

PRELIMINARY SUBMISSION TO :

**THE ENVIRONMENT, HOUSING &
INFRASTRUCTURE SCRUTINY PANEL**

By : Julian J C Mallinson FRICS

Date : 17th April 2019

1.0 INTRODUCTION

1.1 I, Julian Mallinson, am a Fellow of the Royal Institute of Chartered Surveyors and a RICS Registered Valuer.

1.2 I am a Director of CBRE, International Property Consultants and I have undertaken valuations of residential and commercial property in Jersey for over 25 years.

1.3 I confirm that the opinions expressed within this submission are my true and professional opinions.

1.4 I was the owner of the property Brise de Mer, La Greve d'Azette, St Clement, that was subject to a Foreshore compensation payment due to alleged encroachments. I understand that it is not the remit of the Environment, Housing & Infrastructure Panel to investigate individual cases, so I will address the wider issue of the Jersey Property Holdings (JPH) Foreshore Policy.

2.0 THE OWNERSHIP OF THE FORESHORE

2.1 The Foreshore is defined as the area of land between "*le niveau de la basse de mer*" - the low water mark of tide and "*le niveau du plein de Mars*" - the highwater mark of full Spring tide.

2.2 Ownership of the Foreshore has historically been claimed by the Crown or individual Seigneurs (a similar position to an English manor Lord) who are holders of a *fief*.

2.3 A *fief* is an estate of land granted by a monarch in return for feudal services. There are 5 senior *fiefs* in Jersey, St Ouen, Méléites, Rosel, Trinity and Samarès.

2.4 A comprehensive review of *fiefs* is detailed in the articles by Messrs. Richard Falle and John Kelleher, published in the Jersey & Guernsey Law Review, June 2008/ June 2010 – "*The Customary Law in relation to the Foreshore – Parts 1 & 2*"

2.5 Seigneurial rights up to recent times were demonstrated by the gifting of the house neighbouring Brise de Mer to its west (the Girl Guide Headquarters) by the mother of the current Seigneur de Samarès, herself Dame de Samarès. Traditionally properties left by someone dying intestate had to be looked after for 40 years (the minimum period for prescription in Jersey) by the Seigneur (if the land was part of the *Fief*) during which time an

heir could come forward and claim possession. As the land was deemed to be owned by the Seigneur of the Fief de Samarès, the house reverted to the Seigneur. The Dame de Samarès was the Island Commissioner for the Girl Guides so the neighbouring property to Brise de Mer was gifted to the organisation in December 1985, who use it today as their headquarters.

2.6 There have not been any decided court cases concerning the ownership of the Foreshore in modern times, however in *HM Receiver General v Selab Securities Ltd 1985*, concerning the ownership of land immediately behind the seawall at St Clement, the defendant claimed the land up to the wall, as this land was part of the original Foreshore it was part of the Fief de Samarès and had ceased to be Foreshore by reclamation and the defendant's title was based on prescription. As this case was settled on a preliminary point the court did not determine the issue of ownership.

2.7 It was the dispute as to the ownership of the Foreshore of the *Fief de la Fosse* during the 1990's / early 2000's that raised the issue of ownership in recent times. Les Pas Holdings Ltd had acquired the Seigneur's rights in 1986 and bought an action against the Crown and the Public to prove title to the Foreshore at La Collette and Harve des Pas. Despite the Crown and the Public refuting this claim the case never reached court as in 2003 Le Pas Holdings agreed to accept a transfer of reclaimed land on the Waterfront in return for the company disclaiming any further title to the Foreshore of the *Fief de la Fosse*. This area of reclaimed land was subsequently sold to Dandara for £10 million who then built the Castle Quay development upon it.

2.8 To quote my Advocate *"the assertion that the Foreshore belongs to the Seigneur who owns the relevant fief and not the Crown was of course central to the Le Pas Holdings litigation. On the face of it the Crown/Public in spite of having seemingly bottomless pockets agreed a compromise settlement and ceded to the Seigneur an extremely valuable section of the Waterfront development site. One can only conclude that they made that very expensive compromise because they were driven to because of a perceived weakness in their claim to the Foreshore. It was an expensive concession in the context of that litigation and as a precedent in respect of similar disputes in respect to the Foreshore"*

2.9 It would obviously be very expensive in a given case to litigate the ownership of the Foreshore given that it would draw in centuries of records and require a putting together of disparate pieces of evidence, as those detailed in the articles by Messrs. Falle & Kelleher

2.10 I therefore contend that although there are no recent decided cases on the general proposition of the Foreshore it is nonetheless clear there are very strong arguments to be made to say the Crown did not own the Foreshore everywhere.

3.0 THE CROWN'S GIFTING OF THE FORESHORE

3.1 The Crown gifted the Foreshore to the Public on 12th June 2015 by way of a Deed (Appendix A). The Public had previously leased the Foreshore at a peppercorn rental of £4,500 per annum.

3.2 The contract states that the Foreshore is transferred *"with all such rights, appurtenances and dependencies as may attach thereto in the state in which they were at the date hereof with all their apparent of hidden defects (vices caches) if any"*

3.3 Clause 2 states *"That the right of access or of exploitation as a matter of longstanding habitual and recognised custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer"*

3.4 The gift was only of the land and not for any structures (to include seawalls) on it.

3.5 The reason for the gifting was reported by Lieutenant Governor General Sir John Mc Coil *"Her Majesty wishes to support the interests and aspirations of the people of Jersey as expressed through their elected representatives The government of Jersey has expressed a view that the ownership of the Foreshore would assist effective management and economic development, particularly in the area of renewable energy projects"*

3.6 The deed makes no mention of alleged Foreshore encroachments and there are no publicly reported comments by the Crown or the States referring to encroachments.

3.7 Although the Foreshore was gifted to the Public many lawyers claim parts of the Foreshore are subject to *fiefs* and owned by the Seigneurs and therefore the whole of the Foreshore is not owned by the Public as the Crown cannot give what is not theirs to give, as opinionated by Advocate Richard Falle in the JEP article – Appendix B.

3.8 A letter by Advocate Falle has recently been published in the Jersey and Guernsey Law Review questioning the validity and effect of the Deed (Appendix B) and it is Advocate Falle's opinion that the Contract is defective.

4.0 ALLEGED ENCROACHMENTS ON THE FORESHORE

4.1 Prior to the Crown gifting the Foreshore to the Public in June 2015 there seems to be little evidence that alleged encroachments were actively acted upon by JPH.

4.2 In September 2003 a Deed of Arrangement was entered into between the Public and East Lodge Ltd (the owners of Les Amarrages Apartments, Harve des Pas) which acknowledged that a section of the seawall coextensive with Les Amarrages belonged in its entirety to the Public and various encroachments (which extended one foot over the seawall) were covered at a total cost of £70,000. However, the property's title deeds prove that successive owners never claimed ownership. The owners had approached the Department of Property Services (now JPH) during the development of a block of 16 flats. The Crown was not party to this contract.

4.3 In 1971 the States acquired an area of reclaimed Foreshore behind the Pontac to La Rocque seawall from the Crown with the intension of gifting this area to the respective house owners as extended garden areas. For an unknown reason, the transaction to the 63 house owners was never completed and in 2009 JPH sought Ministerial approval to complete the transaction with the JPH publicly stating it would be "*morally wrong*" to charge the householders.

4.4 Just 1 ½ years prior to the Public being gifted the Foreshore HM Receiver General was willing to be party to a joint planning application at no cost, for the reinstatement of steps onto the beach at my property- Brise de Mer. HM Receiver General had previously been party to a joint planning application for another set of steps onto the beach in 2010 for the Girl Guides Headquarters (located next to my property), again at no consideration.

4.5 The Crown's benign and cooperative attitude has not been reciprocated by JPH since the Public were gifted the Foreshore and within a matter of months JPH had pursued the owners of 3 properties seeking payment for alleged encroachments – Brise de Mer, Roche de Mer and Le Petit Chateau de la Mer.

4.6 JPH therefore wasted no time in pursuing property owners for alleged historic encroachments that predate the Public's ownership of the Foreshore.

5.0 FORESHORE POLICY

5.1 Once the Public became custodians of the Foreshore JPH immediately began pursuing owners for alleged encroachments, that had been long ignored by the Crown, without any clear and ascertainable policy.

5.2 Due to a number of articles being published in local media (being principally led by the Bailiwick Express) who referred to JPH actions as a “*Backdated Foreshore Infringement Tax*” the Department for Infrastructure (Dfi) was forced to publish its *Foreshore Statement- 15 August 2017* as written by JPH (Appendix C)

5.3 The Foreshore Statement confirmed that the approach taken by JPH was to :

“contact relevant parties when a “trigger” event occurs, these are typically ;

- *Notification of a potential disposal of a relevant property by sale or contract*
- *Submission of a planning consent potentially involving the Foreshore*
- *An approach to the Department”*

5.4 It was over a year later and 2 ½ years after the Foreshore was gifted to the Public that the Department published its Foreshore Policy – *Foreshore Encroachments : Policy of Property Holdings – 11 December 2017* (Appendix D) .

5.5 This policy was finally published due to mounting political pressure, principally led by Carolyn Labey (Deputy of Grouville) who had questioned Deputy Eddie Noel (the former Minister for Infrastructure – Mfi) in the States over the lack of policy. After the Mfi had formally responded to the Deputy she tweeted, *“ No policy, no map and no date the encroachments will be assessed from. Make it up as you go along ! “*

5.6 The Policy identifies 4 principal categories of encroachment and Clause 7 states *“when a decision is made to transact with the encroaching party, the consideration should be ascertained on a case by case basis having due regard to specific factors and details of the encroachment.”*

6.0 COMMENTS ON THE FORESHORE POLICY

6.1 When JPH recommended the policy for approval by the Minister it stated, *“The attached policy has been drafted with the benefit of experience of a number of recent encroachments”* (referring to Brise de Mer, Roche de Mer and La Petit Chateau de la Mer) the policy was therefore retrospectively formulated and written in hindsight as a result of media and political pressure.

6.2 The Policy fails to explain how the extent of the historic Foreshore will be determined, as old maps clearly illustrate the original Foreshore extended many meters inland from the current coastal defences. Substantial areas of Gorey, St Aubin and St Helier are built on reclaimed land and the original Foreshore would have included the whole area now occupied by the road known as La Grève d’ Azette on which the 3 properties actioned to date are located. The name of the inland area of Samares evolved from the Jèrriais words *salse* (saltwater) and *marals* (marsh).

6.3 The lack of detailed evidence as to the location of the original Foreshore makes a mockery of the whole encroachment policy – is JPH intending to pursue the owners of commercial property located on the Esplanade or in Sand Street, which as their names suggest would have been originally located on the Foreshore, or residential owners who live upon reclaimed land in Gorey, St Aubin, St Helier, St Clement and St Brelade’s Bay ?

6.4 Bob Aubert of The Law Officer’s Department has confirmed in writing that *“The Receiver General is not satisfied that our records are definitive enough to ascertain the extent of the foreshore”*.

6.5 By JPH own policy admission its modus operandi is to approach property owners once “trigger” event occur, namely when the property is being sold, the owner has applied for planning permission or directly contacted JPH. However, if none of these trigger events occur, under Jersey law someone may claim ownership, or have “prescriptive title” to land if one has uninterrupted possession of the land for 40 years or more (known as *possession quadragénaire*).

There will undoubtedly be cases when property that is currently encroaching Public land will not transact or be subject to planning applications by June 2055, after which the encroachments effectively become nullified.

By law a property is either encroaching on neighbouring land or it is not, for JPH to elect to ignore property that is blatantly encroaching on Public land and choose to pursue owners only when a "trigger" event occurs prejudices those owners who are seeking to sell or apply for planning permission.

All encroachment claims should be issued in a uniform manner, regardless of the property owners status and should not be discriminatory.

6.6 The modus operandi of JPH was clearly to go after the "low hanging fruit". In all 3 cases of Foreshore compensation payments since the Foreshore was gifted to the Public, the Department has waited for the properties to be in the process of being transacted, when the owners are at their most vulnerable and intentionally blighting the owner's prospects of selling the property. JPH can then sit back and do nothing and the only way an owner can proceed matters is to agree to whatever terms JPH require or to force a resolution by costly and protracted litigation.

6.7 The Policy directly effects sales of property which may be subject to alleged encroachment claims and I am personally aware of home owners who have chosen to remain in their houses and not sell due to concerns over being "fined" for encroachments that predate their ownership.

6.8 There is also the question as to whether the compensation payments should revert to the Crown as the alleged encroachments occurred when the Crown was the owner of the Foreshore. JPH have confirmed that the Crown was unaware of the intention of the States to obtain backdated fines for historic encroachments that predate the Public's ownership.

7.0 THE REACTION FROM THE LEGAL PROFESSION TO THE POLICY

7.1 Due to my employment as a Chartered Surveyor dealing with the sale and leasing of property I am regularly in contact with lawyers and I have had the opportunity to discuss the Foreshore Encroachment Policy with all the leading local property lawyers during the past 4 years. It is the overriding opinion of these lawyers that the Policy is unfair and that the States have become regarded as a “bad neighbour”.

7.2 On 12/06/2016 Advocates John Kelleher and Chris Philpott jointly wrote to Senator Ian Gorst, on behalf of the Law Society of Jersey and Conveyancing Sub-Committee seeking a meeting with the Chief Minister to discuss the conduct of JPH and whether “ *this policy is a fair way to proceed in all the circumstances You may ponder why local lawyers might wish to become involved in this matter. The simple answer is we do not consider the policy to be fair*” (Appendix E).

7.3 On 21/06/2016 the Chief Minister sent a holding reply saying he will revert shortly. Due to a reminder from Messrs. Kelleher and Philpott the Chief Minister referred the matter to the Attorney General who on 01/09/2016 suggested the matter be dealt with by the Minister for Infrastructure stating “ *I have asked for a meeting on this issue is fixed as soon as possible with the Minister for Infrastructure*”.

7.4 As nothing more was heard and responding to another chasing letter the Attorney General responded on the 04/10/2016 “*I have sent a copy of your letter to the Director of Jersey Property Holdings and asked that he consults further with the Minister for Infrastructure who has responsibility for the management of the Foreshore and sea defences.*” (Appendix E).

7.5 Two and a half years later there has yet to be a response from either JPH or the Mfi to the request on behalf of the Law Society of Jersey Property and Conveyancing Sub-Committee to have a meeting, which suggests a rather arrogant contempt for the Law Society, which is typical of the Department’s general attitude to any party disputing the fairness of its actions.

8.0 THE CONTRACT BETWEEN THE PUBLIC AND AN ENCROACHING PARTY

8.1 Once JPH has decided a party is encroaching onto the Foreshore the encroaching party is made to sign a non-negotiable contract which includes the Clause 6 :

“the Public may at any time require the Purchaser by notice served in writing to immediately

- 1) *Remove the encroaching party wall*
- 2) *Remove the terracing*
- 3) *Block up the openings in the seawall*
- 4) *Repair remove and/or replace the steps joined to the seawall”*

The rights granted under the three known contracts were therefore not full title and allowed the Public to require encroachments to be removed anytime in the future.

9.0 THE STATES OF JERSEY COMPLAINTS PANEL

9.1 As a result of my and Alan Luce’s complaint against the Minister for Infrastructure and JPH regarding the way in which our alleged encroachments onto the Foreshore were administered, the States of Jersey Complaints Board released its findings on 1 June 2018 (Appendix F).

9.2 Having reviewed the submissions the Board concluded the actions of JPH were *“unjust, oppressive or improperly discriminatory”* and *“contrary to the generally accepted principles of natural justice”*.

9.3 The Chairman of the Complaints Panel , Advocate Geoffrey Crill said *“We feel when it is approached by a neighbouring owner seeking clarification of a boundary, the Public has a clear duty to act fairly, promptly and transparently in its dealings with that owner. We do not consider that JPH did so in either of these cases”*.

9.4 The Board asked the Minister for Infrastructure to respond to its findings by early August 2018.

9.5 Kevin Lewis, the new Minister for Infrastructure and JPH responded on 7 August 2019 (Appendix G), unfortunately the reply was littered with the following responses “no comment”, “The Minister does not accept this finding”, “The Minister disagrees”, “The Minister does not accept the recommendations of the Board”.

9.6 Advocate Crill responded by saying “In his reply to the Board’s findings, the Minister appears to consider that all property owned by the Public should be dealt with on the same basis. That is clearly nonsense. Some property may be held for entirely commercial purposes, some for the provision of public services and some for more esoteric public benefit, like monuments and sites of special interest. The Board does not consider it to have been appropriate that JPH approached negotiations on an exclusively commercial basis.”

“The Board is also very surprised that the Minister maintains that 16 months was an appropriate period within which to conclude negotiations with the Complainants. Whether it was due to workloads, or commercial transactions being given priority, we feel that the negotiations in these cases were unnecessarily protracted and resulted in a great deal of stress to the Complainants. We hope that once a clear policy regarding the fixing of the boundary of the foreshore and the payment of compensation in relation to any encroachments has been adopted, the Minister will review the terms concluded with Messrs. Luce and Mallinson and refund them any difference between the compensation each of them paid and the amount of compensation that would be payable had the new policy been in place at the time.”

9.7 In a BBC interview Advocate Crill reiterated his opinion that the Minister’s response was “nonsense” and suggested that the Scrutiny Panel should investigate the policy.

10.0 THE CURRENT SITUATION

10.1 During the States of Jersey Complaints Board’s public meeting Ray Foster, Director of Property JPH, said that his department intended to pursue the owners of all properties with alleged encroachments onto the Foreshore within a 5 year period.

As hundreds of people will be affected by this decision it is inevitable that this policy will result in a class action against the Government of Jersey, however to date with 4 ½ years remaining on the JPH timeframe, no such action seems to have been taken.

10.2 Since JPH response in August last year, I am only aware of one property that has been sold that clearly encroached upon the Foreshore, although other transactions may have occurred.

10.3 The house in question was L’Islet (now known as Beachside), La Grande Route de la Cote, St Clement, that was sold on 16/11/2018 by Danielle Theron for £1,280,000 (Court Reference 1424/809), estate agent’s particulars and photographs are attached Appendix H.

10.4 From the sales particulars and photographs it is blindingly obvious that the house has private steps onto the beach, the boundary wall is on top of the seawall, the amenity space extends up to the seawall and the balcony extends onto the *relief* of the seawall

JPH had fined the owners of the three properties Brise de Mer, Roche de la Mer and Le Petite Chateau de la Mer for the exact same alleged encroachments in 2015/2016.

10.5 I spoke to Ms. Theron who informed me that she requested JPH to inspect her house prior to the sale and after a visit to the property JPH informed her that it had decided not to fine her for any of the encroachments.

10.6 In June 2018 Karen Mc Connell, the Comptroller & Auditor General published a review of how the States manage their property portfolio that revealed the damning verdict that over the ten years after the establishment of JPH, the department has only achieved one of its main objectives. The report focuses on JPH failure to implement a property strategy and a lack of joined- up thinking.

10.7 Shortly after the Comptroller's review, Ray Foster, Director of JPH and the architect of JPH Foreshore Policy, resigned and has now been replaced by an interim head of the department, Tim Daniels. It remains to be seen if the acting head of JPH has the authority to review the current Foreshore policy, which clearly isn't being adhered to, as illustrated by the recent sale of L'Islet.

10.8 From the Minister's and JPH response to the findings of the States of Jersey Complaints Panel it is evident that JPH intends to ignore the vast majority of the Panel's recommendations and that, amongst other things, still considers it to be fair and acceptable policy to :

*** Ignore legal advice received by a party**

*** Charge a party for an independent valuation, refuse to share the valuation and then to force the party to pay a higher price than the valuation figure.**

*** To take 1 ½ years to ratify a boundary.**

*** To issue a non-negotiable contract that can require the encroachments to be removed at any time without reimbursing the party its payment for the encroachment.**

*** To charge parties for encroachments that predate their ownership.**

APPENDICES

- A - Deed of transfer of Foreshore between Crown & Public
- B- Advocate Falle's articles
- C - JPH Foreshore Statement – August 2017
- D- Foreshore Encroachments : Policy JPH -Dec.2017
- E- Letters from the Law Society of Jersey
- F- States of Jersey Complaints Board Findings
- G- JPH response to Complaints Board
- H- Details of L'Islet – recent sale

A

Deed of transfer

To all to whom these present letters shall come

Timothy John Le Cocq
Deputy Bailiff, representing

WILLIAM JAMES BAILHACHE, Bailiff of the Island of Jersey under our Sovereign Lady Queen Elizabeth the Second by the Grace of God Queen of the United Kingdom of Great Britain and Northern Ireland and her other realms and territories Defender of the Faith sends greetings.

BE IT KNOWN that there appeared personally before us in the Royal Court of Jersey at Saint Helier on 12th June, 2015:

HER MAJESTY (which expression shall include Her heirs) represented by **DAVID MICHAEL PETT**, Her Majesty's Receiver General, acting pursuant to a Letter signed by the Lord Chancellor and Secretary of State for Justice dated 1st May, 2015 of the one part; and

THE PUBLIC OF THE ISLAND (the "Public" which expression shall include its successors in title) represented by **ROBERT JAMES MACRAE, Q.C.**, Her Majesty's Attorney General and **MICHAEL NELSON DE LA HAYE, O.B.E.**, Greffier of the States of Jersey acting pursuant to an authorisation dated 11th June, 2015 signed by the Assistant Minister for Treasury and Resources, of the other part.

HER MAJESTY has **GIVEN CEDED AND TRANSFERRED** in perpetuity to the Public all such title rights and interests of the Crown in right of the Bailiwick of Jersey in the hereditaments set out hereunder:

THE sea bed ("*le fond marin*") and all rocks reefs islands and islets found therein situate between the Low Water Mark of Tide ("*le niveau de la basse mer*") to the furthest extent of the Territorial Sea situate all around and adjacent to the Bailiwick of Jersey (the "Sea Bed");

ITEM, all and any abandoned wreck and materials of whatsoever nature or kind they may be and wheresoever situate on or in the Territorial Sea at the date hereof;

ITEM, all that Foreshore ("*rivage de la mer*") situate all around and adjacent to the said Bailiwick of Jersey and being all those parts of the land rocks reefs islands islets and beaches which are found thereon and lying between the said Low Water Mark of Tide and the said High Water Mark of Full Spring Tide ("*le niveau du plein de Mars*") of the other hereditaments now given ceded and transferred wheresoever that may be found (the "Foreshore");

ITEM, all rocks reefs islands islets seawalls sea defences harbours moorings slipways jetties dykes promenades and generally all and any other structures and appurtenances of whatever nature or kind as may presently be found upon or be constructed on the Sea Bed and the Foreshore together with all and any land which may lie between any of the aforesaid sea walls and sea defences constructed or found on any part of the Foreshore and the said High Water Mark of Full Spring Tide;

PROVIDED ALWAYS AND FOR THE AVOIDANCE OF ANY DOUBT all that land rocks and reefs situate above the High Water Mark of Full Spring Tide ("*le niveau du plein de Mars*") such as may be found on the reefs and islets of "Les Ecréhous" situate in the Parish of Saint Martin and "Les Minquiers" situate in the Parish of Grouville are hereby expressly reserved unto Her Majesty.

IT BEING agreed and understood between Her Majesty and the Public:

1. **THAT** neither the whole nor any part of the Sea Bed forming part of the Territorial Sea shall ever be sold ceded or transferred in perpetuity without the prior consent of Her Majesty which consent shall be withheld or granted on such terms as Her Majesty may in Her absolute discretion determine **PROVIDED ALWAYS** that the grant of any lease by the Public of any part of the said Sea Bed for a term not to exceed 150 years shall not require the prior

consent of Her Majesty and shall not constitute any breach of this restriction. **IT BEING FURTHER AGREED AND UNDERSTOOD** that no contract of alienation in perpetuity of any part of the Sea Bed shall be passed before the Royal Court of Jersey save and except one which shall include as a contracting party Her Majesty to confirm and ratify the terms and conditions thereof.

2. **THAT** any right of access or of exploitation exercised as a matter of longstanding habitual and recognised custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer.
3. **THAT** for the avoidance of doubt the Lease of the Forshore entered into between Her Majesty and the Public and passed before the Royal Court on the 18th March 2005 is from the date hereof cancelled and of no effect but without prejudice to anything done thereunder and in accordance with the terms thereof and to the continuance in force of any concession assignment or other right or interest properly granted or ceded thereunder.
4. **THAT** the Public by these presents indemnifies and shall keep indemnified and hold harmless Her Majesty against all or any liabilities, claims, actions, demands, costs and expenses whatsoever in respect of the hereditaments hereby given ceded and transferred.

THE WHOLE IN PERPETUITY.

5. **IT BEING** further understood and agreed between the parties that the understandings and agreements herein contained bind Her Majesty solely as Sovereign in right of the Bailiwick of Jersey.

THE hereditaments were given ceded and transferred with all such other rights, appurtenances and dependencies as may attach thereto in the state in which they were at

the date hereof with all their apparent or hidden defects ("vices cachés") if any situate in the aforesaid Island and Bailiwick of Jersey.

THE Public being bound to conform to all the clauses conditions and restrictions to which Her Majesty was subject for and on account of the title rights and interest of Her Majesty now given ceded and transferred of which Her Majesty has been possessed from time immemorial and by sovereign right.

THE hereditaments were given ceded and transferred with immediate possession.

THE whole without guarantee of title on the part of Her Majesty or Her successors.

IT WAS AGREED between Her Majesty and the Public that all and any rates periodic payments and rental due in respect of the hereditaments now given ceded and transferred for the current year together with any Goods and Services Tax which may be due thereon shall be payable by the Public.

AND the parties swore that they would neither act nor cause anyone to act against this present contract on pain of perjury.

IN WITNESS whereof we have sealed these present letters with the Seal of the Royal Court; present hereto

LOD

B

Advocate Falle's Articles

The Editor,
Jersey and Guernsey Law Review

August 2018

Dear Sir,

My object in this letter is to question the validity and effect of an hereditary contract dated 12 June 2015 ["the Contract"]. This, a gift from the Crown, is the purported conveyance to the Public of the seabed and all the foreshores surrounding the Island of Jersey excepting only those parts of the Ecrehos and Minquiers reefs which are above the high water mark of the spring tide. On the strength of the Contract, the Department for Infrastructure now claims proprietary possession and in December 2017 published a paper entitled "Encroachment upon the foreshore". The titles of a number of property owners whose land extends to the high tide mark have since been challenged, raising for conveyancers questions bristling with technical interest, for those whose titles are affected potential cost and uncertainty, and for the wider community concerns for the continuing inviolability of proprietary rights in land.

As Seigneur of the fief of Lulague dit Mourier in the parish of St John which claims foreshore at Ronez, I consider my title to have been disparaged by the passing of the Contract. Save therefor, I have no personal or professional interest to declare. I also have to make it clear that although I am a member of the editorial board of this Review, the views expressed below are mine alone.

It is my opinion that the Contract is defective. Not only is the subject matter of the gift uncertain in extent but it appears to have been made without regard to settled principle, third-party rights, conveyancing practice and the Jersey law of property, all of which would appear to justify the following observations:

1. The words of conveyance employed in the Contract are at first sight, wide, comprehending "all that foreshore situate all around and adjacent to the ... Bailiwick of Jersey including... all those parts of the land, rocks, reefs, islands, islets and beaches which are found thereon" and the seabed. This description is however, qualified, because what is to pass in virtue of the conveyance is expressly limited in these terms

"The Public being bound to conform to all the clauses conditions and restrictions to which Her Majesty was subject for and on account of the title rights and interests of Her Majesty now given ceded and transferred of which Her Majesty has been possessed from time immemorial and by sovereign right."

It is not in issue that title to everything described above and possessed from time immemorial [foreshore] and by sovereign right [seabed] would pass with that conveyance. But what of those "title[s] rights and interests" in the "land, rocks, reefs, islands, islets" such as Green Island, and beaches which Her Majesty has not possessed from time immemorial or at all? It must be arguable that on a

proper construction only land with the provenance expressly given could have passed in the Contract. The development of that argument is however not central to my purpose in writing this letter. What follows is not unrelated; but it is my theme that the parties intended by the passing of the Contract to suppress private titles in the foreshore.

2. The Crown's paramount feudal title to land in right of the Norman dukes is not in question. The nature and extent of its proprietary rights in land are, however, like those of any private person, determined by law and subject to investigation and proof. Fundamental to the proof of title is a demonstration of provenance. It follows that, if the Crown's claim to have enjoyed immemorial possession of all the foreshores surrounding Jersey is not sustainable, its capacity to pass title must be vulnerable to scrutiny. In what follows, I seek briefly to demonstrate that the provenance given in the Contract is not only in large part inaccurate, but worse, seriously misleading. The evidence is clear: the Crown could not claim immemorial or indeed any Crown possession of those many foreshores which for centuries fell within the strictly territorial jurisdiction of the Seigneurs of maritime fiefs. Such jurisdiction existed largely to enforce feudal rights, *e.g. Varech*, which before the Abolition of Seigneurial Rights (Jersey) Law 1966 were fundamentally based upon ownership of the foreshore. Moreover, that seigneurial jurisdiction and its exercise over the foreshore were for centuries repeatedly recognized by judgments of the Royal Court and the Privy Council.

3. Support for this position is not entirely dependent upon ancient authority. Before the International Court of Justice in 1953 the Crown succeeded in proving sovereignty over the Minquiers Reef, basing its case upon the territorial jurisdiction of the Seigneur of Noirmont over the foreshores of that fief.

The pleaded reply of the United Kingdom states this on the question of the fief of Noirmont [ICJ Vol 1 page533]

"An essential fact to be stressed regarding the Fief of Noirmont is that the Minquiers were considered to be part of that fief. In the submission of the Government of the UK, the Minquiers were included within the Fief of Noirmont by the Crown's exercise of its manorial right to the wreck of the sea".

Professor Wade, counsel for the UK Government, who was also a distinguished historian, had no doubt -

"There can be only one conclusion: the basis of jurisdiction and of the claim was territorial, and only territorial. If a claim was made, or jurisdiction exercised, it could only be on the basis that the wreck had been washed up on the Lord's shore."¹

The finding of the Court was equally clear. Citing the *Grand Coutumier de Normandie* as authority, it stated -

" The Court inclines to the view that it was on the basis of this ancient Norman Custom that the Manorial Court of Noirmont dealt with them on behalf of the Lord in whose fief the wreck is found: the Lord of Noirmont ..."

¹ ICJ *The Minquiers and Ecrehos Case*, oral arguments etc. Vol II Pages 125-127

4. It is worth recording that Professor Wade, when addressing the ICJ, was able to confirm that this same custom continued to be recognized in Jersey in 1953. He said this -

“ It is totally contrary..... to all those feudal concepts that seemed to have regulated such matters in Jersey, it is contrary to English law, and it is contrary to Jersey Law at the present time...”²

The source of that information must surely have been Mr Cecil Harrison, then Jersey’s Attorney General, also appearing for the Crown.

It is surprising to note the striking inconsistency between the Crown position in 1953 and the advice given by the Crown Officers in 2015 which founded a claim to Crown title to all the shores around the Bailiwick based on “immemorial possession”. It is surely also ironic to recall that this was the very claim made by the Men of the Islands in response to the mediaeval *Quo Warrantos* and one which would ultimately be conceded and confirmed to them by Edward III in his Great Charter of 1341, and thereafter repeatedly confirmed by successive sovereigns and finally by Parliament.

5. All this of course is not to cast doubt on Crown title to the seabed under territorial waters. The seabed has always belonged to the Sovereign. There is moreover no evidence that any interest in the seabed under the waters around Jersey has ever been granted to a subject. But seabed and foreshore have throughout legal history been treated as distinct legal entities. The seabed is not and never has been in law or in physical fact, part of the foreshore. The attempt therefore in this procrustean Contract to conflate an unchallengeable title to the seabed with a quite different one to the foreshore was to do violence to established legal concepts.

6. Apart from provenance, there is the issue of formal validity. Article 21 of the *Loi (1880) sur la Propriété Foncière* provides that a contract conveying a parcel of land must, on pain of nullity, define its boundaries. The conveyance of foreshore does not constitute an exception to the law. It must be subject to the same formal requirements as any other parcel of land. It follows that it was wrong in practice to bundle the foreshore and seabed together and describe them in effect as a continuous strip of land surrounding the Island of Jersey.

Given the presence of experienced and competent conveyancers in the Law Officers’ Department, it is difficult to avoid the suspicion that the form taken by the Contract flowed not from any want of competence on their part but was rather determined by other considerations.

7. It is nonetheless difficult to release the conveyancers from all responsibility for the shape and substance of the Contract. Apart from an obligation to treat foreshore as land, separate and distinct from the seabed, they must have known of the existence of third-party titles, that the foreshore is not one but is made up of a number of discrete parcels, each part of a maritime fief, only some of which had ever been in the possession of the Crown. Failure to reflect those facts in the Contract amounted to an unsupported assertion that no private titles in the foreshore exist

8. The Crown’s landed titles in Jersey are well known. Until 1966, the parties to a contract of transfer of land were obliged to make a declaration of the fief – Crown or private- upon which the land to be conveyed was situated. It

² Vol 1 page 128

has always been easy to identify the Ancient Domain. Over the centuries accounts of the Crown estate have been made at intervals in surveys known as *Extentes*. Established by Royal command, their preparation was closely supervised by the Royal Court. The *Extentes* therefore constitute an unchallengeable record of the contents of the Crown estate at particular times with the effect that, if a given parcel of land is not mentioned in the *Extente*, it is generally accepted that it is not on the Ancient Domain. The *Extentes* are published documents accessible to anyone drafting a contract involving rights in land and destined to be sworn by the parties on "*passation*" before the Royal Court. In preparing the Contract, the conveyancer should accordingly have determined, in relation to maritime fiefs, whether they were in the possession of the Crown or the subject of private titles and, if the former, the root of title. He could easily have established whether the particular fief and its foreshore was part of the Ancient Domain or held by the Crown in virtue of a feudal accident such as escheat or confiscation. A significant example of the latter would be the properties of the Alien Priors, whose foreshores have been held by the Crown and administered separately from those of the Ancient Domain since their seizure in the 15th century.

9. All the evidence shows that the Crown had never, until recently, claimed title to the foreshores of private fiefs. It is a matter, therefore, of particular concern that foreshores to which the Crown had no proprietary claim should have been included in a purported gift to the Public.

10. While the Queen can do no wrong, she can nonetheless be wrongly advised. Many of the affected titles are based, not only upon customary law, but upon ancient Crown grants, confirmatory Royal Letters Patent and/or supported by judgments of the Royal Court and the Privy Council. Those titles comprise much of the foreshore surrounding this Island. It must therefore be supposed that Her Majesty's advisers will have passed the Contract in her name in the mistaken belief that a simple contract could lawfully override such ancient titles and even override solemn reservations in earlier laws enacted by the States and confirmed by Order in Council.

11. The Crown is not above the Law and will therefore recognize and be bound by established principle, in this case one forcibly expressed in the dictum of Lord Mansfield in *Goodtitle d Edwards v Bailey*³ -

"It shall never lie in the [grantor's] mouth to dispute the title of the party to whom he has so undertaken... No man shall be allowed to dispute his own solemn deed."

The dictum is not dusty. It was cited with approval by Lord Millett in *First National Bank plc v Thompson*⁴.

12. Perhaps it is in obedience to this or a like principle that it is generally understood that the Crown will not derogate from a grant made by Royal Letters Patent. It is difficult however to square that understanding with this particular contract where, if derogation was its intended effect, it would provide a remarkable example of indifference to Royal Charters, Royal Letters Patent, ancient Crown grants, and titles based upon immemorial possession.

³ [1777] 2 Cowp 597 at 600-601

⁴ [1996] 1 All ER 149

13. Challenged, the parties might point to the reservation of private rights made in paragraph 2 of the Contract.

“ It being further agreed and understood -

...

2. That any right of access or of exploitation exercised as a matter of long-standing habitual and recognized custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer.”

This is a feeble form of words. What we have here are not mere “rights of access or of exploitation” but rights of property in land which are not dependent upon recognition by the general public. This clause is calculated not to preserve but to disparage existing titles to land. It should be contrasted with the unambiguous reservation of rights and titles made in 19th-century Laws confirmed by Order in Council, two of which remained law in Jersey throughout the 20th century. They include:

a). Three laws governing the harvesting of *vraic* [seaweed]: 1829 [art11], 1866 [art12] and finally, art 13 of the *Loi [1894] sur la Coupe et la Peche des Vraics* all contain this statement

“ Il n'est pas entendu déroger, par cette Loi, aux droits qui peuvent exister à l'égard de quelques pecheries particulières, ni aux droits des Seigneurs de Fiefs particuliers.

[translated] “It is not intended by this law to derogate from the rights which may exist in relation to certain private fisheries, nor to the rights of Seigneurs of private Fiefs.”

b). *Loi [1882] sur les Parcs à Huitres*. Art 3 provides, *inter alia*, that applicants for a concession to establish an oyster bed must in their supporting documentation...

“donner les noms et adresses des propriétaires ou prétendus propriétaires du fonds ou de partie du fonds ou des personnes qui occupent le fonds ou partie du fonds qu'on propose d'approprier ainsi que la nature de leurs titres:”

[translated] “ give the names and addresses of the proprietors or intended proprietors of the subsoil or part of the subsoil or of the persons who occupy the sub-soil or part of the sub-soil which it is proposed to appropriate, as well as the nature of their titles”.

Article 4 requires the authorities to give publicity to any application for a concession: –*“afin que tous ceux qui pourraient avoir ou prétendre avoir des droits particuliers ou antérieurs à telle partie du bord et rivage de la mer qui sera désignée ... puissent en avoir connaissance.”* [translated]“In order that all those who might have or pretend to have private or precedent rights to that part of the foreshore ... may have knowledge of it.”

Article 18 of the 1882 Law provides: –

“Il n'est entendu déroger par la présente Loi aux droits qui pourraient avoir les particuliers à certaines parties du bord et rivage de la mer en vertu de Chartres, Lettres Patentes ou usage immemorial.”

[It is not intended to derogate by this present Law from the rights which particular persons might have to certain parts of the foreshore in virtue of Charters, Letters Patent or immemorial usage.]

14. It is noteworthy that Article 1 of the 1894 law mentioned above, before amendment in 1928, defined the extent of the foreshore by reference to the boundaries of fiefs -

“La coupe du vraic sur la côte de l’Est ... sera permise... depuis les rochers du château Elizabeth allant Est jusqu’au courant d’eau qui sépare le Fief de la Reine en la Paroisse de St Martin d’avec le Fief de Rozel”.

[the cutting of Vraic on the the East coast shall be permitted..... from the rocks of Elizabeth Castle[repeatedly confirmed by the Royal Court as the western extent of the Fief de la Fosse] going east as far as the stream which separates the Queen’s Fief in the Parish of St Martin from the Fief of Rozel.]

This last provision unambiguously amounts to statutory recognition of legal boundaries between the Crown and private fiefs extending over the foreshore, boundaries which would have been familiar to the large number of people who, like their ancestors before them, had for centuries been involved in the harvesting of *Vraic*.

15. The express saving of “fisheries” in the vraicing laws was made to protect the lawful enjoyment of such private titles on the foreshore. One example is the fishery appurtenant to the *Manoir des Prés* in the parish of Grouville which the owner holds in virtue of an ancient grant from the Crown confirmed by judgment of the Royal Court following a title dispute in the 1740s. The fishery extends over a significant area of foreshore north of Seymour Tower, its boundaries marked with a large “P” [for the family Payn] cut into the rocks pursuant to that judgment.

16. Any response to these objections by those advising the Department of Infrastructure would in my opinion have to address the relevance of two ancient maxims “*Nemo dat quod non habet*” and “*Res inter alios acta alteri nocere non debet*”. The first, although a statement of the obvious, is nonetheless, evergreen. Where the Crown lacks title it cannot dispose of the rights of others. The second embodies another fundamental legal principle: a transaction between others will not prejudice anyone who is not a party to it.

17. To some, this argument may appear arcane. For the reasons advanced above, I take a different view. But apart from those whose seigneurial titles are threatened by the Contract, the ownership of the *solum* of the foreshore is of immediate practical concern to a large number of persons with properties on the edge of the sea. Given the matters to which I refer in my opening paragraph, and in the light of the above generally, some might reasonably argue that on a proper construction of the Contract, the words of conveyance in terms limit the title passing to the Public to those foreshores of which...” Her Majesty has been possessed from time immemorial...”. It is a construction which, if agreed, would surely offer the parties to the Contract a dignified withdrawal from what would seem to be an untenable position.

18. Unfortunately, settlement of the long running claim of Les Pas Holdings Ltd against the Crown and the States of Jersey some years ago in relation to the foreshore of the Fief de la Fosse meant there would be no definitive judgement on the Law governing foreshore titles. Two long articles in

this Review by Advocate John Kelleher and me, written following that settlement, preserve some of the evidence and rehearse the arguments . Yet despite what was a largely unanswered claim, the parties to the Contract have on one construction, which it must be assumed they favour, attempted without lawful authority to appropriate private titles in land. In doing so they have in my view done violence to the principle of private property upon which our society is substantially based . It is surely an exceedingly bad precedent.

Yours faithfully,

Richard Falle

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Grouville
Jersey JE3 9UZ

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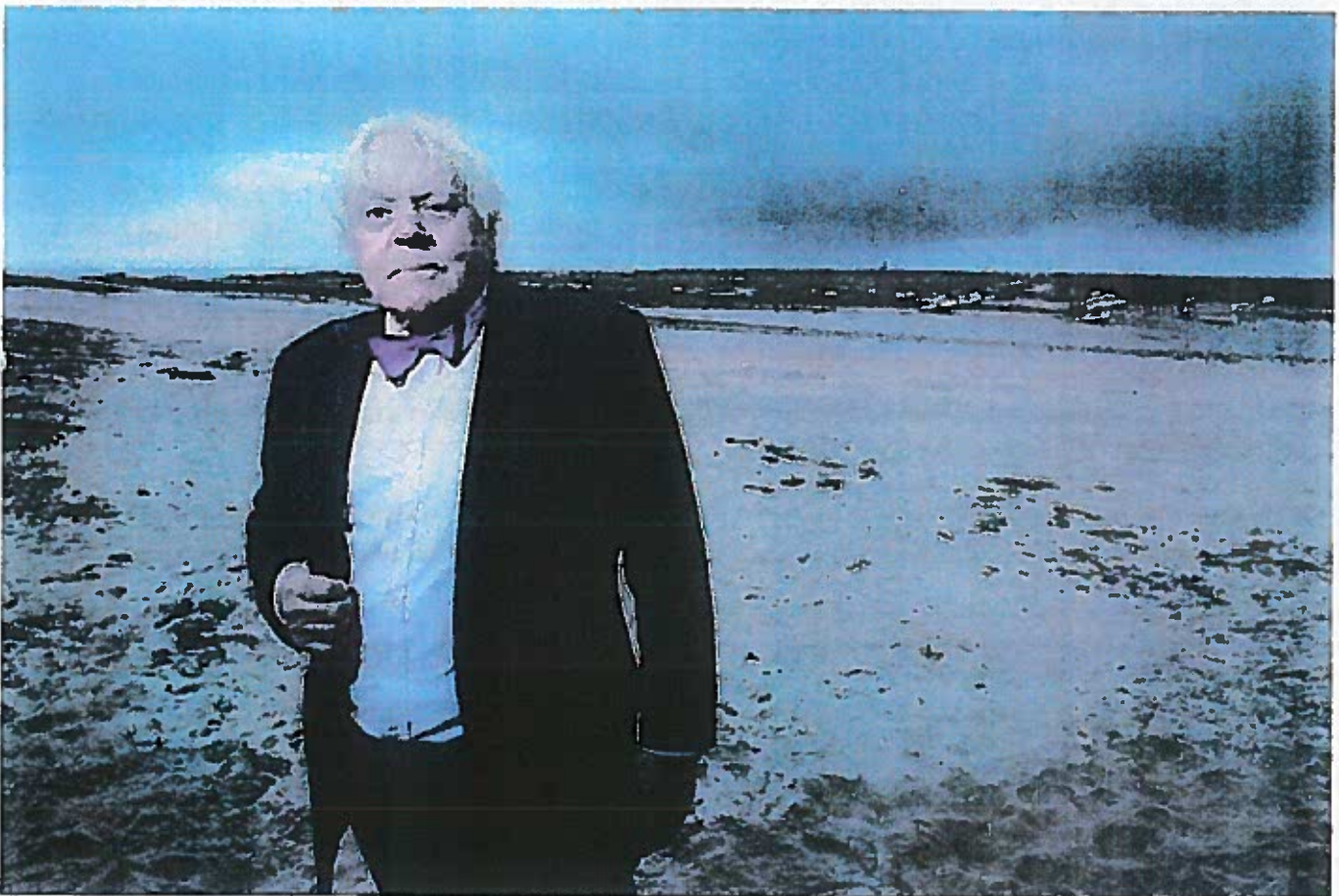
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TAXPAYERS could once again be left having to pay huge damages to landowners with ancient claims to Jersey's foreshore and seabed, the lawyer who made millions from the infamous Les Pas saga has warned.

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Advocate Richard Falle says that the Island and the Crown could be sued under feudal law following the Queen's decision last week to give the Island's foreshore and seabed to Jersey.



St Ouen's Manor

- A fief is an estate of land granted by the monarch in return for feudal service - the terms of service vary for different fiefs.
- In Jersey the holder of a fief is called a Seigneur - a similar position to an English manor lord.
- There are five senior fiefs in Jersey - St Ouen, Rosel, Samarès, Trinity and Méléches. The largest and most important is St Ouen.
- There are countless minor fiefs in Jersey, several of which have been confiscated by the Crown.
- One of the surviving feudal duties for the Seigneur of Trinity is to present the monarch with a pair of mallard ducks when they visit the Island.
- A duty of the Seigneur of Rosel is to act as the butler to the monarch whenever they are in the Island.
- The fiefs have their roots in feudal allegiance to the Duke of Normandy during the 11th and 12th centuries.
- Fiefs are inherited but can be bought and sold - most are considered to have only a sentimental or ceremonial value nowadays. [/breakout]

He believes that under centuries-old law private rights to many areas of the foreshore do not belong to the Queen but instead to Seigneurs, or feudal lords, who were granted fiefs - hereditary property rights - by past monarchs.

'The legal view in my opinion is that you cannot give away what you do not have,' said Mr Falle.

If he is right, the Island could see several reruns of the 14-year legal battle he fought over the area of land on which the reclaimed Waterfront now sits. In 2003, the States effectively paid off Mr Falle and others in a £10 million out-of-court settlement after he argued that the land belonged to an ancient fief, the Fief de la Fosse, which he owned.

The advocate issued his warning after it was announced that the Crown would be transferring ownership of the Island's beaches and seabed to the public, which will give Jersey more control over those areas, including its territorial waters.

Ministers have said that the move would allow Islanders to profit from leasing out the seabed for wind farms or tidal turbines.

But Advocate Falle says that if any future projects are undertaken in areas where fiefs exist, Seigneurial rights to the land must not be breached or the Crown and the public of Jersey could both face legal action from the Seigneurs.

Because the States settled out of court, his claims to the land under feudal law were never tested.

However, the States paid Les Pas Holdings, a company which acted on his behalf, the 2003 multi-million-pound settlement in return for Mr Falle giving up his rights to the land.

They did so despite a public campaign led by the late former Senator Dick Shenton, who came out of retirement to voice public outrage over the feudal claims to the land.

Advertising

Mr Falle was the Seigneur of the Fief de la Fosse, which gave him a claim to a large area of foreshore – the area between low and high tide – along the Waterfront.

In return for giving up the rights to the contested land, Les Pas Holdings was given a £10 million parcel of reclaimed land.

The land was later sold to Dandara and was developed into the Castle Quay complex.



The area of land sold by Le Pas Holdings was developed into the Castle Quay complex

'The Crown can't give away foreshore which it does not own and there are good many areas of the foreshore where there's a private fief,' said Mr Falle.

'There's no question over the territorial waters – historically they were regarded as the Crown's land up to three miles out to sea and then it was extended to 12 miles.

'But the foreshore is covered by feudal law and they will have to accept Seigneurial rights to certain areas.

'There have been no disclaimers, so the Seigneurs should still have rights to the land along the foreshore.'

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Mr Falle also pointed out that third-party rights along the foreshore need to be taken into account.

'In certain areas of the foreshore, certain rights have also been granted. For example there is a family that has fishing rights in Grouville Bay,' he said.

'Those boundaries have been accepted by the Royal Court and any grants will have to take into account the rights of third parties as well as the fiefs.'

Fiefs were a central principle of the feudal system and consisted of property or rights granted by an overlord in return for allegiance and service.

The rights, which are inherited, could include entitlement to income-producing property or other rights such as hunting or fishing.

Advocate Falle explained that rights held under fiefs in the Island became an issue in the 17th century under the reign of King Charles II.

Charles was asked to grant the wastelands and commons in Jersey to Islander Edward de Carteret but the owners of the fiefs objected as they felt their rights to the land were being ignored.

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Foreshore statement

15 August 2017

A number of articles have appeared in the local media in respect of encroachments on the Foreshore. Some of the content appears to have caused confusion and the following statement sets out the Department's position with regard to encroachments:

Introduction

The Department for Infrastructure has a duty to protect the land interests owned by the people of Jersey, the Public. A requirement for planning permission does not overrule or remove the need to have in place the necessary legal rights to carry out building or other operations on another person's land. Planning applications do not generally involve detailed investigations into ownership of land. The planning department cannot give rulings on ownership and that is not its function.

Encroachments on the foreshore are intrusions on to land owned by the Public, by either building or extending on such land or blocking public access to the land. The encroacher is benefitting from the enjoyment of such land and increased value to their property.

The approach taken by Jersey Property Holdings (JPH) to such issues is consistent with the [2006 Ministerial decision](#) that JPH has a duty to extract the optimum benefit from the Public's property assets.

Background

As a matter of Jersey customary law prescription does not run against the estate of the Crown. This means that no person may claim title to land owned by the Crown simply by occupying it for a long time. So an encroachment on land whilst in Crown ownership will not belong to the person encroaching, no matter how long that encroachment may have persisted.

On 12 June 2015 the Public of the Island were given by Her Majesty the Queen the freehold interest of the Foreshore, which included any intervening land between Foreshore and sea defences and the Seabed to its furthest extent in the Bailiwick of Jersey. Prior to that acquisition, the Public had leased the Foreshore under leases from the Crown and, for many decades before and since those leases being granted, had constructed, maintained and administered sea defences, jetties, piers, harbours and the like on the Foreshore with Crown's consent.

The States, through the Minister for Infrastructure, must consider how best to protect the interest of the Public. Taking no action in respect of encroachments would, over time, risk title to land forming part of the Foreshore passing to parties who have encroached on the land now that the land is no longer owned by the Crown. There is also an element of

unfairness in permitting a small group of people to benefit from obtaining, over time, rights to property which are held for the Public at large without the Public receiving fair compensation.

The purchaser of a property is responsible for verifying the legal boundaries of the property they intend to purchase and should take legal advice before they do so. Where land borders property in Public ownership such as the Foreshore and boundaries may be uncertain, the purchasers or their agents are encouraged to contact the Department to verify the position.

Approach

Before publishing a detailed policy for dealing with encroachments on Public land, whether in respect of the Foreshore or otherwise, the approach taken by the Department for Infrastructure is to contact the relevant parties when a 'trigger' event occurs.

These are typically

- notification of a potential disposal of a relevant property by sale or contract lease
- submission of a planning application potentially involving the Foreshore
- an approach to the Department

The Department cannot ignore a pending transaction involving land that may belong to the Public. To do so would run counter to its obligations to achieve best value for the public purse and risks perpetuating a defective chain of title. What the Department has done since 2015 is to negotiate a fair settlement that reflects the circumstances of each case.

The Department will soon issue a policy on encroachments, which will draw on its experiences to date as well as remaining consistent with any relevant legal duties and the 2006 Ministerial decision.

It is worth noting that before the transfer of the Foreshore to the Public, action was taken from time to time on behalf of the Crown to address encroachments on the Foreshore.

Planning Applications

The Planning Law requires applicants who do not own all the land affected by an application to ensure that a certificate is obtained from any adjoining landowner giving authority for the application being made.

By giving such authority as landowner the Public is not approving the proposed development nor is it granting or giving away any legal rights. The Public is simply allowing the applicant to apply for approval of the proposal.

Contact Details

Any queries on encroachments should be directed to the Department for Infrastructure, Jersey Property Holdings, in writing:

By e-mail to p.holdings@gov.je

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Foreshore

Encroachments : Policy JPH



Department for Infrastructure
Jersey Property Holdings

Policy: Encroachments on the Foreshore

December 2017

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Purpose:

The purpose of this document is to set out the policy of JPH - as approved by the Minister - in respect of dealing with encroachments on the Foreshore and the possible courses of action that the department will follow when encroachments are brought to its attention.

Definitions:

- Consideration: A financial value given to land/property in connection with a proposed transaction.
- Dfl: Department for Infrastructure.
- Encroachment: Unauthorised and unlawful entering upon the land, property, or the rights of another party.
- Foreshore: The land surrounding Jersey, as customarily described as lying between the "high water mark of full Spring tide" and the "lowest mark of tide".
- JPH: Jersey Property Holdings (part of Dfl).
- Reclaimed Foreshore: Areas of the Foreshore which have been subject to development to potentially enhance the use of the land, ie, the construction of a sea defence, and in-filling the void behind the wall to create a level area of land.
- Flood defence: A structure intended to provide defence of land against sea water or coastal erosion. Commonly referred to as a seawall.
- The Minister: The Minister for Infrastructure.

Preamble:

Land transactions in respect of the Foreshore and other Public land are made in the name of "The Public of the Island of Jersey", being a conveyancing term to describe land held by the States of Jersey.

The States Assembly is the elected body through which decisions are made that relate to the Public's land. Standing Order 168¹ provides that the prior agreement of the States is not needed for certain transactions in land if the action is recommended by a body established by the States to manage land and buildings owned by the Public and the recommendation is accepted by the Minister.

JPH was established in 2005 to manage the States' property portfolio, and is now part of Dfl.

This policy concerning encroachments on the Foreshore is intended to complement and supplement JPH's 2006 valuation policy "Statement on Land Valuation" as approved under MD-PH-2006-0094.

The Minister, through Dfl and JPH, has certain responsibilities in respect of the Foreshore including flood defences, control of encroachments and beach cleaning. In addition, other Ministers have a range of functions and duties relating to the Foreshore such as development control, the policing of beaches and controlling deposits in the sea.

JPH, and its predecessor department "Property Services²" have dealt with encroachments on the Foreshore since the early 1990s, with evidence of encroachments dating back considerably further than that. All cases dealt with by JPH and Property Services have had regard to the proper value of the land taken. An exception to this, but which was not an encroachment, was reclaimed Foreshore behind the Pontac to La Rocque seawall built in the early 1970s. In connection with that new wall, the States decided, in 1971, to acquire the necessary Foreshore from the Crown, and to gift the reclaimed Foreshore behind the new wall to the respective house owners as extended garden areas.

Neither the land transaction with the Crown, nor any subsequent transactions with the householders took place at the time. However the view taken was that the decision of the States and subject correspondence with the householders made it difficult to do anything other than completing the transactions on the terms intended in 1971. As such, in 2009, JPH sought Ministerial approval³ to complete the transaction with the Crown and with the householders, and a significant number have since been completed. JPH considers that the 1971 decision of the States did not create a precedent affecting the outcome of encroachments on the Foreshore or other negotiated sales of the Foreshore.

¹ Standing Orders of the States of Jersey in pursuance of Article 48 of the States of Jersey Law 2005

² Established as the Property Management Office under P.43/1991

³ MD-PH-2009-0044

Subject to the above-mentioned primary considerations, JPH/the Minister will address Foreshore encroachments as and when they come to the attention of the department. The purpose of this document is to set out what JPH's approach will be.

Policy:

1. There are three principal categories of encroachment on the Foreshore and bases for resolving them:
 - a. **Minor Encroachments.** JPH may decide to leave such encroachments in abeyance. Refer to policy 4 below.
 - b. **Material Encroachments.** Refer to policy 5 below.
 - c. **Negotiable Encroachments.** Refer to policy 6 below.
2. There is a general presumption:
 - a. against parts of the Foreshore being annexed and incorporated by adjacent private landholdings
 - b. that access by the general public to the Island's beaches, promenades, footpaths and coastline will, wherever possible, be preserved and enhanced when considering requests from landowners to ratify existing or potential encroachments
 - c. that the Foreshore is an amenity to be enjoyed, where possible, by the public in general
 - d. that the Public's property rights in respect of the Foreshore, including areas of reclaimed Public land behind sea defences, will be protected
 - e. that public access is not to be rendered more difficult or even made impossible by the actions of third party landowners
3. A proactive approach is to be taken to dealing with and resolving encroachments on the Foreshore, to include:
 - a. identifying existing and new encroachments
 - b. identifying possible future encroachments via new planning applications, and
 - c. monitoring such other means as may bring an alleged encroachment to the JPH's attention.

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4. Where encroachments onto the Foreshore occur which are of a trivial nature in scale⁴, JPH may decide to allow the status quo to continue. However, landowners may nevertheless consider it prudent to agree a ratification of the position by passing a contract with the Public in the Royal Court to that effect. In such circumstances, the costs of so doing will be borne by the landowner.
5. Any new or recent encroachment on the Foreshore or adjoining Public land which:
 - a. frustrates, obstructs or makes harder the exercise of any of The Minister's/Dfl's/JPH's powers and functions, especially in respect of access for maintenance and repair of flood defences
 - b. compromises the Public's access to the Foreshore or any right of access or exercised right as a matter of longstanding habitual and recognised custom by the general public
 - c. affects the delivery of a service by the States of Jersey

shall, apart from exceptional circumstances, be subject to action to cause the Public's land to be restored to its state prior to the encroachment taking place, and for all costs in doing so to be recovered from the encroaching party.

6. Where encroachments onto the Foreshore occur which do not interfere with the Public's access to the Foreshore and/or affect the delivery of a service by the States, Dfl will either require:
 - a. the removal of the encroachment
 - b. the encroachment to remain, subject to a transaction with the encroaching party to include the receipt of a fair and proper consideration, and any additional costs to future public works that the presence of the encroachment may cause, plus reimbursement of all surveying and legal costs incurred and payment of any relevant taxes such as GST
 - c. the encroachment to remain, but subject to a licence or lease of the encroached land to the encroaching party at a fair and proper consideration

⁴ For example an encroachment by a boundary fence or hedge of a few inches

7. In respect of policy 6.b. above, where a decision is made to seek to transact with the encroaching party, the consideration should be 'fair and proper' and not less than the best that can reasonably be obtained. This must be ascertained on a case by case basis, having due regard to specific factors and details of the encroachment.
8. Where an encroachment has existed for at least ten years, whether or not planning permission has been obtained, and whosoever caused by (that is to say either the current or a former owner), JPH may propose a settlement option, ie, policy 6 - rather than removal. In assessing a fair and proper price for the land in such 'historic encroachment' situations, JPH may also have regard to any circumstances which appear relevant to it concerning the particular encroachment in question, including the period of existence of the encroachment.

End of policy

E

Letters from the Law Society of Jersey

Your Ref:

Our Ref: JDK/SC/1031782/0001/J10401778v1

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12 July 2016

Dear Chief Minister

We write this letter on behalf of the Law Society of Jersey Property and Conveyancing Sub-Committee. In the last year or so, Jersey property lawyers have encountered a new approach by the States of Jersey Department for Infrastructure and Jersey Property Holdings whereby they seek to extract compensation from property owners whose properties border a seawall and over which it is alleged they encroach. Having discussed this development, the Sub-Committee has decided to raise with you whether this policy is a fair way to proceed in all the circumstances. We therefore write to request a meeting with you to discuss the subject.

As a starting point, the approach appears to have been initiated following the transfer by the Crown to the Public of the foreshore on 12 June 2015. The modus operandi our clients have experienced is as follows: a client advertises his or her property for sale. The estate agent's particulars are monitored by the States of Jersey and, shortly after advertising the property for sale, a letter is received by the estate agent from the States of Jersey alleging an encroachment. Typically the States of Jersey invite the estate agent to notify the vendor and any prospective purchasers of the alleged encroachment. The States of Jersey then demand compensation to allow the encroachment, but actually allow it only in a very limited way which ultimately leaves them free subsequently to require the encroachment to be removed.

It is clear that rather than identifying in a public way to all owners whose properties border and encroach on a seawall that the States intend to take action in relation to such encroachments, the States of Jersey are targeting individuals at a particularly vulnerable point i.e. when they are trying to sell their property. Discreet conversations with several politicians indicate that many of them appear to be unaware of this practice and it does not appear to be an officially sanctioned States policy. As you will appreciate, a party facing allegations of encroachment when he or she is trying to sell their

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home is not placed in a particularly strong negotiating position. Either they pay up or cannot sell their home.

The policy adopted is in stark contrast to that which has been adopted previously by the Crown and the States. It is the Crown which, according to the States of Jersey at least, owned the foreshore (and presumably anything built on it) until 2015. What this meant is that for many decades a lot of homeowners were led to believe that any encroachment onto the seawall was not an issue.

As you will be aware, ownership of the foreshore is not a settled question in Jersey law. However most homeowners cannot afford a lengthy legal dispute with the States of Jersey to establish who owns the bit of seawall at the edge of their home.

You may ponder why local lawyers might wish to become involved in this matter. The simple answer is we do not consider the policy to be fair. Whilst one can see a case for the States of Jersey to intervene when a commercial property developer builds a block of flats intentionally and directly encroaching onto the foreshore, that is far removed from a small property owner trying to sell the family home in which they have lived peacefully and undisturbed for some time.

We would be grateful to attend upon you to discuss this matter.

Yours sincerely



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Advocate J Kelleher & Advocate C Philpott
Messrs Carey Olsen
47 Esplanade
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21st July 2016

Dear Advocates Kelleher and Philpott

Thank you for your joint letter to the Chief Minister of 12th July 2016.

I confirm that he will revert to you shortly with a response in relation to the points raised therein.

Yours sincerely



Sue Macnair
PA to Senator Ian Gorst
Chief Minister of Jersey

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10 August 2016

Dear Chief Minister

We refer to our letter dated 12 July 2016 and your holding reply dated 21 July 2016. As indicated in our letter, the Law Society of Jersey sub-committee would be grateful if you would allow us to meet with you to discuss the matter raised. We anticipate a discussion about policy rather than law.

We look forward to hearing from you.

Yours sincerely



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Our Ref: 500.1133

1 September 2016

Advocate J Kelleher and Advocate C Philpott
Carey Olsen
47 Esplanade
St Helier
Jersey JE1 0BD

Dear Advocate Kelleher and Advocate Philpott

I refer to your letters of 12 July and 10 August 2016 to the Chief Minister in respect of the Foreshore and encroachments thereon which he has referred to me. I am now dealing with this matter and any further correspondence should be addressed to me.

It seems to me that this is a matter which should, in the first instance, be dealt with by the Minister for Infrastructure and his officers who, in consultation with my Department, are preparing a policy to deal with this. I have asked that a meeting on this issue is fixed as soon as possible with the Department for Infrastructure following which I hope to be able to advise you further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R MacRae', with a long horizontal flourish extending to the right.

Robert MacRae QC
Attorney General

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Mr R. J. MacRae Q.C.
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28 September 2016

Dear Attorney General

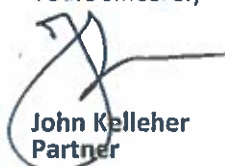
I refer to your letter dated 1 September 2016.

It is disappointing that the Chief Minister has declined to meet with us. The Law Society of Jersey surely, carries some weight as the professional body of Jersey lawyers and one which one might fairly have presumed would merit an audience. This is all the more so since, as our original letter made it clear, it is not our intention to discuss legal issues with the Chief Minister, but rather ask him to address what seems to be a rather ad-hoc and unjustified approach by the States of Jersey to private landowners. I do hope the Chief Minister will reconsider.

In the meantime, I note our original letter was dated 12 July 2016 and we have made no progress whatsoever in this matter since then.

I would be grateful for your earliest attention to this matter.

Yours sincerely



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Our Ref: 500.1133

4 October 2016

Advocate J Kelleher
Carey Olsen
47 Esplanade
St Helier
Jersey JE1 0BD

Dear Advocate Kelleher

I acknowledge receipt of your letter of 28 September 2016 and note its contents.

I have sent a copy of your letter to the Director of Jersey Property Holdings and asked that he consult further with the Minister for Infrastructure who has responsibility for the management of the Foreshore and sea defences.

I will respond to you further once I have substantive instructions from the Minister.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R MacRae', written over a faint circular stamp.

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F

States of Jersey Complaints Board Findings

STATES OF JERSEY COMPLAINTS BOARD

11th April 2018

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

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

Present

Board members –

G. Crill (Chairman)

J. Moulin

G. Fraser

Complainants -

A. Luce

J. Mallinson

Minister for Infrastructure / Jersey Property Holdings –

R. Foster, Director of Estates, Jersey Property Holdings

P. Ahier, Principal Property Manager, Jersey Property Holdings

S. Forrest, Estates Surveyor, Jersey Property Holdings

States Greffe –

L.M. Hart, Deputy Greffier of the States

K.L. Slack, Clerk

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

1. Opening

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

2. Site visit

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

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

3. Hearing

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

4. Summary of the Complainants' case

Mr. Luce – Roche de la Mer

- 4.1 The bundle of papers provided by Mr. Luce, in advance of the hearing, demonstrated that he had acquired Roche de la Mer, formerly known as Littlecourt, on 23rd September 2005. At that time, the part of the property, which was later asserted to constitute an encroachment onto the sea wall, had already been constructed by a previous owner. The contracts of acquisition referenced a right to the opening in the sea wall and the steps, but made no reference to the sea wall itself. At the time of purchase, Mr. Luce had investigated the possibility of paying a one-off insurance premium in the event of there being a catastrophic breach of the sea wall, but had been unable to acquire cover, because he had no insurable interest in the sea wall, or the foreshore, which was, at that time, in the ownership of the Crown but leased to the Public. In June 2015, the Crown made a gift of the foreshore to the Public.
- 4.2 In September 2015, Mr. Luce placed Roche de la Mer for sale with Broadlands Estates. He was subsequently written to – as was Broadlands Estates – on 9th September 2015 by Mr. Forrest, Estates Surveyor, JPH, to the effect that the construction of Roche de la Mer constituted a clear encroachment onto the sea wall, which belonged to the Public of the Island. The letter indicated that JPH had the intention to devise a politically supported policy in respect of encroachments over sections of the foreshore and sea defences. The letter continued, *'In the meantime, it is JPH's intention to commission a valuation of the encroachments and revert with in-principal (sic) terms for a settlement, however, prior to doing so, JPH will require your confirmation that you are willing to participate and that you will be responsible for all fees incurred by the Public, regardless of the outcome.'*
- 4.3 The result of this letter was to cause uncertainty over title issues, which led to potential purchasers withdrawing from the process, or offering significantly below the asking price, subject to the issue being resolved. It also prompted Mr. Luce's mortgage lender to notify him that it would be renewing its arrangement with him every 6 months, as it had concerns over the security of the 'asset'. Mr. Luce indicated that at this time he felt that he was *'at the mercy of progressive buyers'*.
- 4.4 Mr. Luce and Mr. Forrest subsequently spoke on the telephone and on 11th December 2015, the latter sent Mr. Luce an electronic mail message, which stated, *'While one possible solution is to allow the encroachments to remain upon payment to the Public of a financial consideration and the passing of a contract before the Royal Court in which the terms upon which the encroachments could remain would be set out, the Public reserves the right in the alternative to seek the complete removal of all and any encroaching parts of your property. I cannot stress too strongly the seriousness of the encroachments and this should be brought to the attention of any prospective purchaser(s).'* This

correspondence and others emanating from JPH were caveated 'Subject to contract and Ministerial approval'.

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

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

4.7 On 2nd June 2016, Mr. Luce's lawyers wrote to JPH and raised a number of points. In respect of the claim for 'monetary compensation' from their client they asserted that '*the Public ... pitches its unlimited resources against an ordinary homeowner; it intentionally blights the homeowner's prospects of selling by threatening both the landowner and prospective purchasers ... the only way the ordinary homeowner can force a resolution is by costly and time consuming litigation*'. It was also submitted that the Crown had not, in fact, owned the foreshore in the location of Roche de la Mer and that it had been owned by the Seigneur of the Fief de Samarès. Mr. Luce's predecessor in title had owned the land as far as the high water mark. If the sea wall, which had been constructed in 1846, had been built on the high water mark, or to the north of it, the Public had encroached on the land belonging to Mr. Luce's predecessor in title. If it had been built below the high water mark, the Public had encroached on land belonging to the Seigneur. It was questionable, therefore, how the Public

claimed to acquire good title to the wall and how, by its own encroachment, it sought to claim a 'relief'.¹ This notwithstanding, Mr. Luce reluctantly agreed in this correspondence that BNP should be appointed as valuer. It was recalled that the issue of the ownership of the foreshore was not something on which the Board would give an opinion at the hearing.

- 4.8 There followed an exchange of letters and electronic mail exchanges between Mr. Luce's lawyers and JPH over the proposed wording of the instructions to BNP, on the basis that there was no agreement over the extent of the alleged encroachment and Mr. Luce wished for the valuation to be based on various scenarios. On 24th July 2016 Carey Olsen wrote to JPH, '*Our client's position is that the claim is not made out on the arguments you have put forward, but he needs to sell his property and may be forced by the States' never before made claim to settle it.*'
- 4.9 During August 2016 amendments to the letter of instruction for BNP were proposed by Mr. Luce's lawyers and JPH. In an electronic mail message, Mr. Forrest indicated that a new policy in respect of the foreshore and the Island's sea defences was being developed, which would '*address the operational requirements of the Island's sea defences and how these defences can best be maintained ... take in account the provisions of Part 4 (Flood Defence) of the Drainage (Jersey) Law 2005 ... address the Public's position with regard to existing and future encroachments onto the Foreshore and the sea defences and provide a framework for dealing with these on a case by case basis*'. However, it also conceded that '*With regard to ... the diminution in value of the Public's property (the seawall and the land claimed behind it), this land has no inherent value per se. However, as with any land, its value should reflect the use to which it is put.*'
- 4.10 Having instructed BNP, it subsequently emerged that that company was unable to undertake the work until the end of November 2016, which was unacceptable to Mr. Luce as it would have had the effect of further delaying the sale of his property. He had proposed that his original preferred valuer should be used, but this was declined by JPH, who instructed Buckley & Co.
- 4.11 The valuation by Buckley & Co. was obtained on 12th October 2016, in excess of a year after JPH had initially contacted Mr. Luce. Buckley & Co. provided an opinion on a range of possibilities, due to the differing views of the parties. On the one hand, the Public argued that the encroachment at Roche de la Mer extended as far as 8 feet and 5 inches beyond the southern face of the parapet and

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

that the compensation payable should be the resultant increase in the value of the property. On the other hand, Mr. Luce contended that, in the interests of fairness, compensation should be payable on the diminution in the value of the land over which the property was said to encroach, mindful that the alleged encroachment had been constructed before he purchased the property.

- 4.12 Buckley & Co. assessed the diminution in the value of the property alleged to be owned by the Public as building land with planning permission for development as it existed at the time arising from the encroachment. It explored a number of scenarios and the parties agreed the average of the following valuations. The width of the sea wall plus 4ft 4½ inches (3ft of sea wall foundations plus the sea wall relief of 16½ inches) was valued at £51,000. The width of the sea wall, plus 5ft 9 inches (3ft of sea wall foundations plus the relief of the property of 2ft 9 inches) was valued at £62,000. This gave an average of £56,500, which was reduced by half to give the figure of £28,250 plus GST (£29,662.50). Mr. Luce was also required to pay professional costs of £4,500, plus GST (£4,725.00), comprising a share of the costs of the valuation by Buckley & Co. and the Public's legal costs. His total outlay in connexion with this matter was, therefore, £34,387.50.
- 4.13 Buckley & Co's valuations were based on the hypothesis that the sea wall was wider at its base than was actually visible above ground (as referenced in paragraph 4.5 above) and that the foundations '*extended northwards underground for a distance of 3 feet*'. These additional 3 feet cost Mr. Luce in excess of £15,000. However, Mr. Luce provided evidence, within his bundle of papers, that JPH had been made aware in March 2015 - almost a year before they had written to him contending that the foundations extended further inland than was visible – that the sea wall at the location of Brise de Mer had a vertical face to its landside.
- 4.14 When excavation work had been undertaken at Brise de Mer in order to lay the foundations for the columns which supported the balcony, it had been noted that the sea wall had a vertical face. Mr. Mallinson had furnished Mr. Luce with a letter from his structural engineer, which confirmed this. He had also provided electronic mail correspondence between him and an Assistant Engineer at the Department for Infrastructure, in which the latter had opined '*I would not expect the wall construction to extend further landside. I would expect a vertical face ...*' It was extremely unlikely that the sea wall should be constructed in a different fashion at the location of Roche de la Mer, because the 2 properties were located within 50 metres of each other.
- 4.15 On 9th December 2016, Mr. Luce eventually sold Roche de la Mer. The Public of the Island was party to the contract of sale. Clause 15 of the contract read as follows:

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

- 4.16 Mr. Luce indicated that this was an unfair clause as although he had been obliged to pay a significant sum in relation to the encroachment, this clause afforded him no guarantees that it could remain in place, as it gave the Minister the power to oblige him to remove it immediately. Further, he informed the Board that Clause 14 of the contract was incorrect in that it referenced 2 openings and sets of steps in the sea wall onto the beach at Grève d'Azette, whereas there was, in fact, only one opening and set of steps from Roche de la Mer onto the beach. The error had been highlighted to JPH in August 2017, but had elicited the response from Mr. Forrest that *'It is clearly an error that could be easily rectified in the future sale of the property, to which sale the Public would be happy to be party if so required.'* At the hearing, Mr. Luce described this error in the contract as *'sloppy'*, which was accepted by Mr. Foster.
- 4.17 In relation to the 'trigger events' (see paragraph 5.5 below), which would prompt JPH to contact a landowner in respect of a suspected encroachment, Mr. Luce noted that the Department had indicated that it was always willing to discuss a resolution on a 'without prejudice' basis. In his view, this was misleading and contradicted the stated aim of JPH to extract *'optimum benefit from property assets'*.
- 4.18 Mr. Luce notified the Board that having reached a settlement with JPH, albeit under duress, he felt that the Department should treat all people, whose properties potentially encroached on the foreshore, in an equitable manner. He was concerned that the owners of the properties, who were direct neighbours of Roche de la Mer, had not been approached by JPH, presumably on the basis that they were not seeking to sell. He described this as an inadequate and selective process.

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

Mr. Mallinson – Brise de Mer

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

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

4.22 At the time of acquisition, there was one set of steps down from the Apartments to the beach, but there had previously been a second set, which had been removed and the section of sea wall blocked up. In October 2013, Mr. Mallinson contacted Her Majesty’s Receiver General, requesting his consent to be a joint applicant on the form to seek planning permission to reinstate the second set of steps, on the basis that the Crown was the owner of the foreshore. H.M. Receiver General acquiesced, as had similarly been the case in 2010 when the Girl Guides Association had applied for permission to install

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

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

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

4.25 Mr. Forrest responded to Mr. Mallinson on 27th January 2015, having sought the advice of the Law Officers' Department. As was the case with Mr. Luce, this correspondence and others emanating from JPH were caveated '*Subject to contract and Ministerial approval*'. JPH contended that '*The seawall*

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

... cannot form part of the property owned by KSUM Limited by way of prescriptive title and the recently constructed balconies appear to constitute an encroachment onto the sea defences ... We see little reason, then, why KSUM Limited should benefit from the ratification of its encroachments on the preferential basis you seek. Mr. Mallinson subsequently met with Mr. Forrest and Mr. Foster, who refused to entertain any suggestion that the sea wall was not in the ownership of the Crown at that juncture, reiterated that Ksum Ltd had encroached onto the sea defences and sought compensation in order to ratify the boundary.

- 4.26 On the basis that the prospective purchaser's lenders would not provide the funding for the acquisition of Brise de Mer Apartments until such time as the boundary had been ratified, Mr. Mallinson felt that he had no alternative other than to offer £10,000 to effect this ratification and by way of compensation for any alleged encroachments, thereby foregoing his claim to the ownership of the sea wall.
- 4.27 On 9th March 2015, H.M. Receiver General indicated that, in principle, he had no objection to being a party to such a transaction. He referenced Mr. Mallinson's offer of compensation and stated *'Normally I would need to employ the services of a valuation agent for an impartial assessment but this would be time consuming and I believe that time is critical in this matter.'* This notwithstanding, JPH and H.M. Receiver General decided that a valuation was required to calculate the proposed compensation for the alleged encroachment. The valuation was to cover the encroaching parts of the balconies onto the *relief* of the sea wall; access rights to maintain the boundaries; and the use of the sea wall's *relief* as an amenity space. At Mr. Mallinson's request, it was agreed that a separate price would be obtained for the latter. JPH instructed BNP to undertake the valuation, but Mr. Mallinson was not permitted to jointly instruct the firm, so was unable to be party to the terms of reference. Moreover, he was not allowed to have sight of the valuation, which was undertaken on 17th April 2015, despite numerous requests and having been required to pay for it. It was not until the documents were circulated by the parties in advance of the hearing of the Complaints Board that Mr. Mallinson finally had sight of the valuation by BNP, because it had been included in the papers provided by JPH. According to the report of JPH, this initial valuation by BNP suggested a value of between £5,000 and £6,600.
- 4.28 In April 2015 the Brise de Mer Apartments Association was formed in order to facilitate the sale of individual apartments at Brise de Mer.
- 4.29 On 11th May 2015 the Principal Property Manager, JPH, Mr. Ahier, wrote to Mr. Mallinson to the effect that the Law Officers' Department had advised H.M. Receiver General not to participate in the

contract to ratify the boundary on the basis that it would be unsatisfactory to agree a boundary line without addressing the encroachments and that there were concerns around liability in respect of the opening in the sea wall and the steps down to the beach.

4.30 On 12th June 2015, the Crown gifted the Foreshore to the Public of the Island and Mr. Mallinson was informed by JPH that a revised valuation would need to be commissioned to cover additional alleged encroachments on which BNP had not previously been requested to provide an opinion, *viz* the 2 sets of steps, which led from Brise de Mer down to the beach and the *relief* of the sea wall. This notwithstanding that the western set of steps had been in place for in excess of 100 years and the eastern set had been installed, following a joint planning application by Mr. Mallinson and H.M. Receiver General (see paragraph 4.22 above). As previously, Mr. Mallinson was not permitted to jointly instruct the valuer and nor was he permitted to know the contents of the valuation. It was not until the documents were circulated by the parties in advance of the hearing of the Complaints Board that Mr. Mallinson finally had sight of the second valuation by BNP, because it had been included in the papers provided by JPH. According to the report of JPH, the second valuation by BNP suggested a consideration of £18,750.

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

4.32 Mr. Mallinson highlighted that the amount that he had been required to pay JPH for the alleged encroachment at Brise de Mer was excessive when compared with Roche de la Mer and Petit Chateau de la Mer, whose owner had also entered into a contract with the Public. He indicated that there was no correlation between the extent of the alleged encroachments and the valuation thereof, particularly as, at Brise de Mer, the complaint related to a balcony which was overhanging by just 1.13 square foot on to the *relief* of the sea wall. He referenced a letter to Mr. Luce's lawyers, in the case of Roche de la Mer, where JPH had written '*We would seek a valuation based on the diminution in the value of*

your client's property occasioned by the removal of the encroachments, but as we are seeking a solution which permits the encroachments to remain (upon terms to be set out in a future Deed of Arrangement), I see little point in seeking a valuation based on the costs of the removal of the encroachments.' However, when BNP had been instructed by JPH to value the encroachment at Brise de Mer, the valuation was to be based on the cost of removing the same.

- 4.33 Moreover, Mr. Mallinson highlighted that he had, in his view, been treated prejudicially by JPH as he was the only person to be required to pay compensation for the existence of steps from his property onto the beach. The owners of Roche de la Mer and Petit Chateau de la Mer had not been treated in the same way.
- 4.34 At the hearing, Mr. Mallinson asked officers from JPH why they had taken the valuation by BNP and then charged him extra. He cited their own policy, which referenced a '*fair and proper price*' and queried how the actions taken by JPH could be described as fair when they had approached an external valuer to obtain a fair value and then asked for more.

Joint areas of complaint:

- 4.35 Both Complainants expressed the view that JPH had been 'high handed' in rejecting outright any doubts in respect of the ownership of the foreshore, which they had both raised *viz* that the foreshore at the location of both Roche de la Mer and Brise de Mer had been owned by the Seigneur of the Fief de Samarès, rather than the Crown. In early correspondence, JPH had stated that, as far as the Public was concerned, the ownership of the sea wall was not in question. This notwithstanding that a company acting on behalf of a Seigneur of another fief had been given a settlement of land on the Waterfront, worth £10 million, which was indicative of the assertion that legal title to the foreshore of the coast of Jersey was vested in the Seigneurs of those Fiefs that bordered the sea.
- 4.36 Although the Complainants had to meet the cost of the valuations of the encroachments, the way in which the instructions for the valuations were commissioned was a source of frustration for them both. Mr. Luce was refused his choice of valuer, albeit he was afforded input into the letter of instruction and was able to see the valuation. Mr. Mallinson was not permitted to jointly instruct the valuer nor was he informed of the contents of the valuation. Moreover, the Complainants emphasised that JPH had not dealt in an equitable manner with all landowners. They cited the example of the Carlton Hotel, which had paid a significant consideration (£230,000) to the Public in relation to a number of doors

and windows, which had encroached onto La Collette Promenade. They described it as ‘*astonishing*’ that hotels on either side of the Carlton had not been pursued in a similar manner.

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

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

4.39 The Complainants alleged that as soon as the Public had acquired the foreshore in June 2015, it had begun to pursue ‘low hanging fruit’ albeit JPH did not develop a clear policy in relation to encroachments on the foreshore until December 2017. When the foreshore had been in the possession of the Crown, there was little evidence that alleged encroachments had been actively acted upon. Accordingly, for long periods of time many homeowners had been led to believe that an encroachment onto the sea wall was not an issue. Reference was made to the land upon which the sea wall from Pontac to La Rocque was built and the reclaimed land to the rear. In 1971 the States had approved the purchase of the land with a view to gifting it to the neighbouring properties as extended gardens. A severe storm had caused a land collapse which had resulted in the States constructing and backfilling a new sea wall. However, the transaction was not completed and, in 2009, JPH sought the approval of the Minister to acquire the sea wall from the Crown and to transfer to the 63 neighbouring properties the relevant co-extensive sections of reclaimed land behind the sea wall. In the report to the Minister, it was stated, ‘*the land was acquired from the Crown for the sole reason of building the sea wall in 1971, and it would be morally wrong to seek to profit from that land*’.

4.40 It was argued that the conditions imposed within the contracts (clause 15 in the case of Mr. Luce and clause 6 in the case of Mr. Mallinson) were unreasonable, given that they permitted the Minister for Infrastructure to require the purchaser to immediately undertake work, including the removal of any encroaching wall or structure, for which they had paid compensation. Moreover, these ‘clawback’ clauses were causing some lawyers acting for prospective purchasers to advise their clients not to buy

the properties that were subject to such clauses, thereby 'blighting' possible sales. When lawyers acting for the Complainants had highlighted to JPH that the conditions were onerous, JPH had not been willing to negotiate.

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

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

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

5.3 According to JPH, the granite sea wall at Grève d'Azette, which had been constructed in 1846, had been built on the foreshore in order to operate as a sea defence. Part of the foreshore lay behind the inner face of the sea wall to the extent of the full spring tide ('*plein de Mars*'). As a result, when the Public was gifted the foreshore by the Crown, it acquired the area of land behind the sea wall, which was part of the foreshore. This was on the basis that the foreshore was defined as the area lying between the low water mark and the high water mark of the '*plein de Mars*'.

5.4 The granting of planning permission, such as Mr. Mallinson had obtained in relation to the second set of steps at Brise de Mer, did not remove the requirement for the person obtaining such permission to have the relevant legal rights to build, or carry out other operations on another person's land. It would

be expected that a property owner would be aware of the extent of their own property, having been advised of such by their lawyer on acquisition. JPH indicated that there appeared to be an increased awareness of the Public's ownership of the foreshore, as evidenced by the location of the Homestill development at Grève d'Azette, which had been set back from the sea wall.

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

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

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

5.8 The foreshore policy set out the procedure that was to be followed when encroachments were brought to the attention of JPH. The policy provided that landowners were to be notified within 28 days of the discovery of the encroachment. Depending on the 'severity' of the encroachment, there were various

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

- 5.9 As regards the assessment of the 'value' of the encroachment, Mr. Foster indicated that there was no set policy on whether, or not, to engage a valuer. In cases where a piece of land had little value, JPH would be unlikely to use a valuer, particularly if it was the vendor. Where an issue was contentious, JPH would be more likely to engage the services of an external valuer. There was nothing to prevent a landowner from commissioning their own valuation if they were not satisfied with the valuer selected by JPH. In relation to Brise de Mer, JPH had taken the view that because the encroachment was recent, the Department could take its own valuation advice. In the case of Roche de la Mer, the encroachment was historical and had not been constructed by Mr. Luce, so the decision had been taken that the valuer could be commissioned jointly. Once the valuation was received, JPH would take legal advice and then make a recommendation to the Minister as to the level of compensation payable, either at the value provided, or at a different figure.
- 5.10 The policy provided that a valuer, when assessing the value of an encroachment, might consider the following, or a combination of the following: the value added to the freehold interest of the property, which had benefitted from the encroachment; the cost of rectification, by means of removing the encroachment and reinstating the land to its prior state; or evidence of other settlements and ongoing negotiations. In the case of existing encroachments, the value sought might be reduced to reflect the length of time that the encroachment had been in place, or other relevant factors. These were set out in a sliding scale and ranged from no reduction for any encroachment less than 5 years old, to a maximum 50 per cent reduction for any encroachment aged over 40 years.
- 5.11 In JPH's written case it was stated that *'Encroachment involving a seawall is not a scenario which fits into traditional property transaction. There is not a market place for such land, and it becomes a special transaction between the two parties. There is no other party which the Public can seek to sell to. All that the Public can do is look at what the encroacher has gained from building on the Public's land'*.

- 5.12 In the case of Brise de la Mer, the valuation provided by Buckley & Co. had been £56,000. The foreshore policy had not been in place at the time, but JPH indicated that it had been under development and had, accordingly, reduced the compensation payable by 50 per cent in recognition of the length of time that the encroachment had existed.
- 5.13 Specifically in respect of Mr. Luce, JPH opined, *'The settlement was for a modest consideration compared to the overall value of the property ... the encroachments are not trivial in scale ... A 50% reduction was accepted to reflect the historic nature of the encroachment and period of existence of the encroachment. At no time was Mr. Luce forced to admit guilt (sic) for the encroachments. It was accepted that he himself was not responsible for them. Nevertheless it was a problem that he inherited when he bought the property and should have been dealt with by his lawyers at that time. In addition, he enjoyed the benefit of the encroaching parts of his property.'*
- 5.14 JPH's concluding view in respect of the case of Roche de la Mer was that it had *'dealt with the encroachment fairly, looking after the interests of the Public of the Island in a manner that is also consistent with the future maintenance of the sea wall as a flood defence'*.
- 5.15 Specifically in relation to Brise de Mer, JPH indicated that the encroachments were not historical, but arose from works carried out once planning approval had been obtained. According to JPH, the balconies were built in part onto the Public's *relief* on the rear face of the sea wall, the patios for the 2 south-west ground floor apartments encroached onto the same Public land and the access openings through the sea wall, with the steps down to the beach, were being used for direct access, despite there being no contractual access rights. *'... the balconies, patios and direct beach access were only possible by utilising adjoining land in Public ownership. Brise de Mer was therefore deriving gain from land not in its ownership.'*
- 5.16 As was also the case with Roche de la Mer, JPH's view in respect of Brise de Mer was that the encroachments were not trivial in scale and the settlement was for a modest consideration compared to the overall value of the property.
- 5.17 JPH's concluding views in respect of Brise de Mer was that, *'Mr. Mallinson has no grounds for complaint. JPH has dealt with the encroachment fairly, looking after the interests of the Public of the Island in a manner that is also consistent with the future maintenance of the sea wall as a flood defence.'*

6. Questioning by the Board

- 6.1 Mindful that the Board had indicated that it did not intend to voice an opinion on the ownership of the foreshore, JPH challenged the allegation by the Complainants that it had been 'high handed' in relation to this issue. Mr. Foster indicated that it was not for JPH to determine ownership, because they acted on advice from the Law Officers' Department. He informed the Board that he was not aware of any challenge to the ownership of the foreshore in this area and was clear that the Public had ownership thereof.
- 6.2 The Board indicated that, in correspondence between JPH and the Complainants, reference to encroachments implied that the boundary was clear and that the neighbouring owners had obviously extended beyond it. However, during the site visit to Grève d'Azette, the Board had observed an arc of sea wall and queried whether that absolutely followed the boundary of the foreshore, or whether it, in fact, was built according to other topographical, structural and geographical considerations. It was mooted that whilst properties along the length of the sea wall might encroach, in places, onto the foreshore, it could equally be the case that the Public, as owner of the sea wall, was encroaching onto land in private ownership.
- 6.3 JPH accepted the point and informed the Board that the boundary of the foreshore was not a matter on which it had sought advice, as there was a legal definition of 'foreshore'. The presence of fixed structures provided JPH with an indication of the relative positions, but it was conceded that it was not possible to be absolutely certain. The Board was mindful of JPH's own policy on encroachments on the foreshore, which stated *'It may fairly be said that there is no map showing (with a sufficient degree of accuracy) the extent of the upper limit of the Foreshore nor the extent of private land towards it, albeit Admiralty charts, Ordnance Survey and other materials have been reviewed to see whether greater certainty could be provided.'* Officers from the Department explained that, when dealing with these issues, JPH sought to achieve a reasonable position and needed a starting point for any discussions, because it was of no benefit to either party to have an unresolved boundary.
- 6.4 Mr. Foster informed the Board that during 2018 JPH would be seeking the necessary resources to clearly identify boundaries around the foreshore and to highlight any potential issues. Encroachments onto the foreshore had the potential to interfere with the maintenance of the sea defences and from a public perspective this was the primary reason for seeking to resolve matters where these existed. He accepted that this was a significant piece of work, which would take time to complete. The Board questioned whether it was the policy of JPH to establish the sea defence area, or merely to identify

any encroachments. Mr. Ahier expressed the view that both went hand in hand. JPH wished to establish the extent of the foreshore by means of research, but in cases where the foreshore was found to be located behind the sea wall, it would have to consider how to deal with any properties that were abutting, or encroaching on, the same.

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

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

6.7 Although it had not previously been raised by JPH, the Department indicated that where it was safe and practical, its policy was that the foreshore was to be enjoyed by the public of the Island and it would seek to identify whether there was a genuine prospect of preserving and enhancing those areas, mindful that the work to do so would be resource hungry and would have to compete with other demands on public funds. It was noted that a promenade already existed thereon in many places around the coast. If the foreshore was not accessible, because it had been blocked by an encroachment, JPH would consider the type of encroachment and take a view on whether it should be removed.

Mr. Foster informed the Board that a judgment would be taken on a case by case basis because *inter alia* there was no point in creating a land-locked amenity space to which no-one could gain access. However, it was not possible to prescribe every eventuality within a policy. Mr. Forrest indicated that under the provisions of the Drainage (Jersey) Law 2005, there was a prohibition on any construction within 5 metres of a designated flood defence (which included the defence of the land against sea water and coastal erosion), which would relate to any sea wall so designated. In other cases, it was proposed that there should be an access strip of 8 feet to enable access for machinery, if so required.

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

6.9 The Board questioned the 'clawback' provisions imposed within the contracts (clause 15 in the case of Mr. Luce and clause 6 in the case of Mr. Mallinson). It was suggested to JPH that they were oppressive, on the basis that the Public had taken money from the Complainants, but had not passed good title. Whilst indicating that these were standard provisions and that the Law Officers' Department had been responsible for drafting the contracts, the officers from JPH undertook to review them. The Board also highlighted the section of the contracts which related to repairs and maintenance of the sea wall and expressed surprise that these afforded the Public access rights onto neighbouring properties. The Chairman indicated that whilst he could understand the requirement to retain access over Public land which had been encroached upon, it was a different matter to create new rights onto another person's property, where such rights had not previously existed. Mr. Ahier informed the Board that the Public had the responsibility to maintain the sea defences and whilst every effort would be made to repair the sea wall from the sea side, it was possible that access from the land side would be required.

7. Closing remarks by the Chairman

7.1 The Chairman thanked the Complainants and the representatives of JPH for their time and contributions and indicated that a report of the hearing would be prepared in due course, which would

be circulated to both parties for their input on the factual content. The findings of the Board would subsequently be appended thereto.

8. The Board's findings

- 8.1 One of the complaints made by both Complainants was that JPH did not adequately consider their arguments in respect of the ownership of the foreshore. As stated at the outset of this report, the Board was not prepared to consider the matter of the ownership of the foreshore, in part because that is a legal issue rather than an administrative one, but also because both Complainants ultimately chose to enter into contracts passed before the Royal Court on the basis that the Public was the legal owner of the foreshore and both swore oaths to abide by the terms of those contracts. The Board therefore considered the complaints, accepting at face value that the Public is the legal owner of the foreshore, rather than making any finding to that effect.
- 8.2 Prior to the transfer of the foreshore by the Crown to the Public of the Island, it is apparent that there was no set policy as to how the Crown dealt with matters relating to boundaries, or encroachments, between the foreshore and neighbouring properties in private ownership. Requests from the owners of properties adjoining the foreshore for clarification of boundaries, or encroachments, were dealt with by the Crown on an *ad hoc* basis, acting on the advice of the Public as lessee of the foreshore. Arrangements tended to be on a pragmatic and case by case basis and were generally prompted by the neighbouring owner requiring clarity of boundaries, usually for the purposes of the sale of the relevant property.
- 8.3 It is worth reiterating that the most critical factor differentiating the ownership of the foreshore by the Crown from the ownership by the Public is the legal principle of prescription. Time does not run against the Crown, meaning that the Crown could take steps to remove an encroachment towards the foreshore at any time, irrespective of the length of time such encroachment had been in place. The same principle does not apply to the Public, meaning that once the foreshore was transferred into the ownership of the Public, any encroachment towards the foreshore, which can be shown to have been in place for a period of 40 years subsequent to the date of transfer, was legitimated by the passage of time. As soon as the foreshore was transferred to the Public, 'the clock started ticking' as far as any encroachments towards the foreshore were concerned. With that in mind, it was, therefore, entirely appropriate that the Public should formulate a policy relating to its ownership of the foreshore and, by extension, how it approached the matter of encroachments towards it.

- 8.4 The Board accepts that the Public has a responsibility *inter alia* to provide, maintain, improve and extend facilities and measures to protect Jersey from flooding. However, the Public also has a responsibility to manage the property for which it acts as custodian on behalf of the people of the Island, in a fair and proper manner. It is right that, as a general rule, public land should not be given away, but it is also appropriate that negotiations involving public land should be conducted in a fair and transparent manner apposite to the nature of the transaction.
- 8.5 It is a fundamental pillar of both complaints that JPH exploited the vulnerability of the Complainants in requiring a clarification of the boundaries of their respective properties in order to conclude the sales of their properties and that there was really no negotiation over the terms upon which the Public would be prepared to ratify the *status quo* as far as the boundary and alleged encroachments were concerned. It is, of course, the sale of a property that most commonly prompts the clarification of a boundary, or the ratification of an encroachment and, in such a case, it can be said that the property seller who seeks clarification comes to the negotiations at something of a disadvantage. Nevertheless, the Board is in absolutely no doubt that when it is approached by a neighbouring owner seeking such clarification, or ratification, the Public has a clear duty to act fairly, promptly and transparently in its dealings with that owner. The Board does not consider that it did so in either of these cases.
- 8.6 Whilst the Board considers that it was appropriate that JPH should seek a valuation of the alleged encroachments and also that such valuation should have been at no cost to JPH, the Board is strongly of the view that, once obtained, any valuation should have been made available to the relevant owner to form the basis of negotiation, along with any other valuation that the owner may have commissioned separately. The basis on which any valuation was assessed would have been apparent and any disparity clear. Terms of settlement could have then been negotiated in the normal manner, whereas in both cases JPH appears very much to have adopted a 'take it or leave it' stance. The Board accepts that JPH believes that it was acting reasonably in that JPH considers that it could have demanded greater levels of compensation than in fact it did, but the fact remains that the financial terms and also the contractual terms of settlement were not the outcome of what anyone could reasonably regard as a negotiated settlement. In short, it appears that JPH exploited the vulnerable position that the Complainants found themselves in as owners urgently needing to sell their respective properties.
- 8.7 In addition, the Board considers that JPH acted unfairly by demanding from Mr. Mallinson a higher amount of compensation than that assessed by BNP, its appointed independent valuer. The Board is of the view that if an independent valuation is sought by the Public, then the amount of such valuation is the maximum that can be justified, whilst being only the starting point in any negotiation. In

non-commercial transaction such as these, it is inappropriate for the Public to seek to maximize profit but, rather, members of the public should be dealt with in a fair, equitable and transparent manner.

- 8.8 The Board acknowledges that each case of potential encroachment has to be dealt with independently and the appropriate level of compensation - if any - assessed and negotiated case by case. That will necessarily take some time, but the Board could see absolutely no justification for the inordinate amount of time it took for JPH to reach concluded arrangements with the Complainants (16 months in the case of Mr. Luce and 19 months in the case of Mr. Mallinson). JPH was aware of the stress and anxiety being caused to the Complainants by the continuing delay, yet it appears to have done nothing to bring matters to a timely conclusion. Given the huge potential number of similar situations which will arise in the near future, involving virtually every other property adjoining the foreshore where boundaries and possible encroachments may be unclear, the Board urges JPH to refine its procedures, determine responsibilities and above all make public its policy with regard to its stewardship of the foreshore. The Board was informed that JPH is seeking additional manpower to assist with the task, but the Board considers that the establishment and publication of a fair and transparent policy regarding the boundaries of the foreshore and encroachments towards it are an even greater priority.
- 8.9 The Board considers that there should be a policy which acknowledges that it is in the public interest for the landside boundary of the foreshore towards private properties to be clarified. The Board notes that since entering into contracts with the Complainants, the Minister has devised a policy to deal with encroachments, but that policy does not identify what the default location of the landside boundary of the foreshore should be.
- 8.10 The Board was extremely concerned by JPH's statement that the foreshore is an amenity to be enjoyed by the public at large. If, as the Public suggests, the foreshore extends landwards from the seawall, the implication is that JPH is happy for the general public to have free access onto what neighbouring owners have, for many years, thought of as 'their' property. Whilst the Board would applaud any plan to establish more accessible coastal promenades, or pathways, suitable for public access, such a plan must sit alongside a clear policy for the clarification of boundaries towards the seawall where it is not intended to establish a promenade, or other public access.
- 8.11 The Board suggests that the landside face of the seawall should be the starting point for the fixing of the boundary of the foreshore. The Public should retain such land as it considers essential for the safeguarding and maintenance of the seawall, with any residual part of the foreshore transferred to the adjoining owner for an appropriate consideration. In addition, on a case by case basis there should be

negotiations to allow encroachments within such retained areas of land to remain. Alternatively, it would be appropriate for the Public to require and enforce the removal of such encroachments, but only where the maintenance of the seawall, or the fulfilment of the Public's sea defence obligation is impossible.

- 8.12 As stated earlier, the Board considers it appropriate that the Minister should establish a clear policy with regard to the boundaries of the foreshore and the treatment of any perceived encroachments towards it. However, the Board considers that the sliding scale, which has been adopted by JPH to calculate an appropriate 'discount' in relation to encroachments which have been in place for a period of time is unfair, discriminatory and arbitrary and does not align with the stated aim of JPH to deal with private property owners in a consistent manner. Moreover, the Board considers the sliding scale to be something of a blunt instrument and thus an inappropriate remedy for the failure of the Public, as lessee of the foreshore for many years, to monitor adequately any potential encroachments.
- 8.13 The Board is further of the view that the contractual conditions that the Complainants were forced to accept were unreasonable. The Board is in no doubt that the Complainants had no choice but to accept the terms stipulated by JPH if they wished to sell their properties and to that extent they were 'forced to accept' them. JPH informed the Board that several of the clauses were 'standard', in that they had been included in a number of similar previous contracts with owners adjoining the foreshore. Be that as it may, the Board considers that a number of them were unreasonable and oppressive. For example, the Board considers it to be unreasonable for JPH to require payment of a substantial sum in compensation for permitting encroachments to remain, but then to impose an obligation on the owner to remove the encroachments at his, or her, own cost if requested by JPH to do so at some time in the future. Similarly, the Board found it unreasonable for JPH to impose a condition requiring the owner to allow the Public access onto the neighbouring property for the purpose of maintaining the seawall, when no such right previously existed and no compensation for the granting of such right appears to have been considered. Such conditions have a detrimental effect on the value of the properties, but no acknowledgement of that was made by JPH in determining the compensation demanded.
- 8.14 The Board notes that JPH has undertaken to review the wording that was used in the contracts with the Complainants in respect of similar circumstances that arise in the future and the Board considers it essential that it does so. The Board would expect that, having done so, JPH will offer the current owners of the properties, formerly owned by the Complainants, the opportunity to adopt revised conditions in place of those unreasonable conditions that the Complainants had little option but to accept; this at no cost to the owners.

8.15 By the same token, the Board expresses the hope that, notwithstanding that the contracts with the Complainants have been passed through Court, once a clear policy regarding the fixing of the boundary of the foreshore and the payment of compensation in relation to any encroachments has been adopted, the Minister will review the terms concluded with the Complainants and refund them any difference between the compensation each of them paid and the amount of compensation (if any) that would be payable had the new policy been in place at the time. In any event, the Board expresses the hope that the Minister will refund to Mr. Mallinson the difference between the compensation that he paid and the lesser amount assessed by BNP as being the appropriate amount of compensation.

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

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

Signed and dated by

G. Crill, ChairmanDated:

J. MoulinDated:

G. FraserDated:

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JPH response to Complaints Board

STATES OF JERSEY



**STATES OF JERSEY COMPLAINTS
BOARD: FINDINGS – COMPLAINT BY
MR. A. LUCE AND MR. J. MALLINSON
AGAINST THE MINISTER FOR
INFRASTRUCTURE AND JERSEY
PROPERTY HOLDINGS REGARDING
THE HANDLING OF FORESHORE
ENCROACHMENT CLAIMS (R.71/2018) –
RESPONSE OF THE
MINISTER FOR INFRASTRUCTURE**

**Presented to the States on 7th August 2018
by the Minister for Infrastructure**

STATES GREFFE

RESPONSE OF THE MINISTER FOR INFRASTRUCTURE

States of Jersey Complaints Board

On 11th April 2018, a Complaints Board Hearing constituted under Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 was held to review complaints by Mr. A. Luce and Mr. J. Mallinson against the Minister for Infrastructure and Jersey Property Holdings regarding the handling of foreshore encroachment claims.

On 1st June 2018, the Privileges and Procedures Committee presented to the States the findings of the Complaints Board Hearing (*see* R.71/2018).

The Minister for Infrastructure's response to the final report as per paragraph 8.17 of the same

Introduction

This response paper to the final report of the States of Jersey Complaints Board's Hearing on 11th April 2018 has been presented to the Minister for Infrastructure by Jersey Property Holdings ("JPH") as part of a report dated 18th July 2018.

The new Minister, having taken office on 7th June 2018, does not have the benefit of his predecessor's direct involvement in decisions MD-PH-2015-0098 and MD-PH-2016-0073, and the purpose of the 18th July report is, therefore, to set out the events of the 2 complaint cases, and to recommend a response for the Minister to make in respect of the Board's final report.

Responses to findings

- 8.1 No comment.
- 8.2 The transfer of the foreshore from the Crown to the Public in 2015 was in respect of the balance of the foreshore the Crown held in right of the Bailiwick that had not already been ceded to the Public. Whilst it is correct that there was not a set policy for the foreshore prior to December 2017, JPH, on behalf of the Public, acted in accordance with the 9th November 2006 Ministerial Decision reference MD-PH-2006-0094 "Statement on Land Valuation" to extract the optimum benefit from the Public's property assets.
- 8.3 The Minister is pleased to note that the Panel take the view that "it was, therefore, entirely appropriate that the Public should formulate a policy relating to its ownership of the foreshore and, by extension, how it approached the matter of encroachments towards it".
- 8.4 The expression "the Public" in contracts is one that has grown up over the centuries as a conventional description for property which is owned by the States of Jersey ("the States") on behalf of the Island community.

It is the Minister for Infrastructure who is the flood defence authority for Jersey and has power to "provide, maintain, improve and extend facilities and measures to protect Jersey from flooding" (Article 2(3)(c) of the Drainage (Jersey) Law 2005).

The Minister for Infrastructure also has responsibility for the States' property. This is a separate function from his position as the flood defence authority.

The Statement on Land Valuation (made by MD on 9th November 2006) requires that the Public should not dispose of its land, or create rights over its land, for a consideration less than the best that can reasonably be obtained. The Minister agrees that negotiations should be conducted in a fair manner and considers that this was the case for both transactions. The Minister also notes that the Board comments that negotiations should be conducted in a "transparent manner apposite to the nature of the transaction". The Minister will not behave improperly, but is required to take a range of relevant factors into account in negotiating a property transaction.

- 8.5 The Board has made a finding that "*when it is approached by a neighbouring owner seeking such clarification or ratification, the Public has a clear duty to act fairly, promptly and transparently in its dealings with that owner. The Board does not consider that it did so in either of these cases.*"

The Minister does not accept this finding. Whilst the Minister does not seek to question the assertion that each complainant may have been financially distressed, the Minister does not accept that either transacting party was vulnerable.

The starting point for entering into agreements relating to land owned by the Public is that the States Assembly is the elected body through which the Public makes its decisions. That includes decisions relating to the Public's land. This has been modified by Standing Orders, and Standing Order 168 of the Standing Orders of the States of Jersey provides that the prior agreement of the States is not needed for certain transactions in land if the action is recommended by a body established by the States to manage land and buildings owned by the Public [JPH] and the recommendation is accepted by the Minister for Infrastructure.

Both transactions involved the Public acting as a landowner and were carried out in accordance with the 2006 Valuation Statement and Standing Order 168.

- 8.6 The Minister does not accept the finding at paragraph 8.6. The Minister does not accept that it is appropriate for the Public to share the valuation advice that it has received with the other transacting party. Such an approach would severely compromise the Public's ability to engage in a meaningful transaction.

It is open to the parties to a transaction to seek and obtain their own valuation advice.

- 8.7 No comment.

- 8.8 To reach an agreement requires both parties to agree terms. Having reviewed the chronology in relation to each matter, the Minister is satisfied that officers provided information and responded in an appropriate timescale to the various parties involved. The time taken to conclude a transaction will vary depending on the nature of the matter, and in this case the nature of the transaction and the

number of parties involved contributed to the length of time taken to conclude the matter.

- 8.9 Landward boundaries will be dealt with as part of the Minister's intended work concerning the foreshore.
- 8.10 The Minister acknowledges that it will not always be possible to open up access to the foreshore.
- 8.11 The Minister disagrees. The landside face of the sea-wall requires access for maintenance, repair, replacement and possible improvement. The Minister accepts that a degree of pragmatism is required, but that also has to be balanced with the Drainage (Jersey) Law 2005, which provides for 5 metres as the space required behind a sea-defence. Furthermore, the Board's finding does not take into account areas of foreshore where there is no sea-wall.
- 8.12 The Minister notes the Board's finding and will review the policy in light of the comments, including the Board's recommendation that the sliding scale be removed. If the sliding scale is removed, then it would mean that property owners would have to pay the full value of the encroachment.
- 8.13 The Minister will give consideration to whether there is an alternative clause which meets the requirement to enable the sea-wall to be maintained which can be included in future contracts.
- 8.14 As above. The Minister will review the wording for future contracts.
- 8.15 The Minister does not accept the recommendation of the Board.
- 8.16 The Minister has carefully considered the Board's findings. Although the Minister does not accept all of the conclusions of the Board, some of the points raised in respect of the policy on the foreshore will certainly be considered as part of a review.

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Details of L'Islet – recent sale



L'islet La Grande Route De La Cote, St. Clement, Jersey, JE2 6FS | RES060

 3 Bedroom |  2 Bathroom |  2 Reception

Freehold | Asking Price £1,395,000

FREEHOLD. Set on the south coast with direct access to Green Island Beach, this stunning 3 bedroom, 2 bathroom beach house is perfect for any family who enjoys the outdoor lifestyle. The open plan living area with fully fitted kitchen and ample space for dining, leads out to a generous decked area and offers a fantastic entertaining space for the whole family to enjoy. On the ground floor there is also a snug, a separate utility room and a cloakroom. Upstairs there is a master suite, 2 further double bedrooms and contemporary bathroom. Externally there is plenty of storage, a single garage and parking for at least 3 cars. Ideally located on an excellent bus route, with regular routes to St Helier or out to the picturesque Gorey Village, this house warrants an early viewing to appreciate everything it has to offer.



