
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR ECONOMIC DEVELOPMENT REGARDING THE ENFORCEMENT OF A CONTRACT TO USE FACILITIES AT BOULEY BAY

**Presented to the States on 10th March 2015
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT**Foreword**

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Minister for Economic Development regarding the enforcement of a contract to use facilities at Bouley Bay.

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

STATES OF JERSEY COMPLAINTS BOARD

10th February 2015

**Findings of the Complaints Board constituted under
the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint
by Mr. A. Sullivan and Mr. D. Sullivan
against the Minister for Economic Development regarding the enforcement of a
contract to use facilities at Bouley Bay**

1. Present –

Board members –

G. Crill, Chairman
C. Beirne
J. Moulin

Complainants

A. Sullivan
D. Sullivan
S. Sullivan
R.C. Duhamel

Department for Economic Development

Senator L.J. Farnham, Minister for Economic Development
B. Goldman, C.B.E., former Harbourmaster
P. Buckley, Harbourmaster
D. Bannister, Group Chief Executive, Ports of Jersey (POJ)
D. Scott, Assistant Director, Economic Development Department
D. Dixon, Adviser, Law Officers' Department

States Greffe

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

The Hearing was held in public at 10.00 a.m. on 10th February 2015 at Trinity Parish Hall.

2. Opening

The Chairman opened the Hearing by introducing members of the Board and outlining the process which would be followed. There followed a short adjournment when the Board, accompanied by both parties, visited the Pier at Bouley Bay.

3. Site visit

- 3.1 Mr. B. Goldman, former Harbourmaster, pointed out the car parking arrangements for members of the public and boat owners on the Pier at Bouley Bay. Public car parking had been marked out in white and parking for boat owners had been marked out in blue. The Board also viewed the area reserved for parking vessels and noted that consideration was being given to reconfiguring the layout of boat parking beyond the crane in order to accommodate larger vessels (there was currently a size limit of 15 feet). The Board noted that the area beyond the crane was a popular spot for rod and line fishing and support for this activity would continue. The Board's attention was drawn to a hatched area, where vehicles were not permitted to park. This area was kept free to allow emergency vehicles to access the pier. It was noted that as official parking permits were not issued boat owners were asked to display their identity details on vehicles. The location of 2 close circuit television cameras was noted and the Board was advised that activation was triggered by a motion detector. Adjustments had been made to record activity over as much of the pier as possible. Mr. Duhamel understood that there had also been an issue with regard to the accuracy of the dates and times shown on footage. The Board was advised that at least 3 months' activity could be stored. The Board was shown a water cabinet which had been installed by Bouley Bay Boat Owners' Association, a physical barrier which was used to control access to the pier and the crane with slewing wheel (which was to be replaced in the near future). The use of the pier and the aforementioned facilities necessitated the signing of an Agreement with POJ (referred to in greater detail in later paragraphs). The Board noted the extent of the Harbour limits.
- 3.2 The Board was apprised of the manner in which Messrs. Sullivan used the pier on a day-to-day basis. This involved unloading items from their vehicles/trailer on the pier, repairing and maintaining their vessel/lobster pots on the pier and using the crane/water facilities. The Board noted that car parking was limited and it was recognised that this was a popular location, especially during the summer months.

4. Hearing

Summary of the complainant's written case

- 4.1 In his written submission, Mr. A. Sullivan had contended that the specific terms of an agreement drafted by the Ports of Jersey (POJ) in relation to the use of pier facilities at Bouley Bay were unreasonable and discriminatory. The agreement stated that the facilities at Bouley Bay could not be used by anyone, except in accordance with a regulatory Agreement between users and the Harbourmaster. As a non-member of the Bouley Bay Boat Owners' Association (BBBOA) Mr. Sullivan had declined to sign the Agreement, believing the sanctions contained therein to be unreasonable. He understood that no such Agreements existed in relation to the use of other public piers.
- 4.2 It was noted that Mr. D. Sullivan had fished at Bouley Bay since his school days. On leaving school he had become a full-time fisherman, fishing up to 200 lobster pots. Mr. A. Sullivan had stated that concerns had been expressed

by members of the BBBOA about this as they did not believe that the bay was suitable for commercial fishing. Following his retirement from commercial fishing, Mr. A. Sullivan had supported his son David, who had taken over the family business. The Sullivans had rented a section of a shed on the pier to store an engine and other equipment. As a result of the alleged theft of some of the equipment, David had enclosed the section of the shed he was leasing in order to safeguard his equipment. This he had done with the permission of the individual from whom he rented the section of the shed. He was subsequently asked to vacate the shed for non-compliance with certain conditions, the details of which he stated he was unaware and of which he had not had sight. Since that time relations between the complainant and members of the BBBOA had significantly deteriorated, and the complainant alleged that there had been malicious damage to his equipment. In March 2013, he had been unable to access the pier with his boat and vehicle to unload his fishing equipment as a chain and pole barrier had been installed at the pier. Mr. Sullivan had contacted POJ about this and had been advised that the installation had not been carried out by POJ. During a subsequent conversation with a member of the BBBOA Mr. Sullivan alleged that he was informed that he “had no right to bring his vehicle and vessel onto the pier and that he had no chance of obtaining a key” (to enable access to facilities on the pier). Mr. Sullivan had subsequently received permission from Mr. P. Le Neve of Ports of Jersey to remove the chain. Following this incident, the Sullivans had met representatives of POJ and other interested parties at Trinity Parish Hall to discuss the matter. Mr. B. Goldman (the then Harbourmaster) had attended the meeting and had undertaken to address the issues raised. However, following a meeting between Mr. Goldman and representatives of the BBBOA, Mr. Sullivan claimed that Mr. Goldman’s stance had changed and that his actions thereafter had not been impartial. Mr. Goldman had subsequently drafted the Agreement referred to above, and Mr. Sullivan had made it clear that he was opposed to the terms of the same and had refused to sign it.

- 4.3 In the written submission to the Board, Mr. Sullivan had detailed an incident which he claimed had taken place on 14th September 2013, when it was alleged that Mr. Goldman had asked a Police Officer to contact the Sullivans to move a vehicle to allow an ambulance access to the pier. Mr. Sullivan senior had taken the call as his son was at sea, and had advised that he did not have a key to the vehicle at that time but would move it as soon as he was able. The complainant claimed that the police officer said this would not be necessary. On returning to shore, Mr. Sullivan junior was met by Mr. Goldman, who advised him that he should not have gone to sea as he had not yet obtained a safety training certificate. Mr. Sullivan junior claimed that he had placed his name on a list to receive the necessary training to obtain a safety certificate, and that there was an understanding with POJ that fishermen could continue to fish as long as they had applied to do the necessary training. Mr. Sullivan junior alleged that Mr. Goldman became very agitated at this point, to the extent that he did not feel safe to come ashore so had remained on his vessel. Mr. Sullivan senior alleged that close circuit television footage of this incident was missing whilst footage of the ambulance passing his vehicle with ease remained. As a result of this incident, Mr. Sullivan had been fined £3,500, a sum which he could not afford to pay. In the written submission, Mr. Sullivan stated that he had been led to believe that when the former

Minister for Economic Development had been advised of this matter, he had not wished for it to be pursued in this manner.

- 4.4 By this point Mr. Sullivan stated that relations between himself and his son, the BBBOA and Mr. Goldman were extremely poor and he felt that a vendetta was being waged against him. Complaints regarding the disposal of bait boxes and a disagreement relating to the cost of the keys followed. Mr. Sullivan also stated that his son had purchased a larger vessel on the understanding that a bigger trailer space would be made available at Bouley Bay. He had been unable to take the vessel to the bay as he had not yet been allocated a larger space. The Sullivans claimed that there had also been some discrepancy in the manner in which boats were being measured. As part of a review of parking on the pier, negotiation on boat lengths had been offered, subject to there being a period of ‘harmony’ demonstrated by both sides.
- 4.5 Whilst Messrs. Sullivan accepted the need for rules relating to the use of the pier and its facilities, the concern was that these were not fair to all parties, and it was suggested that a more flexible approach might be required in respect of commercial and leisure fishing. It was emphasized that the impact of the proposed sanctions was greater on a commercial fisherman than a leisure boat-user and could directly affect the Sullivans’ livelihood. Moreover, the negotiations on extending the length of boats allowed on the pier was dependent on achieving a period of ‘harmony’. It was alleged that the BBBOA had been given significant responsibility for the day-to-day running of the pier and policing the Agreement. It was further alleged that the complainants’ experience had shown that it was impossible for the BBBOA to apply the rules impartially when it came to the use of the pier by Messrs. Sullivan, and there had been considerable interest in whether or not they held specific safety training certificates. Mr. Duhamel recounted the details of a conversation with an individual during which offensive remarks had been made about the complainant and the view expressed that the BBBOA would not be happy until Messrs. Sullivan had been removed from the pier.
- 4.6 The Agreement stipulated that ‘subject to harmony being demonstrated by all users’ there would follow consultation on boat lengths. However, Mr. Duhamel commented that it would be difficult to achieve a period of ‘harmony’ whilst current attitudes prevailed between the BBBOA and the Sullivans, particularly as it was clear from the terms of the Agreement that a single complaint would be construed as ‘disharmony’. He reminded the Board of the Island’s historic and cultural links with the fishing industry and emphasized the need to support local fishermen.
- 4.7 On a related matter, Mr. Duhamel asked whether there was a broader move towards delegating authority to associations/bodies for the day-to-day running of outlying harbours as part of the incorporation of the POJ.

5. Summary of the Minister's Case

- 5.1 In the written submission of the Economic Development Department, Mr. D. Scott, Assistant Director, had referred to the removal of boats under Regulation 2(1) of the Harbours (Jersey) Regulations 1962. It was noted that a Harbourmaster had the power to issue a direction requiring the removal of an unserviceable or abandoned vessel or other obstruction from – (a) a harbour; or (b) territorial waters. A boat in a parking space in a harbour was viewed as an obstruction, as was a boat moored in a harbour which was not authorised under an agreement with a Harbourmaster.
- 5.2 The Department believed the complaint turned on Regulation 6 (which dealt with agreements between the Harbourmaster and users of a pier) of the 1962 Regulations and considered that the Board should, unless there was an obvious error or partiality, not assume the role of the Harbourmaster in terms of how a facility ought to be designated or used. However, he believed that it was reasonable for the Board to consider conduct in the application of the rules set out in an agreement. Mr. Scott understood that the complainant's argument centred on the introduction of the Agreement and the view that the sanctions contained therein were unfair on fishermen.
- 5.3 It was noted that the Harbours (Jersey) Regulations 1962 provided 3 approaches for regulating the various harbours of Jersey. The first option involved the issuing of directions by the Harbourmaster (Regulation 3); the second the issuing of permits (Regulations 4 and 5) by the Harbourmaster and the third the entering into of an agreement with the Harbourmaster. Each provided a different means by which the Harbourmaster could impose general rules on the use of a harbour. The Board noted that failure to comply with Regulation 3 was punishable by a fine of up to £2,000. Failure to comply with Regulations 4 and 5 was punishable by a fine of up to £5,000. In this particular case the Harbourmaster had chosen a route wherein the sanctions were the least likely to result in criminal prosecutions and which allowed for a bespoke sanctions regime to enforce the requirements for the safe and orderly use of the facilities. Consequently the Department argued that a decision by the Board that the use of Regulation 6 was inappropriate was either a decision that such facilities should not be regulated or that criminal law should be used as the main tool for regulation. The sanctions ranged from a withdrawal of access to the pier facilities for one week for the first proven contravention, extending to one month and three months for the second and third breaches respectively.
- 5.4 Whilst the use of a facility without an agreement under Regulation 6 was an offence, the consequences of such an action were determined by the terms of the Agreement between the Harbourmaster and users. The Harbourmaster was the sole decision-maker in respect of any requirements of the conditions of use of a pier under this legislative regime.
- 5.5 With regard to agreements made in accordance with Regulation 6, the Harbourmaster was permitted to formulate a single Agreement for all users. The Regulation did not prevent an Agreement being signed by a representative of an association (such as the BBBOA) on behalf of members. However, it was noted that all members of the BBBOA had signed the Agreement. Where

the administration of facilities could be supervised by a body on a permanent basis in an outlying harbour, it was considered to be sensible and efficient for the Harbourmaster to make use of that body. Whilst the BBBOA could police the activities of its own members in accordance with its own rules and the Agreement with the Harbourmaster, the ultimate arbiter was the Harbourmaster.

- 5.6 There was no requirement for an individual wishing to sign an Agreement with the Harbourmaster to join the BBBOA. However, it was considered reasonable to assume that breaches of the Agreement by anyone using the harbour might be reported to the BBBOA by concerned individuals. The Board's attention was drawn to the facilities on the pier which were designated under the Agreement.
- 5.7 The Board was advised that extensive negotiations between the Harbourmaster and the complainant had been entered into in order to arrive at a solution in terms of the Agreement. With regard to the sanctions contained within the Agreement and the complainant's view that these were unfair on professional fishermen, it was considered that a 2 tier approach would be inequitable. If such an approach was adopted those using the facilities most for their profession would be afforded greater latitude. Changes had been made to accommodate the Sullivans in so far as was reasonable, but it was important that there was a balanced approach to both their needs and those of the BBBOA.
- 5.8 The Minister, Senator L.J. Farnham, addressed the Board advising that, in accordance with the States of Jersey Law 2005, certain functions defined in law as being the responsibility of the Minister were delegated to, amongst others, the Harbourmaster. These included the delegation of responsibility for activities relating to the safe operation of navigation and other marine activities in the harbour and its approaches. The Minister stated that it was clear that issues had arisen at Bouley Bay and, having regard to the competing uses and the shared facilities, the introduction of an Agreement was viewed as necessary to ensure the safe operation of the pier and its facilities.
- 5.9 Mr. Goldman addressed the Board, advising that he had been made aware of the situation at Bouley Bay during the summer of 2012, although it was understood that difficulties between the complainant and the BBBOA had first arisen in 2009 when Messrs. Sullivan had been refused continued membership of the BBBOA. Mr. Goldman stated that by the time he had been asked to become involved, the situation had escalated and there was considerable ill feeling between the parties. He referred the Board to the submitted documentation, which he believed clearly illustrated the amount of time expended on seeking to resolve the issues which had arisen. The difficulties experienced at Bouley Bay had been the catalyst for a review of existing Directions and Notices to Mariners, which had culminated in the formulation of an Agreement under Regulation 6 of the Harbours (Jersey) Regulations 1962. Mr. Goldman discussed the various options open to him in terms of regulation (as detailed in paragraphs 5.3 and 5.4 above) and it was noted that legal advice had been received in relation to the preferred approach. Mr. Goldman considered the adoption of an Agreement to be both sensible and appropriate. The Agreement applied to both members and non-members

of the BBBOA. In terms of the policing of the Agreement, whilst it was noted that the formation of Associations which could oversee the day-to-day management of outlying harbours (in the context of use by members) was encouraged and viewed as mutually beneficial, Ports of Jersey retained a right of veto over any functions carried out by an Association. This included, for example, the allocation of moorings and waiting lists for the same, for which Ports of Jersey retained oversight.

- 5.10 In terms of the formulation of the Agreement, the Board was informed that the views of all stakeholders had been taken into consideration and Mr. Goldman emphasized that, in spite of considerable dialogue, he had been unable to pinpoint exactly what it was about the Agreement that concerned the complainant. He confirmed that there was absolutely no intention of excluding commercial fishermen from using the pier. Initially, the Agreement had required the removal of vehicles parked on the pier after a period of 15 minutes. This had subsequently been extended to 30 minutes at the request of the complainant. The BBBOA had not supported this, and its members had believed that permitting vehicles to remain on the pier for a longer period would present difficulties for users. Subsequently, it transpired that the extension to 30 minutes was not considered to be sufficient by the complainant and further extensions were requested.
- 5.11 Mr. Goldman explained that he had found himself in an almost impossible situation as the goal-posts were continually moving in terms of what was and was not acceptable in the context of the Agreement. The overriding desire was to ensure the safe and efficient operation of the pier and its facilities by the fair and impartial application of a set of rules. The Agreement was viewed as a starting point and was not set in stone, being capable of revision. However, it was not considered appropriate to have different sets of rules to suit the needs of the various users. Mr. D. Dixon, Law Officers' Department, advised that the current Regulations did not allow for facilities to be the subject of both an Agreement and a permit regime. The Board was reminded that the pier was a public facility and the needs of all users had to be catered for.
- 5.12 The Board discussed the policing of the Agreement with the Minister's representatives and noted that, due to limited resources, Ports of Jersey relied upon reports of infringements from members of the public as opposed to actively patrolling the harbour. Mr. Goldman was satisfied that policing of the Agreement was possible. The Board discussed the benefits of an arrangement whereby users of the pier might be provided with a contact number for the Ports of Jersey for use on infrequent occasions when they were likely to be in breach of the terms of the Agreement as a result of a particular set of circumstances. For example, it might be necessary to park on the pier for longer than the stipulated period when carrying out an emergency repair to a vessel. Mr. Goldman advised that whilst there might be room for compromise, perhaps even seasonal flexibility, some form of discipline was necessary and the starting point, as he saw it, was the Agreement. He expressed the view that it was undesirable and inappropriate to be involved in the micro-management of the pier. He went on to explain that he had walked a very delicate tightrope in terms of satisfying all of the parties involved and had also been accused of not supporting the BBBOA by its members.

- 5.13 With regard to the sanctions, the Board was informed that these need not be imposed upon the receipt of a single complaint. Mr. Goldman advised that he had, in the past, used his discretion in terms of the application of sanctions and was satisfied that sufficient scope for discretion existed. The Board was provided with an explanation of the difference between sanctions imposed under the current arrangement and those associated with other legislative regimes. It was recognised that the sanctions under the Agreement were the least likely to result in criminal prosecutions and allowed for a bespoke regime to enforce the requirements for the safe and orderly use of the facilities. However, it was noted that the complainant desired greater flexibility within the terms of the Agreement and particularly in relation to sanctions.
- 5.14 In terms of the complainant's desire to secure a boat parking space for his 16 foot vessel, it was noted that whilst consideration was being given to reconfiguring the existing boat parking, this would require a certain amount of goodwill from other boat owners as spaces would have to be re-allocated in order to facilitate a revised layout. There was currently a waiting list for parking berths and, once allocated by the POJ, the berths could not be reallocated or re-designated without the agreement of the boat owners concerned. This seemed unlikely at present given the difficulties between the parties. On a related matter, the Board was advised that it had come to light that charges in respect of boat parking on the pier had not been collected by POJ for some considerable time. It was suggested that mediation between the 2 parties might be beneficial in terms of restoring harmony and engendering a spirit of co-operation and goodwill. The view was expressed by the Board that as a young man embarking on a career in commercial fishing Mr. D. Sullivan was to be encouraged, and it was felt that more could be done in the context of mediation. Mr. D. Bannister, Group Chief Executive, Ports of Jersey, advised that mediation had been attempted over a prolonged period and that whilst there had been good faith on the part of the BBBOA in terms of moving things forward, the same could not be said of the complainants.
- 5.15 In terms of the day-to-day management of the harbour, Mr. Bannister advised that consideration had been given to employing an individual to patrol the harbour (with cost implications for users) but this had been viewed as "heavy-handed". He refuted comments made by Mr. Duhamel to the effect that oversight of the pier by the BBBOA was in any way linked to incorporation proposals. The Board was advised that, theoretically it would be legally possible for another body, other than the POJ, to assume the rule of the harbour authority upon incorporation. However, the Agreement was not being driven by this and the overriding aim was to secure the safe and efficient management of the facility.
- 5.16 The Board thanked all persons present for attending and the delegation withdrew from the Hearing.

6. The Board's findings

6.1 The Board considered whether the complaint could be upheld on any of the grounds outlined in Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, as having been –

- (a) contrary to law;
- (b) unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
- (c) based wholly or partly on a mistake of law or fact;
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or
- (e) contrary to the generally accepted principles of natural justice.

6.2 The Board concluded that whilst the Agreement was not in itself oppressive or discriminatory, the enforcement of the Agreement had the potential to be discriminatory and oppressive by virtue of the fact that the supervision of the same was almost entirely reactive to complaints made by members of the BBBOA, who had clear antipathy towards the complainant. The Board therefore considered that the complaint could be upheld on the grounds of Article 9(b) of the Administrative Decisions (Review) (Jersey) Law 1982.

6.3 The Board made no comment on the *vires* of the purported delegation of responsibility to the BBBOA. However, the Board was concerned about the lack of direct policing of the pier and the facilities by POJ and the powerful role assumed by the BBBOA by default. In addition, the Board was concerned about the “one sanction fits all” approach. It was felt that this could be materially oppressive and unfair, particularly in the case of more intensive users of the facilities, such as the complainant.

6.4 Whilst the Board recalled that POJ and, in particular, the Harbourmaster had confirmed that there was sufficient discretion as far as the Sanctions set out in the Agreement were concerned, the Board concluded that it would prefer to see the removal in any future amendments to the Agreement of stipulated periods of suspension for first or subsequent breaches, in order that the punishment was appropriate in all the circumstances. It would, for example, prompt an outcry if a failure to secure the crane hook resulting in serious injury was punishable only by a suspension of one week (assuming a first offence). In addition the above the Board decided to make the following recommendations –

- (a) that the Minister provide the complainant with a letter of comfort making it clear that provided the complainants sign the Agreement and as long as the rules were abided by and did not obstruct other users, a degree of flexibility on sanctions would be exercised;

- (b) that the Minister explore the possibility of creating separate terms of use for commercial fishermen, perhaps through the use of permits. These could be tailored to the needs of fishermen and possibly carry different sanctions. The Board suggested that such a system could for instance permit larger fishing boats whilst restricting the size of leisure craft, giving commercial users the option of either applying for a more generous permit but risking greater sanction, or abiding with the universal Agreement. This could be applied to all of the outlying harbours to provide an equitable and generic approach;
- (c) that an officer from POJ be given direct responsibility for Bouley Bay Pier and, more specifically, the policing of the Agreement. The Board did not consider that this would necessitate the recruitment of additional staff, given that it had been informed that there were already existing staff with responsibility for the outlying harbours. The Board felt that it was inappropriate for the Minister to continue to rely upon the BBBOA to police the Agreement as the potential existed for discrimination and the Agreement was, after all, between users and the POJ. Users of the pier could be provided with a direct contact number for the nominated officer. This would be most useful on the infrequent occasions when a user was likely to be in breach of the terms of the Agreement as a result of a particular set of circumstances. For example, it might be necessary to park on the pier for longer than the stipulated period when carrying out an emergency repair to a vessel; and
- (d) that the wording of the Agreement be amended so that under the section entitled “sanctions” the first sentence was preceded with the words “*without prior approval*” (... contravention of these conditions may result in withdrawal of access). This would afford all users the opportunity of liaising with the officer (referred to in paragraph 6.4(c) above) to seek permission for a specific activity, rather than arriving at a situation where a breach automatically occurred.

6.5 The Board asked the Minister to consider the above comments, and to advise it within 28 days of any action he proposed to take.

Signed and dated by:
Mr. G. Crill, Chairman

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Mr. C. Beirne

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Mr. J. Moulin