

Judgment 16/2006 Cyma Petroleum (CI) Limited v Chairman of the Policy and Finance Committee of the States of Alderney – Royal Court (Civil Action File 957) – 20th March, 2006

Health and Safety at Work (Alderney) Ordinance, 2003 – appeal from dismissal by the Court of Alderney of appeal from three Prohibition Notices issued by the Committee – appeal lay to the Royal Court on a point of law only – whether the conclusions drawn by the Court of Alderney, from its findings of fact, were perverse or unreasonable in a Wednesbury sense - appeal dismissed

IN THE ROYAL COURT OF GUERNSEY

The 20th day of March, 2006 before Richard John Collas Esquire, Deputy Bailiff; sitting alone

In the matter of:

CYMA PETROLEUM (CI) LIMITED

(Appellant)

v.

THE CHAIRMAN OF THE POLICY AND FINANCE COMMITTEE
THE STATES OF ALDERNEY

(Respondent)

Whereas on 8th March 2006 the Deputy Bailiff considered an appeal from a decision of the Court of Alderney in the above matter and heard thereon Advocates J. A. S. White and R. J. McMahon, Counsel for the Appellant and Respondent respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and:

- 1) DISMISSED the appeal;
- 2) AWARDED costs to the Respondent on the normal recoverable basis subject to any application made by counsel within 14 days.

S. M. D. ROSS
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF
GUERNSEY
(Ordinary Division)**

On appeal from the Court of Alderney

Between	CYMA PETROLEUM (CI) LIMITED	Appellant
	-v-	
	THE CHAIRMAN OF THE POLICY AND FINANCE COMMITTEE THE STATES OF ALDERNEY	Respondent

Judgment handed down: 20 March 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Counsel for the Appellant – Advocate J A S White

Counsel for the Respondent – crown Advocate R J McMahon

Cases, texts and statutes referred to:-

- 1 The Health and Safety at Work (Alderney) Ordinance, 2003
- 2 Walters –v- States Housing Authority [1997] 24.GLJ.76.
- 3 Castle Company Management LLC -v- Guernsey Financial Services Commission Royal Court Judgment 36/2004

Introduction

- 1 This is an appeal from the Court of Alderney on a point of law only against a decision of 2 June 2005 dismissing three appeals by the Appellant seeking in each case to annul a Prohibition Notice issued by the States of Alderney Policy and Finance Committee (“the Committee”) under Sections 19 and 20 of the Health and Safety at Work (Alderney) Ordinance, 2003 (“the 2003 Ordinance”). The Prohibition Notices which are referred to in more detail below were issued in connection with the storage, transportation and handling of aviation gasoline (Avgas) in Alderney where the Appellant carried on the business of supplying aviation fuel at Alderney Airport.

Factual Background

- 2 The evidence before the Court of Alderney was contained in three affidavits, one sworn by each of Andreas Michaelides, a director of the Appellant and founder and director of the Cyma Group of Companies; David John Jeremiah

QC, the Chief Executive of the States of Alderney since the beginning of 2005; and Richard Hebry Brown, the Chief Health and Safety Officer of the States of Guernsey who has also been appointed by the Respondent under Section 15 of the 2003 Ordinance as a Health and Safety Inspector in Alderney.

- 3 The Court in Alderney also had the benefit of a *vue de justice*. The Court did not hear any oral evidence.
- 4 In short, Mr Michaelides has been involved in petroleum retailing and distribution since 1969 and with the storage, handling and distribution of aviation fuel and aircraft fuelling since 1985.
- 5 The Appellant was incorporated on 5 July 1995 and commenced operations in Alderney shortly thereafter.
- 6 Avgas was brought to the Island by ship. Prior to the issue of the first Prohibition Notice referred to below, it was carried in ISO containers on a trailer. After the issue of the first Prohibition Notice and until the issue of the second Prohibition Notice, a tanker-trailer was used to transport the fuel. On arrival in Alderney it was taken to an area of land known as the “Crusher Site” located near the harbour where the ISO containers (and briefly the tanker-trailer) were stored until the fuel was decanted into one of two fuel bowsers kept at the airport for refuelling aircraft.
- 7 The operation of the Alderney Airport is one of the transferred services for which the States of Guernsey are responsible and hence they act as Airport Authority and hold the Aerodrome Licence. A part of the Appellant’s operations were carried out on land under the Airport Authority’s control and so could potentially affect the Aerodrome Licence and consequently the States of Guernsey requested Mr Brown to become involved in the safety aspects of that operation even before the 2003 Ordinance came into effect. Prior to 1 January 2004 there was no statutory Health and Safety at Work regime in force in Alderney. Consequently, Mr Brown had no statutory powers in that Island and no powers to act in respect of the Appellant’s activities carried on at the Crusher Site which is away from the airport and near the harbour.
- 8 On 4 May 2004, Mr Brown served an Improvement Notice under the provisions of Section 18 of the 2003 Ordinance in relation to the operations of the Crusher Site which, in his opinion, contravened Sections 1(1) 1(2) and 2(1) of the 2003 Ordinance. The reasons he gave for that opinion are:

“The temporary compound used for the storage of full and empty ISO Tank Containers of Avgas and the transfer of Avgas from the ISO container to the aircraft refuelling bowser, is totally inadequate for this purpose”.

- 9 He required the contraventions to be remedied by 31 July 2004 in the manner specified in a schedule which formed part of the Notice and required that:

“A permanent storage and transfer facility shall be constructed and operated to a standard prescribed in the Health and Safety Executive’s publication: The storage of flammable liquid in tanks” (HSG176)”

10 The Appellant sought, and Mr Brown granted, an extension of the deadline for complying with the requirement in the Improvement Notice, namely to 29 October 2004. Later the Appellant requested, but Mr Brown refused to grant, a further extension to the deadline. Mr Brown exhibited to his affidavit three letters from Mr Michaelides dated respectively 27 October, 29 October and 1 November 2004 which he said contained an admission by Mr Michaelides that the Appellant could not comply with the requirements of the Improvement Notice at the Crusher Site.

11 In February 2005, Mr Brown became aware that the Appellant was continuing to operate from the Crusher Site to which it had not carried out any work and hence the Site was in the same state as when the Improvement Notice was issued. Consequently, he served, with the confirmation of the Respondent, the first Prohibition Notice dated 22 February 2005. This was issued under Sections 19 and 20 of the 2003 Ordinance. The material parts read: *“I am of the opinion that the following activities, namely:*

The decanting of Avgas from an ISO container into fuel bowsers which are being carried on by you/about to be carried on by you/under your control at:

The Crusher Site Alderney

Involve, or will involve, a risk/an imminent risk of serious personal injury and that the matters which give rise/will give rise to the said risk(s) are:

Access to the top of the ISO container does not protect the operative from the risk of falling in excess of 3 metres. The bund is inadequate for its purpose in that it consists of an alkathene sheet overlain by hardcore, there is no earth bonding arrangements and no fire fighting facilities, should an incident occur.

And that the said matters involve/will involve contravention of the following statutory provisions:

Sections 1 and 2 of “The Health and Safety At Work (Alderney) Ordinance, 2003”.

Because the facility fails to comply with guidance published on the subject as it does not negate the risks arising from the decanting operation i.e. falls from height, fire and explosion and pollution of the environment.

And I hereby direct that the said activities shall not be carried on by you or under your control immediately unless the said contravention(s) and matters have been remedied.

I further direct that the measures specified in the schedule which forms part of this Notice shall be taken to remedy the said contravention(s) or matters”.

12 The schedule, a copy of which was not contained in the bundle, read I am told:

“A permanent site shall be provided for the decanting and storage of Avgas by Cyma Petroleum (CI) Limited”.

13 In order to circumvent the Prohibition Notice, the Appellant then used a tanker-trailer rather than an ISO container to import the fuel and consequently Mr Brown issued, with the confirmation of the Respondent, the second Prohibition Notice dated 3 March 2005 in which the activity was described as *“the transfer of Avgas from the tanker-trailer into fuel bowsers”*, but otherwise the provisions of the second Prohibition Notice and the schedule attached were identical to the first Prohibition Notice.

14 Mr Brown next learned that the tanker-trailer had been removed from the Crusher Site but activities were continuing. He felt it was necessary to issue a more general Prohibition Notice, the third Prohibition Notice, with the necessary confirmation from the Respondent, on 5 April 2005. The material part read:

“I am of the opinion that the following activities, namely:

- (1) The Storage of Avgas in Alderney other than on a permanent site and in accordance with guidance published by the UK Health and Safety Executive publication entitled:- “The storage of flammable liquids in tanks” HSG 176; and or*
- (2) The decanting of Avgas from any ISO container into the tanker trailer identified as CYMA 11 and or from the tanker trailer identified as CYMA 11 into fuel bowsers numbers CYMA 105 and 115*

Which activities are being carried on by the Company, or are about to be carried on by the Company, or under the control of the Company, and involve or will involve, an imminent risk of serious personal injury and that the matters which give rise or will give rise to the said risk(s) are:

The height from the top of the ISO container exceeds 3 metres and there is nothing to prevent any employee or director of the Company from falling from the top of the said container. Neither are there adequate controls to protect employed persons or members of the general public from the inherent risks involved in storing Avgas and in decanting Avgas from either an ISO contained or the tanker trailer CYMA 11.

And that the said matters involve/will involve contravention of the following statutory provisions:

Section 1 (2) (a)(b)(c)(d) and 2 (1) of “The Health and Safety at Work (Alderney) Ordinance, 2003”

Because there are no facilities which comply with guidance published on the subject entitled:- “The storage of flammable liquids in tanks”, HSG176 which would negate the risks arising from storing Avgas or from the decanting operations i.e. falls from height, fire and explosion and pollution of the environment

And I hereby direct that the said activities shall not be carried out by the Company, or under the control of the Company, immediately unless the said contravention(s) and matters have been remedied.

I further direct that the measures specified in the schedule which forms part of this Notice shall be taken to remedy the said contravention(s) or matters”.

- 15 The schedule attached was in the same terms as the schedules attached to the previous Notices.
- 16 The Appellant appealed each of the three Prohibition Notices in accordance with the right of appeal in Section 21 of the 2003 Ordinances. The appeals in respect of the first and third Prohibition Notices claimed the Notices were *ultra vires* and an unreasonable exercise of the Respondent’s powers. The second appeal relied only on the Notice being an unreasonable exercise of the Inspector’s and Committee’s powers.

The Health and Safety at Work (Alderney) Ordinance, 2003

- 17 Part 1 of the Ordinance contains general duties of employers, employees and others. Section 1 sets out the general duties of employers to their employees:

“1.(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer’s duty under subsection (1), the matters to which that duty extends include in particular:-

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health, in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is

reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

(3) It shall be the duty of every employer to prepare and as often as may be appropriate, revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

18 Section 2 sets out the general duties of an employer towards persons other than his employees. The first sub-section is relevant:-

2. (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

19 Part 3 contains provisions relating to enforcement.

20 Section 15 enables the committee to appoint inspectors and it was pursuant to this section that Mr Brown was appointed.

21 Section 16 sets out the powers of an inspector and section 17 permits him to take samples from premises.

22 Sections 18, 19 and 20 relate to Improvement Notices and Prohibition Notices:

18. If the inspector is of the opinion that a person –

(a) is contravening one or more of the relevant statutory provisions; or

(b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated;

the inspector may serve on that person a notice (referred to in this Ordinance as “an improvement notice”) which shall -

- (i) state that he is of that opinion;*
- (ii) specify the provision or provisions as to which he is of that opinion;*
- (iii) give particulars of the reasons why he is of that opinion; and*
- (iv) require that person to remedy the contravention or, as the case may be, the matters occasioning the contravention within such period (ending not earlier than the period within which an appeal against the notice can be brought under section 21) as may be specified in the notice.*

19. (1) *This section applies to any activities which are being, or are likely to be, carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.*

(2) *If as regards any activities to which this section applies an inspector is of the opinion that, as carried on, or likely to be carried on, by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Ordinance referred to as “a prohibition notice”).*

(3) *A prohibition notice shall:-*

- (a) state that the inspector is of the said opinion;*
- (b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;*
- (c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions:-*

- (i) state that he is of that opinion;*
- (ii) specify the provision or provisions as to which he is of that opinion; and*
- (iii) give particulars of the reasons why he is of that opinion; and*
- (d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) and any associated contraventions of provisions so specified in pursuance of paragraph (c) have been remedied.*

(4) *Subject to the provisions of subsection (5), a direction contained in a prohibition notice in pursuance of subsection (3)(d) or of section 20 shall not take effect unless it is confirmed by the Committee by a*

notice served by the Committee on the person on whom the prohibition notice containing the direction has been served; and in that event the direction shall have effect:-

- (a) at the end of the period specified by the Committee in the notice under this subsection; and*
 - (b) subject to such modifications, if any, as the Committee thinks fit and states in that notice.*
 - (5) A direction given in pursuance of subsection (3)(d) shall take immediate effect if the inspector is of the opinion, and states it in the prohibition notice containing the direction, that the risk of serious personal injury is or, as the case may be, will be imminent, but the direction shall cease to have effect at the expiration of the 72 hours next following the day on which the prohibition notice was served unless it is confirmed by the Committee by a notice previously served by the Committee under and in accordance with the provisions of subsection (4)*
- 20.(1) An improvement notice or a prohibition notice may include directions as to the measures to be taken to remedy any contravention or matter to which the notice relates; and any such directions:-*
- (a) may be framed to any extent by reference to any approved code of practice; and*
 - (b) may be framed so as to afford the person on whom the notice is served a choice between different ways of remedying the contravention or matter.*
 - (2) Where any of the relevant statutory provisions applies to a building or any matter connected with a building and the inspector proposes to serve an improvement notice relating to a contravention of that provision in connection with that building or matter, the notice shall not direct any measures to be taken to remedy the contravention of that provision which are more onerous than those necessary to secure conformity with the requirements of any building regulations for the time being in force to which that building or matter would be required to conform if the relevant building were being newly erected, unless the provision in question imposes specific requirements more onerous than the requirements of any such building regulations to which the building or matter would be required to conform as aforesaid.*
 - (3) In subsection (2) “the relevant building”, in the case of a building, means that building, and, in the case of a matter connected with a building, means the building with which the matter is connected.*
 - (4) Before there is served in connection with any premises used or about to be used as a place of work an improvement notice or a notice under section 19(4) requiring or likely to lead to the taking*

of measures affecting the means of escape in case of fire with which the premises are or ought to be provided, the inspector shall consult the Chief Fire Officer of the States of Guernsey; and the expression “the Chief Fire Officer” has the meaning given by section 27(1) of the Fire Services (Guernsey) Law, 1989(b).

(5) Where an improvement notice or a prohibition notice as confirmed by the Committee under section 19(4) is not to take immediate effect:-

- (a) the inspector may withdraw the notice at any time before the end of the period specified therein in pursuance of section 18 or section 19(4), as the case may be; and*
- (b) the period so specified may be extended or further extended by the inspector at any time when an appeal against the notice is not pending.*

23 The appeal provisions are contained in Section 21:-

21.(1) In this section “a notice” means an improvement notice or a prohibition notice as confirmed by the Committee under section 19(4).

(2) A person on whom a notice is served may, within a period of 28 days immediately following the date of the notice, appeal therefrom to the Court on the grounds that the requirement or direction contained in the notice is ultra vires or an unreasonable exercise of the inspector’s or (as the case may be) the Committee’s powers.

(3) An appeal under this section shall be instituted by way of summons which shall be served on the Chairman of the Committee and which shall set out the material facts on which the appellant relies.

(4) On an appeal under this section the appellant shall have the burden of proof and the final right of reply.

(5) Where an appeal under this section is brought against a notice within the period allowed under subsection (2) then:-

- (a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;*
- (b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant, the Court so directs (and then only from the giving of the direction).*

(6) *The decision of the Court in any proceedings brought under this section shall be final, subject to an appeal on a point of law to the Ordinary Division of the Royal Court of Guernsey.*

24 The right of appeal to the Court of Alderney pursuant to Section 21(2) is on the grounds that the decision was *ultra vires* or that it was an unreasonable exercise of the inspector's or (as the case may be) the committee's powers. This mirrors the wording of Section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994 on which the Court of Appeal gave guidance in Walters –v- States Housing Authority [1997] 24.GLJ.76. Beloff J.A. set out five possible views which may be taken on appeal by the Royal Court against an exercise of power by the Housing Authority. Applying that guidance to the 2003 Ordinance and bearing in mind that the Jurats of the Court of Alderney are judges of both law and fact (unlike the Guernsey Jurats who are only judges of fact), the Court of Alderney could have taken any one of the following five views:-

- 1 That the powers were exercised *ultra vires* in a way other than Wednesbury unreasonably or irrationally.
- 2 That the powers were exercised Wednesbury unreasonably or irrationally.
- 3 That as a question of fact, rather than of law, the Jurats considered the decision was unreasonable meaning something other than that they themselves would have come to a different decision had they been the authority. That is that the decision was not within a band of decisions within which no court should seek to replace the committee's or inspector's judgment with their own.
- 4 The Jurats would have come to a different decision but the exercise of power was not unreasonable.
- 5 The decision was correct.

25 Under Section 21 (6) of the 2003 Ordinance, appeal lies to the Ordinary Division of the Royal Court of Guernsey on a point of law only. I respectfully adopt the decision of the former Bailiff in Castle Company Management LLC -v- Guernsey Financial Services Commission Royal Court judgment 36/2004 on an appeal from the Court of the Seneschal of Sark. Although in that case there was no provision in the relevant law (The Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2000) that the appeal could be on a point of law alone, nevertheless the Bailiff held that the test on appeal from the Sark Court where that court had considered questions of "ordinary" reasonableness would be on issues of law or "Wednesbury reasonableness" or perversity alone. Matters of Wednesbury unreasonableness and perversity are matters of law (per Beloff J. A. in Walters at page 46F).

26 The Appellant, as Advocate White confirmed, is not appealing any of the findings of fact and expressly stated that she was not saying any of the

findings of fact were perverse. Her argument is that the conclusions drawn from those findings of fact are either perverse or unreasonable in a Wednesbury sense.

27 The appeal being on a point of law only, it is appropriate for me to sit alone and without Jurats.

Grounds of Appeal

28 The Grounds of Appeal are set out in the Appellant's Amended Notice of Appeal:-

"The Particulars of the Grounds of Appeal are hereby amended to be:

- 1 The Alderney Court misdirected itself and failed to address what it was required to do, which was to decide whether the Direction contained in the Notices (to provide a permanent site) was necessary and therefore a reasonable exercise of the Inspector's and/or the Committee's powers. The Court, after finding that the identified risks at the site had probably been addressed by the Appellant, declared that the Direction was reasonable because it had not been complied with; and thereby made a decision that was perverse.*
- 2 If the Court had directed itself properly, it ought only to have upheld the Direction contained in the Notices as being a reasonable exercise of the Inspector's and/or Committee's powers if the requirement in the Direction was necessary in the circumstances to ensure safety. Given the Court's finding of fact that the identified risks at the site had probably been addressed, the Direction was not necessary and it was therefore perverse for the Alderney Court to have found that the Notices were a reasonable exercise of the Inspector's and the Respondent's powers.*

The original Grounds of Appeal numbered 3 to 7 are withdrawn.

- 8. The decision of the Alderney Court not to allow the Appellant's appeals against the Prohibition Notices was perverse, and the Appellant claims an Order of the Royal Court that:
 - (i) the Alderney Court misdirected itself and made a decision that was wrong in law and perverse, such that this appeal is allowed; and*
 - (ii) given the finding of fact by the Alderney Court that the identified risks had been addressed, the Direction in all three Prohibition Notices was unnecessary and the Notices were therefore an unreasonable exercise of the Inspector's and/or the Respondent's powers; and*
 - (iii) the Respondent pay the Appellant's costs in this Court and in the Alderney Court."**

The Judgment of the Court of Alderney

- 29 The Court of Alderney's decision is in two parts. The first part contains seven numbered paragraphs setting out the Court's findings of fact. It is not a comprehensive review of all of the factual background. Much of the evidence was not in dispute in the Court of Alderney and it would appear that the Court considered it unnecessary to recite facts which clearly were not in dispute. My understanding is that in the seven numbered paragraphs the Court has recorded what it has decided in respect of any relevant factual issues that were in dispute.
- 30 The second section entitled "Judgment" contains the Court's decision based on its findings of fact. The Appellant takes no issue with the first two paragraphs of the judgment, but draws attention to the next two:-

*"The Court is of opinion that, while the Appellant may well have addressed the other subordinate issues in the Prohibition Orders, he was unable to fulfil the substantive issue, namely that he should provide a **permanent** site for the Company's operations, without the cooperation and approval of the relevant authorities. That requirement had been notified to him in the Improvement Notice issued on 4th May 2004.*

The Court accepts that the risks identified by the Guernsey Chief Health and Safety Officer at the "Crusher" site have not been managed to the standards required under Section 1 of The Health and Safety at Work (Alderney) Ordinance, 2003, and that the three Prohibition Notices, followed by the directions from the Policy and Finance Committee of the States of Alderney issued under Section 19, were a lawful and reasonable exercise of their powers".

- 31 The Appellant's main argument concerns what the Jurats meant by:

"The Appellant may well have addressed the other subordinate issues in the Prohibition Orders".

- 32 Counsel agreed, and I accept, that "*the other subordinate issues*" relate to the matters set out in the Prohibition Notices as giving rise to the risks of injury and involving contravention of the provisions of the 2003 Ordinance. The Appellant argues that if those had been addressed in the sense that they did not pose a risk, then there were no grounds for issuing the Prohibition Notices. If the only outstanding matter was the failure to provide a permanent site, there would be no justification for issuing the Prohibition Notice as it was agreed by the parties, and accepted by the Court, that even a temporary site could be designed and constructed in a way that complied with the relevant health and safety requirements. If the matters giving rise to the identified risks do not exist, the Court's conclusion (in the second of the paragraphs I have quoted above) that the Crusher Site has not been managed to the standards required is perverse.

33 The Respondent argues that the Appellant has misinterpreted what the Court of Alderney meant when using the word “addressed”. The way Mr Michaelides, who represented the Appellant in the Court of Alderney, presented his case was that each of the matters identified by Mr Brown was capable of being remedied. He was not saying they had all been remedied but that they could be remedied. In other words, Mr Michaelides was acknowledging that the matters, or at least some of them, existed at the time the Prohibition Notices were issued and was, in effect, asking the court to give him another opportunity to put the matters right. Advocate McMahon submitted that Mr Michaelides approached the matter as a practical businessman seeking to provide solutions to the problems. He did not approach the appeal in a legalistic way of examining whether the Committee and Mr Brown had followed the correct procedures when issuing the Prohibition Notices.

34 I favour Advocate McMahon’s interpretation of what the Court of Alderney said. I find support for his argument in paragraph 6 of the judgment where the Court of Alderney said the following:-

“6. The Court has noted the comments of Mr Brown on the safety record of the Company and on the circumstances that led to the issuing of the final two Prohibition Notices. In paragraph 16 he notes that any fire and explosion at an Avgas storage and handling facility would inevitably pose a risk of serious personal injury to employees in the vicinity and, more widely, to members of the public who might be in the area when the incident occurs”.

35 The absence of fire fighting facilities and the risk of fire are mentioned in each of the Prohibition Notices.

36 In the short passage I quoted the Court of Alderney used the word “noted”. A number of times in the seven numbered paragraphs of the first part of their judgment in which, as I have said, the Court set out their findings on the facts, they used the same word “noted”. I understand the Court to be saying not only that it has observed these facts but also that it accepts those facts. Hence that it accepts and finds to be true the comments of Mr Brown quoted in paragraph 6.

37 Further evidence can be found of Mr Michaelides’ acceptance of the existence of the matters identified by Mr Brown as posing a risk. First, he did not challenge the Improvement Notice, but responded by seeking more time in which to find a permanent site where a permanent facility could be constructed. In the letters to Mr Michaelides to which I have referred above (written at the end of October and early November 2004), he indicated his intention to build a proper bund. Also, in the course of argument in the Court of Alderney Mr Michaelides offered to deal with the Mr Brown’s concerns, for example by providing more fire extinguishers if that was required of him.

38 When summing up to the Court at page 166F of the transcript, the Chairman of the Jurats said:-

“In summarising his case Mr Michaelides had stated that it would be possible to resolve the problems relating to the Crusher Site”.

- 39 In conclusion, my understanding of the Court of Alderney’s judgment is that they were satisfied that the matters Mr Brown had identified as giving rise to the risks he identified did exist at the date on which each of the Prohibition Notices were issued. The Court found that Mr Michaelides would be in a position, given the chance, to remedy each of those matters, but they had not been remedied at the date of the hearing. More importantly, the matters existed when the Notices were issued.
- 40 Consequently, the Court found that the Prohibition Notices had been validly issued. As I have said, there was evidence before the Court to support such a finding and consequently there are no grounds on appeal to the Royal Court to hold that the decision of the Jurats was perverse or Wednesbury unreasonable.

The Direction Notice

- 41 Advocate White also argued before me that it was unreasonable for Mr Brown to have issued the Direction Notice under Section 20 of the 2003 Ordinance requiring the Appellant to operate from a permanent site and she said the Court of Alderney did not address its mind to the question of whether the Direction Notice was reasonable.
- 42 Advocate McMahon submitted that this point was not argued, or not strenuously argued, in the Court of Alderney.
- 43 Paragraphs 5 and 6 of the Appellant’s Skeleton Argument in the Court of Alderney deal with the provisions of the Direction Notice and specifically state that the requirement to operate from a permanent site is unreasonable.
- 44 The affidavit evidence exhibited correspondence showing the history of the discussions between the parties regarding the provision of a permanent site. One of the Appellant’s main arguments in the Court of Alderney was that the Guernsey authorities had frustrated the States of Alderney’s attempts to provide him with a permanent site. The correspondence from Mr Michaelides following the issue of the Improvement Notice requested more time to enable a permanent site to be found. In his submissions to the Court of Alderney, Mr Michaelides reviewed the history of the discussions over the provision of a permanent site.
- 45 In numbered paragraph 5 of the Court of Alderney’s judgment (in the part of the judgment where the court was summarising its findings of fact), the Court said:

*“The Respondent, the Guernsey Chief Health and Safety Officer and the Appellant have **all** agreed that the storage of Avgas and the decanting operation should be carried out on a **permanent** site. In his affidavit, the Appellant notes the several attempts that have been made by the Company since 1995 to acquire a **permanent** site close to, or on, Alderney Airport land”.*

46 I understand the Court to be saying that they have found, as a fact, that all the parties, including the Appellant, have agreed that the storage of Avgas and the decanting operation should be carried out on a permanent site. That being so, it was not unreasonable for Mr Brown, in his discretion, to issue a Direction Notice in those terms

47 I note that Mr Brown is not required to attach a Direction Notice as Section 20 of the 2003 Ordinance states:

*“An Improvement Notice or Prohibition Notice **may** (emphasis added) include directions as to the measures to be taken to remedy any contravention”.*

48 It would have been perverse if the Court of Alderney had annulled the Prohibition Notices simply because such a Direction Notice was attached.

49 There was some argument as to what was meant by a “permanent” site. In paragraph 7 of its judgment, the Court recorded that a suitable “temporary” site at the Glacis may become available and would be offered to the Appellant as soon as it was ready and had been approved by Mr Brown, but the Appellant was reluctant to accept another “temporary” site.

50 It is clear from that passage in the judgment that the Court was aware, and accepted, that the Appellant’s operations could be carried on in a manner compliant with the requirements of the 2003 Ordinance from a site where it would only be located on a temporary basis. This shows that the Court was aware, and addressed its mind, to the question that it is the standard of the facilities available, not the length of the lease of the site, which needs to be considered.

51 For the reasons I have given, I dismiss the appeal and propose that costs be awarded to the Respondent on the normal recoverable basis unless either counsel applies within 14 days.