 24 Acoustics reports commissioned by Mr Yates. Shortly afterwards, a trial date of 18th October 2007 was fixed.

13.30 On 21st June 2007 Mr Taylor submitted a request for reconsideration of the decision to refuse the roofing-over application. His request was accepted and the following week the case was again referred to Mrs Ashworth. She duly prepared a report for the Minister and referred it to Mr Le Gresley for

endorsement. On 23rd July Mr. Le Gresley signed it off and the matter was added to the agenda for a Ministerial public hearing to be held on 3rd August 2007.

13.31 The content of the report is worthy of some note. First, it was claimed in it that the 'roofing-over' solution under consideration was '*suggested by the owner of the site in response to the Minister allowing him until December of last year to resolve the problem.*' This was not so. While the specific design was indeed submitted by Mr Taylor, the report failed to outline the sequence of events surrounding the September 2006 site visit when Mr Taylor was first advised by the Minister to consider roofing over the RSL yard and when he had been left in little doubt that this was the Minister's preferred approach, on the understanding that any structure proposed would need to deliver an (unspecified) degree of noise reduction. Secondly, Mrs Ashworth maintained the Department's previous stance on Policy C6 of the Island Plan: viz. that as the application was not for an agricultural use it could only be approved if it was *proven* that the enclosed structure '*would eliminate the noise nuisance.*' We maintain our view that Policy C6 is not as restrictive on such matters as the report owned. Thirdly, we note that the impossibly high test on noise of '*beyond reasonable doubt*' was again applied in the context of how far Mr Taylor and any professional advisers he engaged would have to go to obtain permission. In any case, such a test could not have been applied before the roof had been built, so it was unreasonable.

13.32 The Ministerial hearing on 3rd August 2007 was attended by both Mr Taylor and Mr Yates. Both made robust oral representations in support of their respective positions on the application and these were summarized in a minute produced by an officer of the States Greffe. On the matter of anticipated noise reduction, Mr Taylor contended that the structure proposed would certainly alleviate the noise pollution '*to some extent*', while Mr Yates submitted that (pursuant to Mr Binet's opinion) the structure proposed would simply not be capable of delivering the '*necessary*' level of noise reduction.

13.33 The minute of this hearing is one of the fuller documents in the files we have examined and reveals several not uninteresting things. It confirms that the Minister was aware that the Department had been *'concerned in the relocation of the skip company to Heatherbrae Farm.'* It records Mr Yates' concern that any move on his part to facilitate improvement of the access road to Heatherbrae Farm to alleviate traffic noise would be counterproductive for him insofar as better access would be a further step towards there being a fully-fledged industrial estate on the other side of his fence. It also serves to indicate that for the first time the Department, or at least the Minister himself, recognised a wider policy dimension to the RSL situation. The Minister acknowledged that skips sorting operations were *'a key part of the recycling process'* and, further, that the Department knew of *'three separate skip companies that were experiencing difficulties in finding a suitable site from which to operate.*'.

13.34 The Minister decided to defer the reconsideration in order that the Department could obtain legal advice for him concerning a point of law raised by Mr Yates. This was whether the Minister could lawfully grant consent for an

application for the benefit of Mr Taylor's company when the original 2005 permission regarding the yard in its existing semi-open state was for the sole benefit of RSL rather than going with the land. The Minister also requested that Mr Taylor and Mr Yates make every effort to resolve their differences in the intervening period so as to allow for the resurfacing of the access road to proceed, in the hope that this might alleviate at least some of the noise of which Mr and Mrs Yates were complaining Finally, the Minister asked his Department to clarify why it was reportedly not possible for Health Protection to model the extent of the noise reduction that the scheme could be expected to deliver.

13.35 Afterwards Mr Yates wrote to the Minister on 13th August iterating what he had said at the hearing and expressing disappointment that matters had been deferred. His seeming exasperation was, from his perspective, understandable; he had now been pressing the Department to resolve his problem for some 15 months and the end did not yet appear to be in sight. His letter having crossed with one from Mrs Ashworth confirming the Minister's request that Mr and Mrs Yates resolve the boundary dispute with Mr Taylor as soon as possible, we sense that Mr Yates became yet more exasperative. He replied to Mrs Ashworth, saying that the boundary dispute had '*no bearing whatsoever on the sole matter before the Minister*.' (But of course in Mr Taylor's eyes it was certainly not irrelative.) He also made several strong allegations regarding the Minister's conduct. He accused him of being '*injudicious*' to the point of showing bias against himself and his wife and of '*directing his mind to extraneous things in the discharge of his statutory duty*.' He also asserted that the Minister should withdraw from determining the application because, in his opinion, he had compromised his position.

13.36 This was a difficult letter for any planning officer to have received and Mrs Ashworth referred Mr Yates' letter to Mr Thorne, the Director of Planning. He asked Mrs Ashworth to speak with him and the Minister was also involved in the conversation at some point. Handwritten notes on the file copy of the letter indicate that Mr Yates' tone was seen as irksome. Mrs Ashworth then responded on 21st August, saying that the Minister had '*taken great exception*' to the allegations made by Mr Yates but that he would nevertheless delegate responsibility for determining the application to the Assistant Minister, Deputy A.E. Pryke. Three days later, Mrs Ashworth wrote to Mr Taylor and reported this change to him.

13.37 This should have been the point at which Senator Cohen's involvement in RSL's case ended. Regrettably, and as subsequent paragraphs reveal, we found that the Minister continued to play a role in ensuing months in the handling of the request for reconsideration of the application.

13.38 Mr Le Gresley had by then sought advice from the Law Officers' Department on the point of law raised by Mr Yates. The question he put to the Law Officers was whether the Minister could properly allow the development while still retaining control over any additional works which might be required to further reduce the noise levels. Advice was eventually provided on 11th October. The advice indicated that Condition 2 of the 2005 permit, that restricted the permission to RSL, did not prevent the Minister from making a

decision either way on the application to roof over. It also reflected very clearly the extent to which the broad scope of the 2005 permit and the looseness of some of its conditions were the real problem for the Department.

13.39 Mrs Ashworth wrote again to Mr Binet at Health Protection, saying that the Minister was concerned by the consultation response Mr Binet had originally submitted in February 2007. She explained that the Minister expected Health Protection to be able to model the precise degree of noise reduction that enclosing the RSL yard would achieve and she added, we sense feelingly –

> *'The whole issue is very difficult and sensitive and the Minister wants the situation resolved and wants to pursue the matter as we really do need to know whether the roof will solve the problem.*
>
> *'If you cannot help with this can you please advise us of who would be able to supply this information?'*

13.40 Health Protection's response came swiftly and with some firmness from Mr Binet's line manager, Mr Pritchard. He replied, saying –

> *'... I need to make one thing very clear. This Department will not warrant the design solution for the shed; we will not accept liability for approving the design of a structure in terms of whether it will / will not prevent a statutory noise nuisance.*
>
> *'... It is for the applicant to demonstrate the robustness of their application. It is not for this Department to model roof designs, and their impact, on behalf of the applicant.*
>
> *'... I appreciate it is going over old ground but permission should not have been granted for this type of commercial use so close to residential dwellings.'*

This was fairly irrefragable advice. Mrs Ashworth passed it to Mr Taylor on 31st August, saying –

> *'I write to advise you that having contacted the Environmental Health Officer he has made it clear that, notwithstanding the Minister's request, it is for you as the applicant to demonstrate the robustness of your application but it is not for the Department to model roof designs and their impact, on behalf of an applicant.'*

13.41 This was the point at which, we judge, any remaining semblance of the Department's 'proactive' approach towards RSL's operations at Heatherbrae Farm ceased. There seems to have been no consideration given to, for example, bringing in a third expert party to adjudicate between the rival claims on noise. And there seems to have been no stocktake of the litigious situation now arising and what this implied given that RSL's existing permission (to operate in the Countryside Zone) remained fully in force. After all the Department's facilitation and encouragement that had enabled the company to move away from La Prairie in 2005, and after all the encouragement, or more, aimed at Mr Taylor for (in the Minister's eyes) a compromise solution to be found – and after both parties had been obliged to incur some large costs –

RSL and Mr Taylor were now left truly on their own, so to speak, in trying to address the adverse turn of events that the Department had allowed to arise.

13.42 Mr Taylor, to his credit, put to one side any aggrievement he might have been very entitled to feel and again elected to follow the lead given by the Department. He too engaged Southdowns Environmental Consultants to assist with noise reduction modelling in support of his reconsideration request. He also decided to proceed unilaterally with the resurfacing of the driveway, notwithstanding the fact that he still considered the boundary dispute with Mr and Mrs Yates to be unresolved. The resurfacing, we were advised, was done at considerable cost and in order to demonstrate that he, Mr Taylor, was making every effort to comply with the wishes expressed by the Minister. (But, as things turned out the Department took this action into no account at all, and had either not noticed it or had forgotten its quite specific encouragement on this score.)

13.43 On 4th September 2007, in preparation for his forthcoming civil action against RSL, Mr Yates rang up Mr Webster on the telephone seeking information to assist his case. He followed up his call with an e-mail in which he requested data on other occupants of the units at Heatherbrae Farm and on planning conditions applied to other skip companies operating in the Island. Mrs Ashworth responded three weeks later listing the names of the approved occupants of the other 11 units leased out by Mr Taylor and confirming the approved dry storage use for each. She also confirmed that in 2005 Mercury Distribution had taken over the unit previously occupied by a scaffolding company and said that there had 'never been any complaints recorded on file' about any of those other occupants. This was incorrect. Mr Yates himself would have recalled having complained to Mr Porter about activities at other units some six months earlier and Mr Porter's letter of 19th March 2007 to Mr Taylor about this was on file.

13.44 Mr Yates' request was followed by a meeting at the Department on 26th September between Mr Yates' lawyer, Advocate O'Connell, Mr Le Gresley and Mrs Ashworth. Advocate O'Connell followed up the meeting with a letter the next day to Mr Le Gresley, saying –

> *'The matter has a long and chequered Planning history, as we discussed. I am grateful to you for the information that you provided to me which was of a public nature but I am interested in pressing you or other members of your Department to see if assistance can be given evidentially at the trial. I recognise that this may be straying into sensitive territory because it may involve criticising the decisions of previous Committees either by implication or expressly. Nevertheless it is my view that my clients have the right to have the factual position fairly laid before the Court. The target of the proceedings is not the Planning Department or any of its officers.'*

There is no record on file of what was discussed at the meeting preceding the sending of this letter, but the extracts from the letter, both above and in the following paragraph, offer clues. The sense we certainly get from the second

sentence above is that there may have been discussion of things having been got wrong in 2005. The quotes cited below give at least some impression that there may have been some animadversion of RSL during the conversation. Advocate O'Connell seems from what he wrote to have been not unpleased with what he gleaned, and was perhaps encouraged in his own mind to seek more information in support of his clients' case.

13.45 Mr Le Gresley sought Mr Thorne's advice. He said in so doing that he had concerns about several points in Advocate O'Connell's letter. These suggested, among other things, that the Department had '*let Mr and Mrs Yates down*' and that a witness from the Department could help by providing '*a summary of the history of Reg's Skips Limited so that the Court can understand that it has previously performed activities that have been complained about.*' In other words, RSL would, it could be construed from this, be able to be portrayed as a 'troublesome' company, as opposed, for example, to one performing an invaluable recycling service, as accepted by the Minister but whose operations States planning policy had, it seems, severely failed to accommodate. Mr Thorne and Mr Le Gresley were aware that the request was unusual; Departmental involvement in a civil case was a very rare event indeed. Mr Thorne said that he would back his colleague's judgement, whereupon Mr Le Gresley did prepare a witness statement. We were advised that he had to do this in something of a rush. It was passed on to Le Gallais & Luce less than 24 hours before the case was due to be heard in the Royal Court. This was, of course, most unsatisfactory as far as Advocate Clarke's ability to consider the statement was concerned.

13.46 On 18th October 2007 the action against RSL got underway in the Royal Court. Advocate Clarke sought to have Mr Le Gresley's statement declared inadmissible. He succeeded, however, in having only the last two paragraphs struck out in full, on the basis that they were irrelevant and should not be permitted to colour the Jurats' appreciation of Mr Le Gresley's remaining evidence. Those paragraphs said –

> *'With the benefit of hindsight, the application made in relation to Reg's Skips occupation of Heatherbrae Farm was more significant than was anticipated at the time. Indeed, in 2006 the Department received an application for the change of use of [another] site..., for the sorting of skips. That application was refused for a variety of reasons (based on the policies set out in the Island Plan 2002). It is fair to say that the problems encountered by the Planning Department in relation to Heatherbrae Farm were material in reaching that decision. Currently, although each application will be considered on its individual merits, when considering applications of this nature, the Planning Department is more sensitive to the types of problems associated with this type of use / business.*
>
> *'I must say that I have some sympathy for the predicament of Mr. and Mrs. Yates in relation to the use of Heatherbrae Farm by Reg's Skips. The experience they have had is exactly what the relevant*

planning policies are there to prevent and it is disappointing that this has occurred.'

13.47 It can quite readily be seen from these words why Advocate Clarke was so ill at ease with them. In our opinion, too, they are insufficiently balanced. We appreciate that they were produced in a rush, under pressure, and at the request of the plaintiffs not the defendants. Advocate O'Connell was unlikely to have sought a statement from the Department if he had gained any impression from his discussion with officers that it might not have been of some assistance to his cause. But it is troubling to us that there was no recognition at all of the situation in which RSL now found itself, whose predicament was the direct result of actions or failings by the Department, while the last sentence quoted above is a rather less than full account of what happened with the original 2005 planning permission, which (whatever the Department may later have said it intended) allowed skip storage and sorting without restrictive conditions. We can see why the Court struck them out but for the purposes of our inquiry they do, we believe, give a clear indication of the Department's predominant attitude to the case. It links with the notion, noted earlier, that the Department's view was that RSL was a '*nuisance*.' We therefore think that it was an unwise decision to provide an 'official' statement to one side in the proceedings, notwithstanding the fact that only one side had made such a request.

13.48 The remainder of Mr Le Gresley's statement was submitted and the Royal Court took it as read. Had the Court been given the opportunity to be made aware of the full planning history, one suspects that rather more of Mr Le Gresley's statement may have been considered for deletion. As it was, the Court was not. We certainly do not believe for a moment that there was any intent on the part of Mr Le Gresley to give the Court less than the full facts as he understood them; the problem was, rather, that the Department had failed all along to have the full planning history in mind as it faced and reported continuing events. The statement referred, for example, to '*unauthorised*' activities at La Prairie, St Peter, without the qualification that it was simply the Department's untested view that the activity was unauthorized (no 'enforcement' correspondence in respect of La Prairie had ever mentioned skip sorting as being unauthorised). It said that RSL had applied for pre-application advice in 2005 regarding a move to Heatherbrae Farm; in fact the company had done no such thing and the request to the PSC for advice had come from the Department itself, because it was keen to get RSL moved from La Prairie and because it had undertaken to RSL to help it find a new, better, site. It said that the PSC had invited RSL to submit a formal application, when communications regarding planning had been with Mr Taylor only. It said that Mr Taylor had submitted the application in May 2005, when in fact he had done so on 10th March 2005, one day after the PSC's cautious views had been interpreted by officers to amount to agreement in principle for skip sorting operations at the site. No mention was made of the fact that the conditions attached to the 2005 permit for RSL had been issued without having been checked as required, or that one key element of them was so loose that, on the confirmatory advice of the Solicitor General herself, it was unreasonable and unenforceable in the manner attempted by the Department in its response to the

complaints from Mr Yates. The circumstances by which the 2006 'reconsideration application' came about at the Department's own behest were not stated correctly. The circumstances leading to the withdrawal of the Enforcement Notice were not revealed. In short, the witness statement was a very unsatisfactory document indeed and is testimony to the Department's own collective failure to understand the case with which it was dealing.

13.49 It is important to emphasise here how difficult receipt of this statement was for Advocate Clarke. We had initially been somewhat surprised that Le Gallais & Luce had not thought to challenge rather more of the language in Mr Le Gresley's statement in the knowledge that such challenge might have proved relevant in the subsequent costs hearing. We realised, however, that Advocate Clarke first had sight of the statement less than 24 hours before the case got underway and was consequently under considerable and urgent pressure to appreciate any weaknesses in the account of his client's history. An attempt was made to get the statement struck out entirely but this was clearly not easy to achieve. So he focussed on the elements of the statement that he thought were most damaging to his clients. We also remembered that much of the relevant planning history – including the facilitation and processing of the 2005 planning application – was Mr Taylor's, not that of Advocate Clarke's client. It would hardly have been realistic to expect Mr and Mrs Pinel, given the timing, to challenge Mr Le Gresley's account. We emphasise this point because it meant that the unsatisfactory account in the statement became part of the Court's record of evidence and was thus impracticable to contest later on, most notably when the issue of a Ministerial contribution to RSL's costs arose after the case.

13.50 Given that the attention of the Department and of other relevant parties was firmly on the Royal Court case during this period, it is not surprising that there relatively few further developments on Mr Taylor's request for reconsideration of the refusal of his roofing-over application.

13.51 On 9th November 2007 Southdowns Consultants produced its report for Mr Taylor. The report suggested that the proposed roofing-over would deliver a significant reduction in noise levels. It did not, however, provide proof '*beyond all reasonable doubt*' that the scheme would eliminate the alleged noise nuisance. It would have been impossible for it to do so. On the basis of the imprecise requests made of him by the Department, Mr Taylor concluded that the delivery of a reduction in the region of 10dBA ought reasonably to be enough, and the report enabled that to be claimed.

13.52 During this period there was an exchange of correspondence between Mr Taylor and Mrs Ashworth concerning traffic movements that could be expected in the event that the request for reconsideration was approved. Mr Taylor estimated that there would be between 3 and 12 movements per day and he took the opportunity to criticise the Department for what he believed was an inappropriate reliance in its report for the September 2006 site visit on assertions by Mr Yates concerning traffic movements. When Mr Taylor requested, and received, a copy of Mr Yates' written account of his legal objections to the request for reconsideration that he had prepared soon after the August 2007 hearing, he was also advised that the reconsideration would

finally be determined by the Assistant Minister on 18th January 2008. Mr Taylor was reminded that he had not yet provided data on the degree of noise reduction likely to be attained by the roofing-over of the yard. In this regard, we note that Mr. Taylor had been in possession of the Southdowns report for several weeks, albeit that the ongoing court case may have influenced the speed with which he forwarded his report to the Department.

13.53 On 14th December 2007 Mr. Taylor eventually supplied his report from Southdowns Consultants to the Department. He wrote a covering letter, saying –

> *'You will see from the data that the proposed building will reduce the noise level by more than what the Minister asked for. The Minister gave me an undertaking that he would support my application on this basis so I look forward to hearing from him in due course.'*

13.54 Given what had transpired at the site visit a year previously this was far from an unreasonable position for Mr Taylor to adopt. The Minister had not asked for a precise reduction in noise but had wanted to see clear evidence of good intent in tackling the problem. Mr Taylor felt that, along with RSL, and at some considerable expense, he had now kept his side of the bargain. The problem now, however, was that the terms of the debate changed, the Royal Court having found in favour of Mr and Mrs Yates in their action against RSL.

14 THE *VOISINAGE* CASE

14.1 The Bailiff's judgment in the case of Yates v Reg's Skips Limited ([2007] JRC237) was given on 11th December 2007. He was sitting with Jurats Tibbo and Morgan. The Royal Court found that the activities of RSL at Heatherbrae Farm constituted a breach of the duty of *voisinage* owed to Mr and Mrs Yates. An injunction was granted, to come into effect from 1st May 2008, requiring RSL to vacate Heatherbrae Farm. A deciding factor, it can be seen from the judgment, was that the Court preferred the evidence on noise supplied by Mr and Mrs Yates' consultant, 24 Acoustics, as being more 'fluent and persuasive' than that presented by Southdowns Consultants acting for RSL. While, of course, it is not for us to reopen the Court's decision, some matters of import do arise from it relating to our terms of reference that bear some consideration. These are over and above the concerns about Mr Le Gresley's witness statement on behalf of the Department that we have already noted.

14.2 Paragraph 17 of the Bailiff's judgment said, in referring to Mr Le Gresley's evidence, that the actual effect of RSL's activities on Mr and Mrs Yates had not been anticipated. (Mr Le Gresley himself had added 'simply' before the negative for added emphasis.) '*Had those effects been anticipated'* Mr Le Gresley's statement and the Bailiff's paraphrasing of it both continued, '*either the application would have been refused, or a permission would have been issued with a more precise condition regulating the activities of the company*'. In the circumstances it was not for the Royal Court to consider whether the effects should have been anticipated. Of course they should have been, in relation to all neighbouring properties and not just the Yates' (which was less near RSL's site than others) and we venture to think that they would have been, if the Department had been more thoughtful and diligent in 2005. They may also have been had Mr and Mrs Yates, or any other neighbouring residents chosen to object to Mr Taylor's application at the time. Thus the judgment given against RSL, and indeed what Mr Le Gresley had said in his statement, went right to the heart of the matter of the way the 2005 permit was issued, with a key condition that was too loosely worded and thus unenforceable, and the way the Department failed, or chose not, to appreciate that fact in its 'enforcement' actions during 2006–7.

14.3 Also significant, however, is what the Bailiff had to say at paragraphs 32 and 35 of his judgment –

> '*32. It follows that, in our judgement, the activities of the defendant company at Heatherbrae Farm constitute a breach of the duty of voisinage which is owed to the plaintiffs. We reached this conclusion not without considerable sympathy for Mr and Mrs Pinel. They were permitted, if not encouraged, by the Planning Department, to establish their business at Heatherbrae Farm which they did in good faith. The difficulty is that any skip operating business is inherently noisy.*
>
> '*35. By way of postscript, we direct that any application for the costs of these proceedings should be pursued only after a*

directions hearing before the Bailiff at which consideration can be given to the question whether any other party or parties should be convened.'

14.4 The sagacious Bailiff had spotted that Mr and Mrs Pinel had not turned up at Heatherbrae Farm by accident. Their company had a valid planning permission to sort and store skips there, and they would not have had that without overt action on the part of the Department after it had decided it wanted RSL to vacate the La Prairie site. Our reading is that he sensed clearly – and of course correctly, as we believe we have now established – that RSL had been encouraged to move to Heatherbrae Farm. He did not, however, have the evidence before him to demonstrate the point; Mr Le Gresley's witness statement certainly did not own it. But the existence of the 2005 planning permission was a factor to be weighed, whether or not there had been 'encouragement.' The Bailiff, therefore, seems (at paragraph 35) to have had in his mind the question whether this consideration should be reflected in a degree of liability on the part of the Minister for the costs incurred by RSL as the loser of the lawsuit.

14.5 The directions hearing took place on 20th December and the Bailiff ordered that the Minister be convened to attend before the Court when the application for costs was heard. This was an unusual step, not without legal precedent but rare; and we have got to know that, unsurprisingly, it caused a not insignificant degree of concern within the portals of both the Planning and the Law Officers' Departments (although the Minister himself apparently remained unaware of it). We revert to this at section 16 below.

15 RECONSIDERATION OF THE 2007 APPLICATION

15.1 Mr Yates might perhaps have thought that the Court's decision was the end of the matter. But he learnt in the margins of the courtroom that Mr Taylor's request for reconsideration of his roofing-over application was (quite properly) still live. He therefore wrote to Mr Le Gresley on 24th December 2007 setting out at length many reasons why the application should not be approved and seeking –

> *'...full details as to how the Planning Department propose to deal with this reconsideration application, including the procedure and the proposed timetable.'*

15.2 Mrs Ashworth responded promptly on 27th December enclosing Mr. Taylor's report from Southdowns Consultants and saying that Assistant Minister Pryke would convene a meeting in due course to decide upon the matter, once Health Protection had also reviewed and commented on the Southdowns report. She did not say any more about procedure. (At the time the Department did not have a documented procedure for managing requests for reconsideration.)

15.3 Meanwhile, this was not an easy moment for Mr and Mrs Pinel. The implications of the Court's decision for their livelihood were readily apparent. The season, Mrs Pinel told us, was not at all festive for them. It was their belief that Mr and Mrs Yates would not rest until RSL had left Heatherbrae Farm; accordingly any action they now sought to take to try to remain at Heatherbrae Farm would be sure to be opposed to the uttermost. They had, as they explained to us, three main things in mind. First, they remained convinced that Heatherbrae Farm was the best option for their business, and they had a valid planning permission for the storage and sorting of skips there. Secondly, their underlying belief was that, short of closing their business, they had done everything they could to comply with the wishes of the Department, notwithstanding that they felt strongly that the Department had not been impartial towards them in its handling of the case. They therefore felt keenly that they had right on their side. Thirdly, they knew that Mr Taylor had engaged Southdowns Consultants to provide further analysis in support of his request for reconsideration of his roofing-over application and that that had not yet been determined, thus leaving a window for optimism, so to speak. For all these reasons they asked Le Gallais & Luce to consider grounds for appealing against the Royal Court's judgment.

15.4 Advocate Clarke's view was that an appeal was likely to be very difficult indeed. This was because not only did it appear that Mr and Mrs Yates had no interest in compromise but also the notion of challenging the other side's expert evidence on noise would obviously be problematic unless, perhaps, a clear change of circumstances could be demonstrated.

15.5 Mr and Mr Pinel sought 'political' help. Approaches by them to several States members yielded a particularly positive response from Senator B.E. Shenton, who was then the Minister for Health and Social Services, in which capacity he had political responsibility for Health Protection. He visited them at

Heatherbrae Farm on 5th January 2008. As he put it to us, Senator Shenton was told by Mr and Mrs Pinel that they wished to stay at Heatherbrae Farm, for two reasons. First, the site was eminently suitable for their operations in terms of its location, the sorting space it offered and its physical characteristics, notably its concrete surface; the latter, in particular, would make RSL's application for a licence under the Waste Management (Jersey) Law 2005 more likely to succeed.[12] Secondly, it seemed clear enough that there was nowhere else for their business to go.

15.6 Senator Shenton told us how he learned of the significance of the 2007 roofing-over application in relation to a possible appeal, saying –

> *'... they still wanted to operate out of Heatherbrae obviously. So there was a requirement to make sure that the landowner would be able to make the premises soundproofed to an extent that they could continue to operate and this would be the roofing-over of the area, I think it is the slurry area, at Heatherbrae. Because this was important, I then telephoned the Minister for Planning and Environment.'*

15.7 The Senator took steps to corroborate what he had been told. Having satisfied himself that RSL was deserving of help, Senator Shenton decided, as he put it, to be proactive. One factor in this, he put to us, was that he had reservations about the adequacy of appeal processes in Jersey in general, including the 'request for reconsideration' process. He told us –

> *'It seems to me in a lot of cases, and this is a general observation, that a lot of the appeal processes within the States of Jersey are just cul-de-sacs where people are just sent off to make their representations if they have been hard done by and very rarely do they ever get what I would call true justice.'*

15.8 Thus on 9th January 2008, four days after his visit to Heatherbrae Farm, he rang up the Minister on the telephone. He made this call from his place of work in St Helier and invited Senator Cohen to ring him back on his office number since, he explained in leaving a message, he could not remember the number of his mobile telephone. The Minister called Senator Shenton back moments later. Because this was a telephone call to Senator Shenton's workplace, a financial services business, the conversation was automatically recorded through the system in place there for the recording of clients' calls. Sometimes in such situations the caller hears a message saying that a call may be recorded for training and monitoring purposes. We understand, though, that the Minister did not hear such a message.

15.9 When we first received evidence about this telephone conversation from Senator Shenton its genesis was not immediately explained to us and, while

[12] We are advised that, as of the beginning of September 2010, the Environment Department had yet to licence any of the public or private sector waste management operations in the Island and that 13 applications for such a licence awaited determination

what we received from him had the appearance of being a transcript, it was presented to us as '*notes*' of a conversation, albeit an '*accurate representation*' thereof. We took thorough steps to ascertain the veracity of the evidence, whereupon it became clear that there was an extant recording of the whole conversation, of which Senator Shenton's 'notes' were in fact extracts. We subsequently took steps, with Senator Shenton's full cooperation, to obtain a full transcript. It is or may be for others, not us, to pass any desiderated judgement about Senator Shenton's actions, either in taking steps to ensure that his conversation with the Minister was recorded or in not taking steps to warn or remind the latter that calls to the telephone number in question were automatically recorded. Our duty has been to consider the evidence we have received; and we received this. Because, however, of the notoriety that this episode has already gained in the public domain, we have reproduced the whole transcript at Annex 3 for avoidance of doubt about its contents.

15.10 After opening banter the conversation turned to RSL. The subject was initiated by the Minister and we therefore suppose that the fact that this was the purpose of the call was mentioned by Senator Shenton when he left a message for the Minister to call him back. Senator Shenton said that Mr and Mrs Pinel had to decide very soon whether or not to appeal against the judgment of the Royal Court. They would appeal, he said, only if it seemed likely that the roofing-over of their operations area would be possible. As Senator Shenton told us, his assessment was that they desperately wanted to stay at Heatherbrae Farm and they had realised that the only possible hope of that in their eyes was approval of the roofing-over application in order to mitigate any problem of noise (and thus achieve changed circumstances for the purposes of the appeal).

15.11 The Minister said in response '*well I have already given them an undertaking that they can do that.*' To Senator Shenton's riposte '*so they can, so it is likely that that will be successful?*', the Minister replied '*absolutely, absolutely*.' A few moments later, Senator Shenton having posed the same question again, the Minister repeated his assurance – '*yes, absolutely*.' Referring to Mr Taylor's original 2005 planning permission for RSL, the Minister also said '*... I do know that the planning consent in the first place was fundamentally flawed..... apparently it was an absolute cock-up*.' (We attach some importance to this particular remark because the judgement it exhibits could have been derived by the Minister only from briefing by officers.)

15.12 These were not very wise things for the Minister to say. First, and most importantly, he had actually stepped back publicly from determining the application some four months previously on grounds of perceived conflict of interest; the decision now rested with Deputy Pryke, and Mr Taylor as the applicant had been told that (as had Mr Yates). The Minister should have made this clear and said no more, or perhaps no more than that he would pass on the comments to his Assistant Minister for her information. Secondly, the assurance he gave to Senator Shenton that the application would be approved was a serious fettering of discretion, in very considerable contravention of due process, although we do absolutely recognise that it stemmed from his constructive approach at the site visit in September 2006 when he had said firmly that he wanted a reasonable solution to the problem (in contrast with the

untoward recommendation he received from officers that all sorting of skips should cease, contrary to the extant planning permission). Thirdly, it was emphasised that the context of the conversation was the impending decision by Mr and Mrs Pinel about whether or not to appeal, a crucial decision for them, and the significance of the roofing-over application in that context. This alone should have obliged the Minister to pause for thought, knowing that what he said would be reported back, but in the immediacy of the moment and no doubt desiring to be frank with, and helpful to, a colleague, he did not. Fourthly, but this is not a criticism, the fact that the application in question was Mr Taylor's rather than RSL's itself had, it seems, gotten somewhat lost in the discussion.

15.13 Senator Cohen said several things to us about this episode. First, he observed that he could not recollect the conversation. At more than two years distance no-one would be surprised or concerned by that, and certainly not us. But the problem for a Minister is that others may well hang on every word he or she utters, especially where decisions of importance are in the offing. Secondly, he expressed his dismay that a colleague on the Council of Ministers could stoop, as he put it, to the recording of a private, informal telephone conversation with a fellow Minister. We note these sentiments carefully although we also note that Senator Shenton made it clear that he was helping Mr and Mrs Pinel, and so it should have been inferred that anything said in an albeit 'private' conversation would be reported back. Thirdly, and having seen the transcript, he reminded us that in the conversation he had also said that an appeal would be difficult and was not to be lightly considered, and that Mr and Mrs Pinel needed to be sure that they had had good advice. This is a very fair point indeed but in our view it does not override the unwisdom of his having given the 'assurance' about approval of the application that he did.

15.14 Senator Shenton reported back to Mr and Mrs Pinel immediately. Mrs Pinel then spoke to Advocate Clarke. (It was not known by any of these three actors that the Minister had passed the decision on the application to Deputy Pryke; had the Minister noted that in the telephone conversation things might have developed differently.) Advocate Clarke responded cautiously. Such a decision of the Minister, he told us he said to Mr and Mrs Pinel, might well, if confirmed, form a reasonable basis for an appeal; approval of the application might give the Court of Appeal an opportunity to reach a different conclusion since RSL would be able to demonstrate that the injunction would not be necessary in order to achieve a satisfactory resolution of the dispute.

15.15 It needs to be remembered here that Mr Taylor believed that the latest analysis by Southdowns indicated a significant impact on noise levels if the planned roofing over was implemented and he remained confident of the Minister's support. His position, indeed, was that the Minister had given him an undertaking to approve the application provided good action to mitigate the noise was put in place. He iterated this in writing to the Department (paragraph 13.52 above) and nothing was written in reply to him that might have served to disabuse him of his stated belief or to weaken it. Mr and Mrs Pinel were cognisant of all this and their, and Mr Taylor's, confidence could only have been reinforced by the signal they had now received about the

Minister's remarks on the telephone. Advocate Clarke therefore submitted notice of appeal that same day, 9th January 2008, which was just a day ahead of the deadline in the rules of the Court of Appeal. The sole ground of the appeal was stated as being the impending approval of the roofing-over application, which would change the position as it was before the lower Court by enabling the noise problem to be tackled in a new way. Advocate Clarke said in the notice of appeal that the approval was expected a week or so thence; this reflected what Mr Taylor had been told by the Department, viz. that the decision was due to be taken on 18th January.

15.16 Advocate Clarke, however, continued to impress caution on his clients. Having given notice of appeal, he wrote again to Mr and Mrs Pinel, saying that it was '*even more important*' to get the Minister's assurance confirmed in writing. This would be necessary in order to argue successfully for staying the Royal Court's injunction's entry into force on 1st May, pending the hearing of the appeal. Mr and Mrs Pinel thus received clear advice from Advocate Clarke that an oral assurance alone from the Minister would not provide a sufficiently robust platform from which to argue their case in the Court of Appeal. Nothing less than the planning permission signed and sealed would suffice. At some point in these exchanges Advocate Clarke, as was his duty (and normal practice), advised Mr and Mrs Pinel that they would of course be entitled to seek a second opinion if they were not content with his approach.

15.17 Meanwhile, officers in the Department knew nothing of all this. There is no evidence that the Minister reported his conversation with Senator Shenton to anybody there. On the contrary, hand-written notes on subsequent correspondence between Mr Taylor and the Department imply that the Department knew nothing at all of the conversation. So the 'assurance' that the Minister had given and his description of the Department's handling of the original 2005 permit for RSL as flawed (and worse) were not in any way prayed in aid in the Department's preparation of advice for the Assistant Minister on the request for reconsideration. The decision on this, as already indicated to Mr Taylor, had been expected on 18th January 2008 but shortly before that it was again deferred. The main reason for this seems to have been pressure of work and the fact that Health Protection's comments, including its analysis of Mr Taylor's Southdowns' report, was sent to the Department only on 23rd January.

15.18 Mr and Mrs Pinel continued to discuss their predicament with friends and acquaintances, several of whom, we understand, encouraged them to obtain a second opinion. The law firm whose name emerged as best for this purpose was Messrs Sinels. Accordingly, early in February 2008 Mr and Mrs Pinel went to see Advocate P. Sinel and his then partner in the firm, the late Advocate C.G.P. Lakeman. The latter requested papers from Le Gallais & Luce and time was spent on a detailed review of the case. The advice then given to Mr and Mrs Pinel was that RSL's grounds for appeal were, in fact, perhaps somewhat wider than Advocate Clarke had believed and not, or not necessarily or only, posited upon approval of Mr Taylor's roofing-over application.

15.19 The following grounds of appeal were identified by Sinels –

(a) that the wrong defendant had been held liable under the common law of *voisinage*, that is, the tenant rather than the landowner;

(b) further, or alternatively, that there had been an erroneous application of the law when looking at the needs of the average person in the particular neighbourhood;

(c) further and alternatively, that there had been an erroneous application of the law when looking at whether RSL had been acting lawfully; and

(d) that there had been errors in the consideration of expert evidence.

15.20 Mr and Mrs Pinel were impressed by this analysis. It was manifestly not unreasonable and it seemed very positive. They judged that the chances of succeeding on appeal would indeed be greater if they changed lawyers. Advocate Clarke accepted the decision with good grace. By 20th February 2008 he had ceased acting for RSL and the case files were passed to Sinels.

15.21 Meanwhile, Mrs Ashworth was preparing her report for the Assistant Minister's reconsideration of the 2007 roofing-over application. Mr. Yates submitted his objections on 7th January 2008, supported by 24 Acoustics' review of Mr Taylor's Southdowns report, which had been forwarded to Mr Yates by Mrs Ashworth just after Christmas. 24 Acoustics' conclusions broadly mirrored its previous advice in support of Mr Yates' position.

15.22 We suspect that the Department was foxed by the battle of ideas displayed in the two expert reports on noise now in play. Aspects of them are not easy for any layman to follow, and perhaps not any expert. 24 Acoustics obviously had a brief to seek to counter whatever arguments were put forward by Southdowns Consultants but probably its most telling point – which unfortunately was not addressed by the Department even in passing – was that the States evidently had no published policy on noise. 24 Acoustics therefore argued that the approach on background noise levels followed by many UK local authorities was a reasonable model to follow, and this gave a different result to that which derived from Southdown's methodology. Mr Taylor was provided with a copy of Mr Yates' letter of objection and the supporting report by 24 Acoustics. He wrote back to Mrs Ashworth on 12th February observing that 24 Acoustics had at no time consulted him about the proposed structure and that its report was based on various assumptions that meant it was misleading. There is no evidence that the Department took any notice. It was more interested in the stance of Health Protection as the 'official' arbiter on noise in the absence of any published policies.

15.23 Mr Binet responded for Health Protection on 23rd January 2008. This time his advice was somewhat less equivocal than hitherto, but still fairly generalised. He stated –

> *'The proposed works will reduce noise levels but not enough to abate the nuisance caused by the skip business.*
>
> *'Clearly, if the building was to be occupied by a much quieter operation, it would be a different matter.'*

This advice was given with the benefit of both expert reports having been received by Health Protection. But no analysis of their competing claims was proffered by the latter, nor asked of it by the Department. Mr Binet's latest comments now lay on the table alongside the advice, still current, that he had given on 2nd February 2007 when the roofing-over application had first been sent to Health Protection for comment –

> *'Although the proposal would lessen the impact of the business on the neighbours I doubt if it would eliminate the likelihood of complaint.*
>
> *'The Department would not oppose the application as it will improve the existing unsatisfactory position.'*

15.24 Mrs Ashworth had completed her report on the case for the Assistant Minister by 18th February 2008. Her draft was endorsed by Mr Le Gresley unchanged, Once again Mrs Ashworth focussed on the application of Island Plan Policy C6 (Countryside Zone) and the same extremely high test regarding noise was cited as applied previously by the Department, viz. that Mr Taylor should be required to demonstrate '*beyond reasonable doubt*' that his scheme, if approved, would '*eliminate*' the noise nuisance. This choice of words deserves remark. One might have expected, in an attempt at balance between the parties, words less final, such as 'mitigate' or 'significantly reduce', words that would have given the Assistant Minister some room for manoeuvre in her decision-making. It is frankly impossible to see how in the particular circumstances of the digladiation between the parties there could ever be 'elimination' of the perceived 'nuisance', let alone elimination of the 'likelihood' of complaint, which was the context in which Mr Binet used the word. And 'proof' *'beyond reasonable doubt'* was an entirely unreasonable test because 'proof' could by definition not be had unless and until the building had been built.

15.25 A constructive alternative approach would have been for the Department to have retained a third expert party to give a final opinion by which the parties would agree to be bound. Health Protection itself, however, had made clear that, although it did have some members of staff with the necessary qualifications in the field of noise measurement, this was not a role that it would seek or for which it was fully equipped, not least because it did not possess the appropriate computer software that would have enabled precise modelling of noise attenuation from any structure and in any location. Retaining a third expert party would, we think, have been good practice by the Department having regard to the particular circumstances of this case but we suppose that it could have been contemplated only if the Department had recognised that its starting point was the need to sort out a problem of its own making (and it could, of course, have been contemplated rather sooner). Yet at this point, Mr Yates having already secured his injunction, it was even less likely to happen unless Mr Yates felt strongly that he might lose on appeal. We do not think that he thought that.

15.26 The conclusion in the Department's report was clear: Mr Taylor's proposal would not meet the high, but undefined, test that had been set. As noted above, there was no analysis in the report of the pros and cons of different

approaches to noise testing and indeed noise 'nuisance', and no attempt to weigh the two expert reports against each other. The conclusion stated in the report was that –

> *'... it [is] not considered by this Department that it was proven that the roofing over of the yard would eliminate the noise to the extent that a noise nuisance would no longer exist. It follows that any exceptional reason to grant consent for this commercial development in the countryside falls away.'*

This was based only upon a less than satisfactory reading of Mr Binet's responses on behalf of Health Protection. The Department had not actually 'considered' anything for itself on noise, and had no written noise policy on which to fall back.

15.27 We consider that there were some further problems with the report. First, on the noise question, it said that Mr Yates had submitted as part of his objections a report by 24 Acoustics that had formed part of his, Mr Yates', civil case against RSL, and that it was *'relevant at this point to note that in its determination of the civil case the Royal Court did not accept the Southdowns findings, preferring the reliability of the 24 Acoustics evidence.'* This was quite inaccurate, a point which we consider needs to be emphasised. The roofing-over application, or the idea thereof, had not been raised at all during the *voisinage* case against RSL, and the report sent in by Mr Yates (on 7th January 2008) was 24 Acoustics' review of Mr Taylor's Southdowns report concerning the roofing-over. Bringing the Royal Court's judgment into the frame in this manner was tendentious in the context of preparing the ground for a well-founded Ministerial decision. It is at the very least a telling example of analytical sloppiness that should have been readily picked up when the report was reviewed in draft.

15.28 Secondly, on the background to the case, the report repeated unquestioningly, and perhaps not without a degree of disingenuity in the language used, the argument that had been discredited or negated by the withdrawal of the enforcement notice a year previously, saying –

> *'....Finally Mr Taylor contends that he was originally landed with the problem by the Planning Department who approached him asking if he could accommodate Reg's Skips. The records show that the use was agreed on the basis of information supplied at the time which led the Department to consider that the use would be acceptable in this location because of its reasonably low-key operations. (Reg's Skips had to relocate as they were occupying a site in St Peter without consent.) Reg's Skips state that the level of use is the same but has not, despite being asked to do so a year ago, supplied the Department with the figures that they say they have to prove the statement. The Department is strongly of the view that the use has intensified over time...'*

15.29 We were somewhat disturbed to see this point still in the frame despite the whole enforcement notice saga (which had no mention at all). As for the line

of reasoning itself, we will merely contrast it with the Minister's view of events as he had graphically put it to Senator Shenton five or six weeks before (paragraph 15.11 above). We have also already noted in that context that it would have been unlikely for the Minister to have had such a firm and knowledgeable opinion about what had really happened in 2005 without its having been inculcated by him from his officers.

15.30 Thirdly, the report contained no meaningful description of the Minister's specific intervention during the September 2006 site visit that had not only led to the application's being submitted in the first place but also to costly action to mitigate noise undertaken in good faith by Mr Taylor, most notably the resurfacing of the driveway to Heatherbrae Farm. The report as drafted did indeed note that Mr Taylor had written, saying –

> *'... that from the data [provided by Southdowns] it could be seen that the proposed building will reduce the noise level by more than what the Minister asked for and that the Minister gave an undertaking that he would support the application on this basis'*

but made no attempt to analyse this, saying only that –

> *'the Minute of the Ministerial meeting makes no reference to any noise levels merely that more information was required.'.*

The reference to that Minute merely clouded the issue insofar as the Minister's qualified undertaking was in fact given at the site visit in September 2006, a year before the Ministerial meeting of 3rd August 2007.

15.31 Given the force and sensitivity of Mr Taylor's assertion regarding the Minister's stance (which was written just a few days after the Minister's assurance to Senator Shenton that the application would be approved) the Department should certainly have ensured that all aspects of things relating to it were thoroughly analysed and weighed. But the point was just left hanging, so to speak, the reference to the Ministerial meeting but not to the site visit being something of an irrelevance.

15.32 So, in our opinion, this report was most unsatisfactory and would not have offered the Assistant Minister a sufficient basis for good decision-making. We say this, however, in the conditional since the report that was eventually placed before her was a little different. Mrs Ashworth's, having been signed off by Mr Le Gresley and published, was then withdrawn (paragraph 15.34 below).

15.33 The report of 18th February 2008 was posted on the Department's website and listed for decision by Assistant Minister Pryke on 26th March 2008. On the day, however, the item was withdrawn from the agenda because of representations from both 'sides'. Advocate O'Connell had written to the Department the day before saying that his clients were 'extremely concerned' that the report said that Mr Taylor had stated that Mr Yates had *"falsified the number of vehicle movements" and that the video supplied by Mr Yates illustrates this'*. Mr Taylor had indeed made this assertion in a letter of 12th February to Mrs Ashworth, based on his own viewing of the video film in question. In evidence to us he said he stood by this. The report was not wrong

in what it said about Mr Taylor's expressed view but, as with the substantive noise issue, it was uncritical and offered no opinion about the Department's own view of the evidence.

15.34 Secondly, just before the meeting on the 26th was due to begin, Mr Taylor told Assistant Minister Pryke that he was not at all happy with the report and that he wished to have more time to challenge points made therein. It is not clear that at this point the Assistant Minister was aware of Advocate O'Connell's letter too but in any event she sensibly withdrew the item. It was rescheduled for 9th April.

15.35 Following this, Mrs Ashworth's report was edited heavily by Mr Le Gresley (although he had already signed it off). He told Mr Thorne in an e-mail –

> *'I have been in and amended the officer RFR report to take out much of the irrelevant "noise" and to focus on the planning issues.'*

15.36 Mr Le Gresley's changes did indeed narrow the focus of the report. He deleted substantial parts of it rather than attempting to redraft them. The problem with doing this, however, was that Heatherbrae Farm had long since ceased to be a conventional case for the Department; it had been the Department's own actions and procedure, not to mention the Minister's interventions, that had brought into play many of the crucial factors we have aimed to describe but which were now excluded altogether from the revised report.

15.37 His deletions included the text cited at paragraphs 15.28 and 15.30 above. This left rather a gap in the tale. The Minister had made a not insignificant commitment at the site visit in September 2006 but the Department had neglected to record it. The Department also failed to clarify the Minister's position on what the Minister might reasonably have meant by '*compliance with statutory limits*' or, perhaps more appropriately, to confirm that in fact there were no statutory limits to be applied. It was certainly correct that the note of the August 2007 Ministerial meeting had made no reference to any noise levels but Mr Taylor had been referring to the unrecorded, but well-evidenced, site visit of September 2006 – all of which was utterly backed up, in his eyes, by the Minister's assurance given to Senator Shenton; accordingly that reference should have been corrected, not removed altogether. Mr Taylor did not receive a substantive written response to his various letters drawing attention to the Minister's position at the site visit and this left him further entitled to believe that the Minister would support the application. What the latter had said to Senator Shenton on the telephone simply served to confirm him in this view.

15.38 The revised report was issued on 31st March 2008 ahead of the rescheduled ministerial meeting on 9th April. On the all-important noise issue, Mr Le Gresley's one substantive addition, the subordinate clause of the second sentence below, said –

> *'On the basis of [the Health Protection] consultation response it was not considered by this Department that it was proven that the roofing over of the yard would eliminate the noise to the extent that*

a noise nuisance would no longer exist. It follows that any exceptional reason to grant consent for this development falls away and that the presumption against commercial development in the Countryside Zone enshrined in policy C6 should apply.'

This gave the Assistant Minister virtually no room for manoeuvre in her decision, but, in our judgement, the revised report offered a very imperfect assessment of the complexities of the matter.

15.39 9th April proved to be an inconvenient date for Mr Taylor, who was due to be out of the Island. The request for reconsideration was finally scheduled for 24th April, preceded by a site visit by the Assistant Minister the day before.

15.40 Both Senator T.A. Le Sueur, then Minister for Treasury and Resources, and the then Deputy of St John wrote to Assistant Minister Pryke in support of approval of Mr Taylor's request for reconsideration. Senator Le Sueur's note was particularly measured, and cognitional of the wider policy context –

'There is always a balance to be struck between the needs of the applicant and those of the owners of surrounding properties, and in this context I understand it is now intended that the area in question would be roofed over. On that basis, I think the balance of support swings away from the one (?) household which appears to consider itself adversely affected, more in favour of a local applicant who is struggling to make a living providing a very necessary service to the Island community, and one which using the 'Environment' side of your role I think you will appreciate helps in the orderly disposal and recycling of waste products. Indeed, given the general level of housing density around the Island, I can think of few better places to undertake these activities without infiltrating undesirably onto "green zone" sites (as had happened in the past at Egypt). I know the difficulties which Mr and Mrs Pinel have faced over the years finding a suitable location, and whilst probably nowhere in Jersey is "ideal", this site appears better than most.'

15.41 But, as already noted, the Assistant Minister was now boxed in by the advice she had been given about the applicability of Policy C6 of the Island Plan. This was notwithstanding that RSL had a valid permission to sort and store skips at the same location, the decision on which in 2005 had been based on an exception to Policy C6 (which was not said in the report before Deputy Pryke). There is no evidence that the Assistant Minister was advised to give any consideration at all to matters of the kind raised by Senator Le Sueur. It would have been very desirable indeed had these broader things, including the fact of RSL's existing permission to sort and store skips at Heatherbrae Farm, been overtly set out in the report to help ensure that the decision taken was properly made taking into account all relevant factors, and seen so to be made.

15.42 The Assistant Minister's decision on 24th April 2008 was to uphold the refusal. The grounds that were recorded by the States Greffe were similar to those deployed when the application was first refused in 2007 under delegated authority –

'The Assistant Minister noted that the application was contrary to the general presumption against development within the countryside as set out in Policy C6. It was recognised that the Reg's Skips operation remained a nuisance and whilst the proposed development might serve to improve the situation, it was not guaranteed to resolve that problem. It was considered that insufficient evidence had been submitted to justify the Minister granting an exception to that policy. Accordingly, the Assistant Minister, having determined that Heatherbrae Farm was not considered to be appropriate for the operations undertaken by Reg's Skips, accepted the recommendation of the department and maintained refusal of the application.'

15.43 This comes across as quite carefully crafted language. It was a properly taken decision but one that was done on the basis of a very unsatisfactory report that did not begin to adduce all relevant factors concerning and surrounding RSL's case. The word '*guaranteed*' apart, which we have already said was much too high a test in the context in which it was used, one aspect in particular of the wording above is rather troubling: the Assistant Minister's 'determination' that Heatherbrae Farm was "*not considered to be appropriate for the operations undertaken by RSL*". This was not language iterated from the report itself but does seem clearly to reflect what Mr Yates wrote in his letter of objection on 7th January 2008 and the stance of opposition he is recorded as having taken at the meeting. It took, for example, no account of anything that Mr Taylor had said at the meeting about the Department itself having caused the problem by encouraging RSL's move to Heatherbrae Farm. We simply cannot see how the decision can be squared with the fact that, for better or worse, the Department had already permitted RSL to operate on the site (a permission that, of course, remains in force) and we have to question whether the Assistant Minister was advised sufficiently on this and how far the full background to the matter was known to her. The unsatisfactory report that she had before her was not sufficient for the purpose. Deputy J.G. Reed of St Ouen, who spoke at the meeting in support of RSL, made the point strongly about the fact of the existing planning permission for RSL and the mitigations already introduced by Mr Taylor, questioning too, it would appear from the minute, whether the views of objectors were not being given greater weight than the rights of landlord and tenants. The Assistant Minister's summing-up, cited above, hardly addressed these key points. Deputy Reed's perspicacity was, frankly, ignored.

15.44 By the time Deputy Pryke came to announce her decision both Mr Taylor, and Mr and Mrs Pinel, we were not very surprised to be told, had already formed the view that she had merely been going through the motions on the Department's behalf, insofar as the arguments aired were broadly identical to those heard at the August 2007 meeting. Two differences, however, were, first, the extent to which the report presented to Deputy Pryke had the effect of curtailing her scope to consider any alternative course of action and, secondly, that the Minister himself, who by his attempt in September 2006 to secure a compromise had effectively caused the application to be submitted, and who had given assurances as to its being approved, was not, this time, the actual

decision-maker. We should add here that we have no grounds at all for supposing that Assistant Minister Pryke knew anything of the Minister's assurance to Senator Shenton three months previously that the request for reconsideration would be approved, and we do not suppose it.

15.45 The minute records an observation made by Mrs Pinel at the conclusion of the meeting. She commented that RSL would not have moved from La Prairie if the outcome that now presented itself had been anticipated. If nothing else this serves as a reminder of just how poorly the Department approached the whole case.

15.46 Her decision having been taken, the Assistant Minister was asked by then Deputy A.D. Lewis of St John from where businesses such as RSL were supposed to operate, given that locations in the urban area would place them in even greater conflict with neighbouring properties. This was much the same point as the then Minister for Treasury and Resources had addressed to the Assistant Minister before the meeting. Deputy Pryke said that the matter would be addressed through the ongoing Island Plan review. As of September 2010, well over two years later, the problem remains quite unresolved. The new draft Island Plan has not yet been lodged '*au Greffe.*' We note, though, that in an attempt to take matters forward positively and with a greater degree of expedition, an interesting proposition was lately lodged in the States seeking government action to identify land suitable to be used by private contractors, of which RSL would be a prime example, for the recycling of waste materials.[13] In our view it will be highly unsatisfactory if the response to that proposition is simply still that one must wait on the draft Island Plan.

15.47 Mr Taylor was incensed by Assistant Minister's decision. He wrote to the Minister the same day, saying that the Department had conducted a '*charade*.' He reminded the Minister that it had been his very own officers who had approached him in 2005 and invited him to take RSL on as a tenant, and he cited the inconsistency between this and what Deputy Pryke had said in declaring Heatherbrae Farm to be an inappropriate site for RSL. For this reason alone we think his incensement was quite justified. An officer in the Department, who we presume would probably have been one of the actors in this tale, annotated his letter with the comment '*So what? It's got worse*.' This was hardly a constructive comment and is further evidence, if it were needed, that the Department had indeed encouraged RSL to relocate; and that, when trouble arose in the form of fierce, adverse pressure from an energetic, resourceful and erudite neighbour, rather than accept that its approach in 2005 had been superficial and wanting, which indeed it was (not to repeat the Minister's own expressive view of it), it chose to adopt the position, unenforceable under the Planning and Building Law, that it had somehow been hoodwinked by the company's having '*intensified*' its business. Interestingly, the final paragraph of Mr Taylor's letter suggests that he probably knew about the assurance given by the Minister to Senator Shenton in the recorded telephone call. But the note made on the letter received indicates that the

[13] P.97/2010 (Recycling of waste materials: identification of suitable sites)

Department unfortunately did not. Mr Taylor did not receive a substantive reply to his letter.

15.48 Mrs Ashworth wrote to Mr Taylor after the meeting to confirm the Assistant Minister's decision, but what she wrote was subtly different from the language recording the decision (paragraph 15.42 above), which, of course, would not yet have been formally committed to paper. She wrote, saying –

> *"The case has been a very difficult one, not least because of the conflicting advice given by the two acoustic engineers, but on balance the Assistant Minister has decided that insufficient conclusive evidence has been put forward to thoroughly convince her that the roofing over the area [sic] would substantially or totally eradicate the noise nuisance to neighbouring properties."*

15.49 This contains two points for remarking. First, the noise reduction test had changed from '*elimination beyond reasonable doub*t' to '*substantially or totally eradicate the noise nuisance*'. That might have been an even stronger test than the one we have already criticised. What we mainly detect from this is a good deal of muddle, and lack of rigorous thinking, about what any of these words was meant to mean in practice. Secondly, the explanation hints at a difficult, balanced decision, which is perhaps what any good planning decision should be. But 'balance' was, as we have already observed, exactly what seemed to be lacking in the report for the meeting, which failed to address the genuine question of balance at the heart of the dispute about noise. Again, we believe that this is evidence of simple muddle about exactly what were the planning issues in the case and of failure to review and analyse the by now complex history of the case, especially the enforcement notice fiasco of the previous year.

15.50 Mr Le Gresley took a further step towards closing the RSL file when he wrote to Advocate O'Connell once more on 29th April 2008. Advocate O'Connell had been pressing for a response to letters he had written concerning an alleged 'improper' private conversation between Mr Taylor and Deputy Pryke at the Ministerial meeting on 26th March 2008 when the decision on the roofing-over application was postponed, and also asking for copies of all material submitted by any party in connection with the 2007 application. Mr Le Gresley rebutted the former issue, which he correctly said was just a brief word about dates, while on the latter he wrote –

> *"Having now determined the Request for Reconsideration, I really see no benefit in providing that information. Your client is not the applicant in this case and does not have rights so far as I can see to require copies of this information."*

15.51 The one comment we make in relation to the above is that throughout our whole work on the RSL case we have endeavoured, with some difficulty, to understand what rights of access to information Mr Yates and his legal

representative were entitled to enjoy, whether as a matter of law or policy[14]. We have formed the view that the degree of access Mr Yates did receive, from the time of his first complaint in April 2006 until the moment recounted in the preceding paragraph, was influenced as much by his forceful, plausible and well-resourced approach to officers of the Department as by any rule or convention of policy.

[14] In this regard we acknowledge the existence of the Code of Practice on Public Access to Official Information

16 THE 2008 COURT HEARINGS

16.1 The story now reverts to where things were left at paragraph 14.5 above, the Minister having been convened to appear at the costs hearing for the *voisinage* case. The Solicitor General was responsible for drafting the Minister's submission to the Court, reliant on input from the Department on the case history. This was submitted on 4th March 2008 to the Bailiff and copied to Advocates O'Connell and Lakeman. Whereas the planning history of RSL's case was only tangential to the original *voisinage* action it was rather closer to the heart of the matter for the costs hearing because the convening of the Minister in it stemmed from the Bailiff's apparent view that RSL had been, at least to a degree, encouraged by the Department to move to Heatherbrae Farm. Thus the evidence prepared by the Department and presented on behalf of the Minister about the planning history should have been of some moment in the proceedings.

16.2 The submission rather sidestepped this by emphasising, on the Minister's behalf, what had in his view caused the litigation itself. This was 'intensification' by RSL, but by this was not meant intensification of use in the planning sense, but rather the simple intensification of activities that reflected RSL's business growth and which had triggered the complaints and eventually the litigation. The salient part said –

> *'... the litigation was brought about not because Reg's Skips moved to Heatherbrae Farm but because Reg's Skips intensified the use which they made of the site and refused thereafter to reduce it.*
>
> *'... The Minister therefore submits that the proceedings were brought about not by the permission, or even any encouragement, to move to Heatherbrae Farm but by intensifying activities there even though it must have been clear to Mr and Mrs Pinel from the terms of the permission which was granted that they should not increase the level of the activity.'*

16.3 This may have been a forceful legal argument for the instant purposes but it is disappointing to see the reference to the 2005 planning permission which, on the argument put forward specific to the *voisinage* case, was an irrelevance. It certainly could not have been *'clear'* to Mr and Mrs Pinel that *'they should not increase the level of the activity.'* Nor should it have been. They had a lawful planning consent for their operations and were quite entitled under it, like anyone else, to strive to grow their business. The problem with the whole argument, though, its neatness apart, was that, naturally given the circumstances, it rather sought to avoid addressing the Bailiff's view, that RSL would never have found itself in this difficult position had it not been encouraged by the Department to make the move to Heatherbrae Farm. That was exactly the plaintive point made by Mrs Pinel when the roofing-over request for reconsideration was rejected (paragraph 15.45 above). We add that it does not appear that the Minister was aware of the paper submitted in his name. There is no reason why he should have been but, had he been, he might

have thought that it did not quite tally with his views on the effectualness of the 2005 permission that he had expressed earlier in 2008.

16.4 The argument also deployed in the Minister's name that RSL, having intensified its use of the site 'refused' to reduce that intensity of use is unfair at best. RSL voluntarily stopped using the mini-digger in May 2006 when told to by Mr Porter, at some financial cost, and, working with Mr Taylor, a variety of not inconsequential noise mitigations were examined by the company in line with what the Minister had said at the site visit, and put in train with the benefit of expert consultancy advice, again at some considerable cost. The entire 'roofing-over' episode was a constructive attempt to resolve the problem in line with the Minister's own expressed views. We accept that there had been 'refusal' in Mr Yates' eyes, having regard to his demands of RSL as a prelude to his litigation. We also accept that this line of argument reflects aspects of Mr Le Gresley's written statement that Advocate Clarke did not succeed in having declared inadmissible. Both these were part of the Court record, so to speak. But the fact remains that the relevant part of Mr Le Gresley's statement did not in our view provide a sufficient explanation of the planning history. The Minister himself had, in 2006, studiously ignored the Department's own recommendation that all skip sorting should cease, a proposition that went beyond the bounds of the Planning and Building Law. So, it being said to the Court in the name of the Minister that RSL had 'refused' to do anything was an injustice to Mr and Mrs Pinel, and indeed to Mr Taylor.

16.5 The costs hearing was to have taken place on 27th March 2008. In the event, the hearing was deferred because Advocate Lakeman was called away from work for personal reasons. It was rescheduled for 29th April. Advocate Lakeman acted for RSL, and Advocate S. Pallot of the Law Officers' Department for the Minister.

16.6 The former argued that the Minister should be ordered to pay 50% of RSL's costs, on account of the encouragement to RSL to relocate to Heatherbrae Farm surmisable in the Bailiff's judgment. Advocate Pallot drew on the submission described above.

16.7 It was also argued on the Minister's behalf that an order for costs should not be made against a public authority based upon a decision taken by it in the exercise of a statutory discretion in circumstances where the authority's action could not give rise to any claim for damage. We have no comment on this.

16.8 The Royal Court's decision was given on 3rd June 2008, twelve days after the Court of Appeal had dismissed RSL's appeal in the *voisinage* case (paragraph 16.7 below). The Royal Court, the Bailiff sitting alone, ordered that RSL should pay the costs of the plaintiffs (that is, Mr and Mrs Yates) on the standard basis but would be entitled to recover 25% of those costs from the Minister. The same was ordered in respect of the plaintiffs' costs arising from the costs application. This was half the amount sought by Advocate Lakeman but nevertheless quite a defeat for the Department and the Law Officers. The Bailiff said also that he was minded to order that the Minister should pay RSL's costs in respect of the costs application but that he was willing to hear

arguments on that first. This aspect of the matter was overtaken by the Minister's subsequent appeal (paragraph 16.13 below).

16.9 The Bailiff justified his decision, saying –

> *'It is true that the primary responsibility for the breach of the duty of voisinage lies with the defendant. It seems to me, however, that the Minister must bear some responsibility for encouraging the defendant to move its business to a site where it ought to have been foreseen that such a breach would ensue.'*

16.10 This was confirmatory of his earlier view that the Department had indeed encouraged RSL to relocate to Heatherbrae Farm, and it well reflects our detailed analysis of the Department's failure in 2005 to weigh all the issues properly, including noise – the very failure that precipitated RSL's later troubles. It is, in our opinion, greatly to the then Bailiff's credit that he reached this view despite having a had really very incomplete account of the planning history before him. Had the picture before the Bailiff been complete one could speculate that he might well have ordered a higher, or even a full, contribution from the Minister.

16.11 The Court of Appeal heard RSL's appeal against the Bailiff's decision in the *voisinage* case itself on 21st and 22nd May 2008. The appeal was refused at the end of the hearing, the written judgement following some time later. Advocate Lakeman then argued for a six months stay of execution of the Royal Court's order requiring RSL to vacate its premises, that is, until 21 November 2008. This was because of the need either to sell or relocate the business. Advocate O'Connell argued for one month only. The Court granted a stay until 1st October 2008. In so doing it prayed in aid the sympathy that the Bailiff had expressed for Mr and Mrs Pinel, who had removed their business to Heatherbrae Farm (whether merely 'permitted', or 'encouraged', to) in good faith. The Court of Appeal, in Jones JA's written judgement, repeated that it had no reason to believe other than that Mr and Mrs Pinel had pursued their appeal on advice and in good faith; and it said elsewhere in the judgment that it did not regard the appeal, taken as a whole, as being without merit.

16.12 That said, the arguments put to the Court of Appeal by Sinels on RSL's behalf were comprehensively rejected. An endeavour by Advocate Lakeman to introduce apparently consolidated time series data on noise readings was disallowed because the way this was presented amounted to new evidence that was impermissible. Perhaps more significantly, Advocate Lakeman had changed the grounds of appeal. Advocate Clarke's original ground, submitted on 9th January 2008, the day after the Minister had given his assurance to Senator Shenton that Mr Taylor's roofing-over application would be approved, was simply that change of circumstances – viz. the approval of the roofing-over request – '*that would justify a different decision*'. Advocate Lakeman's revised grounds, submitted on 25th February (by which time there was still no resolution to the roofing-over decision), were founded in legal arguments challenging the way the Bailiff had applied the law of *voisinage* and the way he, the latter, had dealt with the conflicting expert evidence on noise. And at a very late hour, that is, the evening of the day before the hearing was due to

commence, Advocate Lakeman sought a further substantive change. This was to withdraw the concession, made by Advocate Clarke and so far sustained by Advocate Lakeman, that, in principle, the creation of excessive noise could amount to a breach of the duty of *voisinage*, and to introduce in its place a new ground, to the effect that the correct construction of the law of *voisinage* as it currently stood in Jersey was that it was applicable only to damage to land or buildings, which was not the case in this instance.

16.13 All this did not earn the approbation of the Court of Appeal. It was in breach of the Court's rules of procedure to such an extent that Sinels were ordered to pay one half day's costs of the hearing to RSL on an indemnity basis. For the remainder, RSL was held liable to Mr and Mrs Yates in costs on the standard basis. The Court noted, however, that there was nothing in the material before it to suggest that RSL was in any way to blame for what it described as the failings of its Advocates.

16.14 One of Advocate Lakeman's contentions was that, where planning permission had been given and the public interest therefore taken into account, the public interest should prevail over private rights. This was rejected by the Court of Appeal as a matter of law but also as an irrelevance because the matter had not been adduced in the Royal Court. So the circumstances of the 2005 permit were not considered by the Court of Appeal and the fact that, based upon our researches, it did not have full information about RSL's planning history was, as things turned out, immaterial to its decision.

16.15 Another of Advocate Lakeman's new grounds is worth noting. This was that there had been an erroneous application of the law '*when looking at the needs of the average person in the particular neighbourhood.*' In support of this he argued that the planning permission granted for Heatherbrae Farm since 2002 had caused the site to take on a commercial character, wherein standards in relation to such things as noise fell to be regarded differently. This line of argument was not accepted by the Court. We simply note that exactly the same argument, viz. that the use of the site had become 'commercial', had, albeit in a different context, been asserted by neighbours who had objected to Mr Taylor's roofing-over application, and indeed implied by Mr Yates himself in his submission of 27 October 2006 to the Royal Court supporting his application for leave to apply for judicial review.

16.16 We observe, without presuming to offer a 'legal' view, and with the benefit of hindsight, that given the sequence of events that unfolded on the roofing-over request for reconsideration from the time of the Minister's assurance in January 2008 to Senator Shenton about its approval up to its actual refusal by the Assistant Minister a month before the Court of Appeal hearing, it seems unlikely that an appeal based upon Advocate Clarke's original single ground would have been successful, even if the full facts about the Department's mishandling of the request for reconsideration had been revealed at the time. That does not, however, detract from the cautious reasonableness of the supposition made at the time on the basis of what the Minister had said to Senator Shenton but it does imply that had Mr and Mrs Pinel not engaged Sinels and stayed with Le Gallais & Luce, Advocate Clarke would have been properly obliged to advise strongly that the appeal should be withdrawn. This

would have had a notable impact on RSL's burden of costs and, from a purely operational perspective, would not have put the company in a worse position than that which it presently finds itself in.

16.17 We return now to the Royal Court's decision that the Minister should pay 25% of RSL's liability for costs arising from the *voisinage* case. (This did not apply to the costs of RSL's unsuccessful appeal.) By 6th May 2008, a week after the hearing in the Royal Court but a month before its written judgment was delivered, Mr Le Gresley had already instructed the Law Officers' Department to lodge an appeal if the Department lost. Consequently, when the judgment was published, Advocate Pallot expeditiously served notice of appeal on behalf of the Minister. This sought to have the order of 3rd June set aside, and also the Bailiff's order of 20th December 2007 convening the Minister, so that he could be discharged altogether from the proceedings.

16.18 The main ground of the Minister's appeal was that the Court erred in finding, in relation to the *voisinage* case, that the Minister had '*encouraged [RSL] to act as it did before proceedings were brought.*' It was said further that the Court should not have made any finding on this in the main action without the Minister having had an opportunity to be heard. It was also claimed that the Court erred in holding (as it effectively did) that a duty of care was owed by the Department to applicants for planning permission to exercise its statutory discretion in a way that held anyone granted permission safe from actions for breach of any *voisinage* obligation towards neighbouring properties. And it was also asserted that the Department had no connection at all with Mr and Mrs Yates' bringing of proceedings. The main ground took things right back to what had really happened in 2005.

16.19 We have formed the view that briefing for Advocate Pallot focussed largely on the summary of events in Mr Le Gresley's original witness statement. This implies that a number of key events and actions were perhaps not rehearsed. The Court of Appeal would, in particular, not have known about the full extent of the encouragement offered to RSL to relocate to Heatherbrae Farm (and to Mr Taylor in order to facilitate it) or that that encouragement had been fuelled by the Department's anxiety to resolve the perceived problem of the unsightliness of the La Prairie site without recourse to the uncertainties of formal enforcement action in relation to a 'pre-1964' site. As for the duty of care point, the Court would not become aware that this was not a normal case of the Department's reacting to the unsolicited submission of a planning application; rather, this was a case where the Department, with, later on, the significant involvement of the Minister himself, had in effect solicited two planning applications from Mr Taylor. A further distinguishing factor in this case is that the appellant's own Department had failed to administer various planning applications properly. Had it done so, we find it a little hard to conclude that matters would have gone for RSL quite the way they did. We think that both the Royal Court and the Court of Appeal might not have been wholly uninterested in all these aspects of the case. All of them, we believe, might have served to add credence to the Bailiff's brave but inevitably somewhat intuitive position on the Minister's responsibility for events and the impinging of this on the costs.

16.20 The Court of Appeal heard the Minister's appeal against his having to contribute to RSL's legal costs in the week beginning 24th November 2008. Mrs Pinel herself represented RSL, the company having passed the point of being able to afford professional representation. The Court allowed the appeal, accepting the broad argument put forward by Advocate Pallot on behalf of the Minister that there had been no encouragement. It noted that there had been no particular analysis of that notion in the *voisinage* case once the Bailiff had raised the point, and that the origin of the proceedings indeed lay in the accusation of '*intensification*' that Advocate O'Connell had first put to RSL on behalf of Mr and Mrs Yates in October 2006. All this meant, argued Advocate Pallot, that the Minister was completely unconnected with what had happened. The planning law implications of the concept of 'intensification of use' were not adduced, and did not need to be.

16.21 Advocate Pallot also argued that the Bailiff's judgment in the costs hearing was tantamount to holding that the Minister had acted negligently in granting planning permission to RSL in the first place. RSL, having acted on the permission would, on this argument, thus be entitled to some level of indemnification by the Minister. Advocate Pallot argued staunchly that this would be contrary to the Planning and Building Law 2002, which (at Article 19(7)) says that action taken by the Minister in granting planning permission does not give any person the right to claim compensation in respect of any loss or damage the person may suffer as a result of that action. We defer to the point of law but we speculate that the argument, and the outcome, might have been different had Advocate Pallot and the Court of Appeal been fully apprised not only of the way the 2005 permission actually was handled, with minimum attention given to key planning factors such as the Countryside Zone policy, but also of the Minister's own view of that handling, as he had expressed it to Senator Shenton at the beginning of 2008.

16.22 It was perhaps inevitable that the Court of Appeal would allow the appeal since virtually no evidence of causation (such as 'encouragement') had been adduced before the Royal Court and that was what the Court of Appeal had to rely upon. But we think it is worth letting some of McNeill JA's words speak for themselves –

> *'...in my view, Advocate Pallot was correct to identify that whilst the fact of the grant of the planning permission and its exercise were at the root of the litigation, nothing connected the Minister with the litigation itself. He had not funded the litigation, not directed the litigation, not stood to benefit from the outcome and not participated in the litigation.*
>
> *'There was no encouragement to litigate or to defend. The planning permission was permissive only. It was a decision which had to be taken on planning merits.'*

16.23 We end this narrative far from certain as to whether the Court of Appeal would have reached exactly the same conclusion had it been aware of all the information about RSL's planning history that we have researched and presented for the purposes of this report.

17 THE COSTS

17.1 Our second term of reference requires us to establish whether the legal fees accrued by RSL, totalling '*nearly £300,000,*' were as a result of any failings in the processes or actions of the Planning and Environment Department.

17.2 Although it is our understanding that neither the total sum nor its constituent parts were challenged by any creditors when Senator Shenton lodged his proposition P.29/2009 in an attempt to secure an *ex gratia* payment for RSL, we considered we should take reasonable steps to corroborate the sum quoted before arriving at our findings. We also considered it appropriate in the circumstances to acknowledge the full range of expenses incurred by RSL as a consequence of its having been encouraged by the Department to move from La Prairie to Heatherbrae Farm.

17.3 When Senator Shenton lodged P.29/2009 he submitted that the company had incurred costs in the sum of £297,000 as a consequence of defending the *voisinage* action. We examined the composition of this putative sum with care, and with full assistance from various parties, including Mr and Mrs Pinel and Advocate Clarke. Our conclusion from the examination of all relevant records made available to us is that RSL incurred costs of £249,000 as a direct consequence of the complaints made by Mr and Mrs Yates, of the subsequent 'enforcement' action by the Department, of the *voisinage* action and the other related matters heard by the Court.

17.4 The sum quoted by Senator Shenton was largely accurate at the time P.29/2009 was lodged but the position now is different for several reasons. First, and principally, following certain negotiations sums were eventually accepted by both Sinels, and Mr and Mrs Yates, in full and final settlement that were somewhat lower than the costs initially invoiced to RSL. Secondly, we have established that just over £9,000 of our total costs figure quoted above was incurred as a consequence of RSL's complying with the 'instruction' of the Department's Enforcement Section in 2006 to cease mechanical sorting of skips – an 'instruction' that we have said we think was not lawful given the terms of RSL's planning permission. Between May and August 2006 RSL had to compensate by employing hired labour to sort skips manually. This particular cost, although a small part of the total under consideration, brings home to one the potential unsung costs to private firms or individuals of 'official' action that those concerned with should always stop to contemplate.

17.5 Of the £249,000 incurred by RSL, we calculate that £157,000 was incurred as a direct consequence of failings in the processes or actions of the Department. That sum represents the costs incurred up to the point in February 2008 when RSL formally instructed Sinels and pursued alternative grounds of appeal (paragraph 15.20 refers). For the sake of completeness these figures do not take into account interest payments RSL made (and, we understand, continues to make) on loans taken out with various parties in order to enable it to settle the various costs it had incurred.

17.6 We also acknowledge that on 19th June 2008 Appleby, acting on behalf of Mr Yates, offered to settle with RSL and the Minister (who had been ordered by the Royal Court on 3rd June to pay 25% of RSL's costs arising from the *voisinage* case) for £50,000, having maintained, however, that the actual costs incurred by their clients amounted to £87,600, including some £7,500 paid to or on behalf of 24 Acoustics. Appleby also indicated that Mr and Mrs Yates would be prepared to receive their due in instalments, the given proportion falling to the Minister (£12,500) being paid directly.

17.7 On 31st March 2009, Appleby sent a memorandum on behalf of Mr and Mrs Yates to the States Greffe with a request that it should be copied to all States members for the debate on Senator Shenton's proposition, which was to commence the following day. It was duly circulated. The memorandum was in essence an apologia of Mr and Mrs Yates' stance throughout the dispute. It offered a critical commentary from their perspective on aspects of RSL's approach and behaviour, a critique of Senator Shenton's report to the States and some of his accompanying actions and statements that was not exactly laudative, and a firm recommendation to States members against supporting the proposition. This memorandum made reference to the offer to settle for £50,000 and to accept payment by instalments but said that RSL had refused to respond to this offer, thereby obliging Mr and Mrs Yates to go to the extra cost of having their expenses taxed by the Judicial Greffier. This process led to their being awarded £68,000 rather than the £50,000 offered. The extra cost of £18,000 was ascribed to a want of reasonableness on Mr and Mrs Pinel's part. This was just for the case before the Royal Court. Taxation of Mr and Mrs Yates' costs for the hearing before the Court of Appeal yielded a further £28,000 payable by RSL as the losing side in the case.

17.8 Mr and Mrs Pinel did not respond positively to Mr and Mrs Yates' offer to settle at £50,000. With the benefit of hindsight it is evident to us that Mr and Mrs Pinel were having to weigh a range of factors that made the decision less than straightforward. First, the Minister appealed the Royal Court's costs order made against him. Secondly, advice they received from Sinels led them to the view that the settlement would be renegotiated if the Minister was successful in his appeal. Matters were further complicated because Mr and Mrs Pinel believed that Sinels required payment of their bills before Appleby and that Appleby would require RSL to demonstrate in advance its ability to pay either in full or by instalments. The quantum of costs levied by Sinels was a key factor because the sheer scale of the fees incurred had simply not been anticipated. Although the fees charged by Sinels were quite rightly not a matter of concern for Mr and Mrs Yates or their lawyers, they nevertheless affected the ability of RSL to pay. Mr and Mrs Pinel sought help from Senator Shenton to challenge the bill submitted by Sinels because they considered the sum to be less than reasonable. Taking all these factors into account, we understand why Mr and Mrs Pinel concluded that they were not in a position to settle and thereby declined the offer. The appeal was finally determined on 27th November 2008.

17.9 We also consider it necessary, and just, to draw to the attention of the States the costs incurred by Mr Taylor in his seeking to meet the requirements laid

upon him by the Department as the RSL saga unfolded; after all, each of the relevant planning permissions under review was in his company's name, not RSL's and both were submitted in response to proactive behaviour on the part of the Planning Department and the Minister respectively. Mr Taylor incurred planning application fees of £210 for the 2005 application and £1,812 for the 2007 application to roof over. He expended a further £1,325 to obtain a professional report from consultants Southdowns, having been required by the Planning Department to demonstrate the level of noise reduction that could be anticipated by the roofing over of the skip sorting area.

17.10 We acknowledge that Mr Taylor also incurred fees following his engagement of Amalgamated Facilities Management to explore noise reduction options as a consequence of the Minister's decision at the site visit on 20th September 2006. He spent a not insignificant sum resurfacing his driveway as a direct consequence of the Minister's decision at the 3rd August 2007 hearing and the subsequent related correspondence sent by Mrs Ashworth. Mr Taylor also suffered a loss of earnings as a consequence of the early termination of the lease under which RSL had operated from Heatherbrae Farm. However significant the financial impact of this affair has been on RSL, it would perhaps be less than equitable if the consequent financial impact on Mr Taylor was forgotten.

17.11 Mr and Mrs Yates told us that they incurred legal and professional costs of £170,000. Although they eventually recovered £80,000 from RSL and a further, relatively nominal sum from Sinels arising from the judgement of the Court of Appeal, the remainder of those costs were paid by Mr and Mrs Yates directly.

17.12 If the States accept our recommendation that some recompense should be made to RSL and some reimbursement to Mr Taylor, we have instructed our Clerk to make available to the Treasurer of the States all the information on which we have based our considered estimate of the total costs incurred by the company.

18 CONCLUSIONS

18.1 We found in the Planning Department's dealings over several years with Mr and Mrs Pinel of RSL, and with Mr Taylor, the owner of Heatherbrae Farm and RSL's landlord for most of the relevant period, considerably more evidence than we would have liked to find, or expected to see, of –

(a) sloppy report writing and administrative practice,

(b) absence of due process (and seemingly a lack of recognition of its importance), and

(c) want of analysis in order to ensure well founded decisions.

18.2 As the case became more complicated and controversial, little sense emerges from the evidence we have seen and received that anyone in the Department, junior or senior, with one exception, really had a grip on it. We found no malpractice – it is important to emphasise that – but we certainly did find some episodes of misdoing – that is, the Department acting wrongly – and some specific elements of maladministration, by which we mean, as the dictionary defines it, the poor or bad management of public affairs. One example of this was the way that, in 2006, a letter from RSL's lawyer remonstrating on behalf of his clients against enforcement action was turned, without notice or his even being informed, into a 'request for reconsideration' of the very matter the lawyer asserted, rightly as it turned out, was already quite permissible. Another was the extremely unsatisfactory report prepared for the 2006 site visit in which the Minister was invited, in effect, to revoke RSL's planning permission and destroy their business without a single argument adduced in support and without, it seems, knowledge that the Minister did not have the power to do that anyway. And we have pointed to several instances where in our judgement the Department showed imbalance in the way it treated the complainant in the case, for example through the provision of information compared with both RSL and Mr Taylor as the holder of the relevant planning permission, in a manner that, had it been known, would have warranted the perception that one side in the dispute was being shown or given undue attention.

18.3 In similar vein, we have also pointed to the view that was held in the Department, and which was confirmed to us in evidence, that RSL was a 'nuisance' to the Department, and viewed as troublesome. We also heard the word 'wrongdoer' used to describe the company. By any standards, this was not good. People always hold views but public officers need to rigorously put them aside in order to do right to citizens, and to be seen to do right.

18.4 We also found examples of the contrariwise. The helpfulness shown to Mr and Mrs Pinel by one planning officer in the wake of the refusal of their Homestead application in 2005 was one good example of this, as indeed was the way RSL's move to Heatherbrae Farm was initially facilitated. Another was the way the force of RSL's appeal against the enforcement notice was readily appreciated by a senior planning officer, and acted upon promptly. But

we fear that these occasions seem to stand out as exceptional. The Department's overall handling of RSL's case was totally unsatisfactory.

18.5 As for the Minister's role, we find that it was broadly commendatory save for one misjudgement and, probably, a tendency to informality in decision making that would have not have been particularly problematic if only decisions always been meticulously recorded. He was robust in viewing RSL's business as something of importance to the Island, the Department having taken no account at all of this, or of the relevant waste management policy context. He was wise to ignore the Department's erroneous recommendation in 2006 effectively to revoke RSL's planning permission. He was serious about seeking compromise on the noise problem and led from the front on that at the site visit. Although Mr Yates may, however, have had a point when he argued that he had occasionally extended his purview to non-material planning considerations, the Minister was assiduous in responding to pressure to stand aside from the decision-making because of his acquaintance, albeit quite distant, with Mr Taylor. His misjudgement was to promise in the telephone conversation with Senator Shenton what he could not deliver, precisely because he had stepped aside. This holds, we feel, whatever view was taken by him, or may be taken by others, of the nature or circumstances of that conversation.

18.6 We cannot fault the professional way in which officers of the Health Protection team in the Health and Social Services Department dealt with many requests for advice and assistance in the course of the case. But the fact that their views were not always satisfactorily reflected by the Department in planning reports does tend to lead one to the view that the relationship between these two was not as close or constructive as it might or should have been. Certain outcomes, for example, may have been different had the way the Department presented the views of Health Protection to its Ministers been more precise and had documents routinely been put to Health Protection in draft for clearance.

18.7 The criticisms and shortcomings noted above were clearly heightened by organisational weakness in the Department and what is hard not to describe as a lack of effectual managerial leadership of it during much of the period in question. Not only were Mr and Mrs Pinel, and Mr Taylor, let down badly as a result, but also the same could be said for the Minister and Assistant Minister, and before them the former Committee, for they could proceed with decision-making on such business on the basis only of good and sufficient advice. Too often that seemed to be wanting.

18.8 Examples contributing to this view include –

(a) poor record-keeping and recording of decisions;

(b) overly informal decision-making;

(c) unsatisfactory arrangements for the proper taking of decisions under delegated authority, including the signing-off of planning conditions and a lack of clarity about the rules or conventions pertaining to delegation;

(d) poor understanding, in 2006, of the important changes wrought by the new Planning Law;

(e) looseness in the application of Island Plan policies to the planning applications and procedures;

(f) insufficiently robust procedures for consultation with other States departments on planning applications;

(g) poor report writing coupled, in certain cases, with a marked lack of analytical rigour;

(h) insufficient evidence of genuine team-working, with planning and enforcement officers operating in an informal 'conversation-driven' setting with insufficient sharing of knowledge and oversight of policy and practice;

(i) uncertainty as to precisely what the aims and objectives of the 'enforcement' function were or should be; and an absence of established procedure for dealing with enforcement matters and complaints, including mechanisms – for example, complex case review procedures – to ensure balance between the rights and interests of applicants and the legitimate concerns of complainants; and

(j) lack of rigour in ensuring appropriate dealings with a complainant in relation to the interests and legitimate expectations of an applicant for, or holder of, a planning permission and in making sure that such dealings are not only balanced but immune from any criticism that they might not be balanced, or seen not to be.

18.9 These were all serious, and probably systemic, weaknesses that we perceived in the Department during the period in question and we judge that, variously, they had a significantly adverse bearing on RSL's case.

18.10 In summary, our conclusion is 'yes' in relation to the first of our terms of reference. The pertinent planning applications – and the process surrounding them including 'enforcement' – were not handled and determined to a sufficient standard and in a manner that should reasonably have been expected by any citizen.

18.11 We conclude similarly in relation to our second term of reference. Legal costs were incurred by RSL as a direct consequence of –

(a) the Department's aim of getting RSL moved from La Prairie and its consequent encouragement and facilitation of RSL's move to Heatherbrae Farm;

(b) in particular, the Department's failure to tell Health Protection that the 'commercial' proposal was a skip sorting operation;

(c) the loosely drafted condition in Mr Taylor's 2005 planning permission that enjoined RSL to operate at its new site *'in the same way as a skip storage and sorting yard only'* as at its old site, which was wholly unable to bear the restrictive interpretation that the Department wanted

to put on it once it received strong and persistent complaints about RSL from a neighbour;

(d) the misconceived but remarkably persistent effort by the Department to seek to 'enforce' that flawed condition. Only following a legal challenge by RSL did the Department itself take legal advice and appreciate that the condition was unenforceable for want of precision.

18.12 Mr Yates himself told us that his litigation was a last resort. Had the Department tackled the case properly from the start, it would not have arisen; either the permission would not have been granted or it would have been granted with appropriate conditions that would have mitigated the noise nuisance.

18.13 Mr and Mrs Pinel's decision to appeal against the judgement of the Royal Court in the *voisinage* case was, in the first instance, directly influenced by the assurance given by the Minister to Senator Shenton in January 2008 that Mr Taylor's 'roofing-over' planning application reconsideration would be successful. That led to considerable further legal costs. The assurance should not have been given, not only as a matter of intrinsicalness ahead of the due process of the determination of the application but also, and more significantly, because the Minister had stood aside from the case several months previously under pressure from complainant Mr M. Yates, on the grounds that he was conflicted owing to his being slightly acquainted with Mr Taylor. This action on the Minister's part, however well-intentioned, was unwise. Mr and Mrs Pinel cannot be faulted for placing reliance on information from such a source: Senators are at the apex of Jersey's polity. But the disconnectedness of the Minister's positive assurance from the process within the Department that led two months later to the rejection of the reconsideration request by Deputy A.E. Pryke, then Assistant Minister, was so utter that it made the eventual decision a blow of high proportions.

18.14 As for the legal costs faced by Mr and Mrs Pinel, the order of the Bailiff in the costs hearing after the *voisinage* case that the Planning Department should pay a quarter of the costs would, had it not been successfully appealed by the Minister, have reduced significantly the costs faced by Mr and Mrs Pinel. The Court of Appeal's decision might also, we conclude, have been more supportive of the Bailiff's judgement had the Court received a full account of the planning history.

18.15 We add that the shortcomings we have identified in the Planning Department were similarly adversative to Mr Taylor, who had gone to some lengths and expense to accommodate RSL on his land and to seek to mitigate subsequent alleged nuisance at the behest of the Minister, whose good intent was undermined by the Department's own actions.

19 RECOMMENDATIONS

19.1 Although our main terms of reference do not specifically invite us to make recommendations, it seems to us desirable that we do in order that the States, in considering our report, are in no doubt about our view on what should be done to bring this case to closure. What follows relates only to the first two of our terms of reference. Recommendations about the planning process itself in the light of this first report, which are invited by our third term of reference, will follow in our second report.

19.2 We make four recommendations which we invite the States to accept –

(i) the Department should apologise, publicly, to Mr and Mrs Pinel, Mr Taylor, and Mr and Mrs Yates for the various mistakes, misguided actions and inactions that we have set out in this report;

(ii) the States should compensate Mr and Mrs Pinel, as owners of RSL, in the sum of £157,000 pursuant to paragraph 17.5 above;

(iii) the Department should reimburse to Mr Taylor his fees for his two planning applications, in the sum of £2,022, and his costs for hiring professional acoustic advice in the sum of £1,325. This makes £3,347 in total;

(iv) pursuant to paragraph 15.46 above, the States should beyond doubt ensure that there are specific, robust policies in the new Island Plan to enable and encourage the sorting and recycling of inert waste on private land, in respect of both existing businesses and new entrants to the market, and that the Planning and Environment Department is held to account on delivering this.

ANNEX 1 – CHRONOLOGY

2000

27th September	Mr R. and Mrs R. Pinel commence operations as a family business at Home Farm, St Peter

2001

12th February	Mr and Mrs Pinel acquire a second skip lorry and employ a second driver
29th March	RSL becomes a limited company
14th December	The Department receives a letter from an anonymous 'concerned parent' reporting possible unauthorized works at Home Farm, St Peter and possible pollution affecting the neighbouring St George's School
18th December	A Planning Enforcement Officer visits Home Farm and records unauthorized activity

2002

11th July	The States adopts the Island Plan 2002, which includes new policies on waste management
1st August	The Department approves an application submitted by Mr C. Taylor for change of use from dairy to dry storage in respect of Heatherbrae Farm, St John, subject to a condition that individual occupants utilizing the site be approved by the Committee
29th August	Retrospective application P/2002/2136 is submitted to the Department requesting permission for a change of use sufficient to allow RSL to continue operating from Home Farm
13th September	Planning receive from Mr W. Le Marquand (owner of a larger competing business WP Recycling and Skip Hire) a letter of objection regarding application P/2002/2136. Mr Le Marquand cites the proximity of the Home Farm site to St George's School
31st December	RSL now employs four full time staff and one part time staff. It also owns and operates four skip lorries

2003

1st January	The Environment and Public Services Committee (EPSC) decides to implement increased non-segregated/non-recoverable inert waste tipping charges at La Collette, St Helier
27th February	EPSC gives in principle approval to a three year pricing policy for the disposal of inert waste

4th March	An Enforcement Notice is issued requiring the reinstatement of land at Home Farm used by RSL
2nd May	The EPSC confirms the refusal of application P/2002/2136 and extends the Enforcement Notice compliance date to 11th August 2003
16th June	EPSC defers the introduction of its 3 year pricing policy having noted a dramatic decrease in the volume of material arriving at La Collette, St Helier
6th August	The Department is notified that the refusal of application P/2002/2136 will be the subject of a Review Board hearing under the Administrative Decisions (Review) (Jersey) Law 1982
2nd September	The Finance and Economics Committee approves a further 6.1 per cent increase in charges for tipping increased non-segregated/non-recoverable inert waste at La Collette, St Helier

2004

19th January	The Review Board rejects the complaint concerning the refusal of application P/2002/2136
April	Reg's Skips Ltd. relocates to La Prairie, St Peter
20th May	Application P/2004/1056 is submitted seeking permission for a change of use from dry storage to commercial use at The Homestead, St John, on the basis that the site would be occupied by RSL for skip storage and sorting
8th June	The States adopts the Waste Management (Jersey) Law 200-, which would in due course impose a licensing regime on waste management undertakings, including skip companies
18th August	A Planning Enforcement Officer visits La Prairie, St Peter regarding complaints of unauthorized activity and then writes to RSL advising that 'the keeping of skips full of waste material is not [in order]'

2005

20th January	EPSC upholds a decision to refuse application P/2004/1056, whereupon RSL searches for another site
20 – 24th January	Miss E. Baxter, Planner and Mr R. Pinel visit Heatherbrae Farm separately and meet owner Mr C. Taylor
24th January	Mr C. Taylor writes to Miss Baxter about the possibility of the skip storage and sorting business relocating to his property
9th March	Pre-application advice is sought from the Planning Sub-Committee (PSC) on the possible relocation of Reg's Skips Ltd. to Heatherbrae Farm

10th March	Miss Baxter writes to Mr Taylor highlighting positive pre-application advice from the PSC
10th March	Mr Taylor attends the Department and submits application P/2005/0423 for a change of use from dry storage to commercial use at Heatherbrae Farm
22nd March	Application P/2005/0423 is advertised in the Jersey Evening Post
8th April	Health Protection advise the Department that they have no objection to application P/2005/0423 in principle but note that commercial uses likely to cause problems with noise or smell should not be permitted
23rd May	Application P/2005/0423 is approved under delegated powers and with 5 specific conditions attached to the permit
8th August	Mr C. Taylor advises the Department that RSL is in the process of moving to Heatherbrae Farm
17th November	EPSC approves further increases in waste tipping charges

2006

7th April	RSL acquires its 5th skip lorry (with 1 functioning as a reserve vehicle only) and employs 6 full-time and 1 part-time staff
27th April	Health Protection and the Department's Enforcement Section receive the first complaints regarding noise generated by RSL at Heatherbrae Farm
3rd May	Environmental Health first visit Heatherbrae Farm, where 'Some audible noise' is noted and photos are taken
8th May	Mr M. Porter, Enforcement Officer, visits Heatherbrae Farm
10th May	Mr Porter advises Mr and Mrs Pinel that the Heatherbrae Farm operation breaches conditions attached to the planning permit and suggests that the company might wish to apply to vary the permit conditions
18th May	Le Gallais & Luce write to the Department clarifying the nature of the RSL operation, contending that the permit authorises mechanical sorting and indicating that RSL would wish to change its permitted working hours
23rd May	Planning elects to treat the Le Gallais & Luce letter of 18th May as a request for reconsideration of 2 conditions attached to permit P/2005/0423
9th June	Mr D. Binet, Environmental Health Officer, expresses concern at the request for reconsideration and advises Planning that the relocation of RSL to Heatherbrae Farm should not have been permitted
20th September	The Minister for Planning and Environment (the Minister) conducts a site visit at Heatherbrae Farm and makes an interim

	decision on the request for consideration in the form of a temporary permission, with conditions.
17th November	The Royal Court rejects an application for judicial review of decisions concerning RSL's operation at Heatherbrae Farm
5th December	Mr C. Taylor submits an application to roof over the silage clamp at Heatherbrae Farm

2007

9th January	The Minister refuses the request for reconsideration application processed on 23rd May 2006 and issues an Enforcement Notice restricting the activity of RSL
23rd January	The application submitted by Mr C. Taylor on 5th December 2006 is formally accepted by the Department as application P/2007/0195 following certain revisions prompted by advice from Health Protection
7th February	Le Gallais & Luce appeal against the decision of the Minister to issue the Enforcement Notice
28th February	The Minister withdraws the Enforcement Notice having received legal advice
24th April	The Department rejects application P/2007/0195 under delegated powers
21st June	Mr C. Taylor requests reconsideration of the decision to refuse application P/2007/0195
3rd August	The Minister holds a public meeting at which he defers his decision on the reconsideration of application P/2007/0195
21st August	The Minister delegates to his Assistant Minister responsibility for determining the reconsideration of application P/2007/0195
11th December	The Royal Court determines that the actions of RSL at Heatherbrae Farm constitute a breach of the duty of *voisinage*

2008

9th January	Senator B.E. Shenton and the Minister discuss the RSL matter over the telephone. The Minister advises that permission to roof over the former silage clamp would be given
	Le Gallais & Luce advise the Royal Court that RSL would appeal the decision of 11th December 2007
6th February	Mr and Mrs Pinel obtain a second opinion from Sinels regarding the Royal Court appeal
20th February	Sinels write to Le Gallais & Luce advising that they have received instructions to act for RSL in the Royal Court appeal

24th April	The Assistant Minister upholds the decision of 24th April 2007 to refuse application P/2007/0195
22nd May	The Court of Appeal dismisses the appeal against the decision of 11th December 2007
3rd June	The Royal Court orders that RSL pay the costs of the plaintiffs on the standard basis but that RSL would be entitled to recover 25 per cent of those costs from the Minister
27th November	The Court of Appeal upholds the Minister's appeal against the Bailiff's order in the Royal Court that he should contribute to the costs of proceedings instituted by Mr and Mrs Yates against RSL

ANNEX 2 – THE POLICY CONTEXT

RSL was, and remains, a waste collection, segregation and disposal business whose target market included private households, smaller construction company businesses and miscellaneous other undertakings. That company was operating in the period under review, and indeed continues to operate, as part of a business sector and within a sphere of the Island's economy in which the States has, from the perspective of public policy, taken considerably increased interest over the last decade.

During that decade the States has sought to encourage responsible waste recycling. This objective has been articulated through, for example, the waste management policies within the Island Plan 2002, the Solid Waste Strategy of 2005, and adoption of the Waste Management (Jersey) Law 2005. The Transport and Technical Services Department (TTS) has buttressed the policy stance through imposing strict rules governing the acceptance of mixed waste loads at its disposal sites and through overt price differentials for disposal of different waste commodities.

We received evidence from the Chief Officer of TTS, Mr J. Rogers, that pricing structures, waste acceptance practices and the TTS Department's own policy of encouraging recycling through the proactive work of its Recycling Officer had for some time been specifically intended to encourage waste sorting at source by the person or business generating the waste. Provision of waste collection and disposal services provided by a third party was an acknowledged alternative option for those generating waste. It was acknowledged that the Planning and Environment Department had a significant degree of responsibility for regulating such third parties.

Save for exceptional cases, sorted material only was received at Bellozanne (for burnable waste, green waste or scrap metal) or La Collette (for inert waste). In this regard, TTS was also motivated by a desire to prolong the life of the La Collette 2 land reclamation site and the Bellozanne incinerator plant.

Planning and Environment Department figures concerning the number of planning applications processed per year, coupled with data compiled by the States of Jersey Statistics Unit for the construction industry through the same period and Transport and Technical Services Department records of tonnages of waste delivered to Bellozanne and La Collette, indicate that the relocation of RSL to Heatherbrae Farm, St John in August 2005 broadly coincided with a return to significant growth in the construction industry and in the wider economy.

It is therefore apparent that the States were seeking to influence waste management behaviour at a time when –

(a) waste volumes were rising,

(b) demand for the services of skip companies was increasing because of this, and

(c) States policy generally demanded the sorting of waste before its disposal.

It was not readily apparent to us in reviewing factors that relevant States Departments had fully thought through the planning and land use implications of deliberately encouraging the sorting of 'mixed waste' skips away from the two Island disposal

sites. However desirable on-site sorting of waste may have been in principle, in practice it was in many cases impracticable to achieve. This was the market opportunity thus available to RSL and to similar firms.

The Planning Department acknowledged to us that suitable sites for skip companies have been and remain in extremely short supply and that it had several outstanding cases involving skip companies reportedly operating at, or beyond, the margins of relevant planning permissions. It is axiomatic to us that this issue must be grasped realistically in the new Island Plan.

It is the Planning Department's duty to ensure equitable treatment of firms operating or wishing to start up in such markets. We place on record our concerns that a competitor to RSL in the same market appears to have been treated more favourably in respect of putative breaches of planning requirements. In contrast, we fear that complainants in relation to that business have been treated less favourably than in the case of RSL. This is a matter that we will expand upon in our second report.

ANNEX 3 – TRANSCRIPT OF A TELEPHONE CONVERSATION

09.04 a.m. 9th January 2008 – Conversation between Senator F.E. Cohen, Minister for Planning and Environment (FC) and Senator B.E. Shenton, then Minister for Health and Social Services (BS).

FC: Hi Ben.

BS: Hi Freddie.

FC: How are you?

BS: Not too bad. I could not remember my mobile number.

FC: Don't worry. I know the feeling. How was your Christmas and New Year?

BS: It was reasonably quiet. I did the old hospital visit on Christmas Day and all that sort of stuff, so...

FC: Were you here the whole time?

BS: Yes. I was, yes.

FC: Oh, right. It is all a bit depressing being back at work I am afraid. I am not enjoying it.

BS: No. Well, you cannot get away, that is the only problem. I had people phoning me up on Christmas Eve with problems of this, that and the other.

FC: I get people phoning me all the time about planning applications and it is always the same story. They have been let down by the Department, that everything is too slow, the Department is hopeless and it is quite difficult to deal with because half of the complaints are valid and the other half are just... they are trying it on.

BS: Yes, yes. It must be a nightmare for you. I mean, I get a fair few complaints about Health but you just have to sort of go through the processes.

FC: Well, what I have been trying to get [my wife] to agree, and she will not, is to put the house phone on an answer-phone and have another line just for our friends.

BS: Well that is what my dad did. He put the house phone on an answer-phone and went ex-directory and got another line in...

FC: I think that is the thing to do.

BS: ... because otherwise he would be away on business and my mum would be getting phone calls at 11.30 p.m. at night.

FC: Well, [my wife] gets that and sometimes they are quite abusive. And I had one the other night. Some guy was drunk, saying '*I have got a friend over and he thinks that you are saying he is absolute ******* rubbish*' and '*I think you are a *******' ... and going on.

[Laughter]

BS: Yes, sorry about that!

[Laughter]

FC: Some bloke called Ben.

BS: I had had one too many!

FC: On Reg's Skips, I heard from Anne that Reg has got legal fees of £50 – 60,000...

BS: Christ almighty.

FC: ...and may go under.

BS: Well the other thing is they've got to decide whether to appeal or not and they have got to get the appeal in in the next few days, if they decide to appeal. But they are in a bit of a catch 22, because they will only appeal if it looks like

there is a possibility they would be able to roof over the old slurry area, which is where they are keeping the skips at the moment.

FC: Well I have already given them an undertaking that they can do that.

BS: So they can, so it is likely that that will be successful, is it?

FC: Absolutely, absolutely.

BS: Okay.

FC: My understanding of the ruling is that they would not have much chance of an appeal.

BS: Mmm, well...

FC: So I think, I think if you are advising them, you need to tell them that they need to be absolutely sure they have got a really good chance, because otherwise they will end up with another £50 – 60,000 in legal fees.

BS: Yes, yes.

FC: And there is nothing much Planning can do because this is now out of Planning's hands.

BS: Yes, although they were arguing that there was some liability with Planning. Do you not have to go and see the Bailiff about this or something?

FC: Not that I am aware of.

BS: Oh, right. There was this thing that the Bailiff wants you to go to court. It was in the paper.

FC: Oh. I am not aware of that.

BS: Because it was Planning that suggested they move there in the first place.

FC: I will find out but I am not aware of that. I do know that the Planning consent in the first place was fundamentally flawed.

BS: Yes, yes. I was under that impression.

FC: And the Planning Officer has now left, but it is... apparently it was an absolute cock-up.

BS: Right. Okay, okay, so it is likely that they will be able to roof over?

FC: Yes. Absolutely.

BS: Okay, because I have also got this Graham Pallot one but it would be handy if we could organize something with Guy.

FC: I will send Guy an e-mail saying lets all get together for lunch.

BS: Oh, okay. Whenever I send him e-mails he does not reply.

FC: He will, do not worry. A free lunch will get him out!

[Laughter]

BS: Okay.

FC: Alright.

BS: Okay, that is great. That is all I needed to know.

FC: Alright. Speak soon.

BS: Thanks a lot. Cheers.

FC: Bye.