Judgment 32/2006 Barrett and Barrett v (i) Minister of the Environment Department; and (ii) Osprey Investments Limited –Royal Court (Civil Action File 935) – 19th June, 2006

Island Development (Guernsey) Law, 1966, as amended – grant of preliminary declaration – application by neighbours for judicial review – applicability of judicial review to decision by the Island Development Committee/Environment Department – held that the department had failed to take into account the requirements set out in section 17 of the Law – preliminary declaration set aside (See also Judgments 54/2003 and 21/2005)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 935

The 19th day of June, 2006 before Alan Robin Winston Hancox Esquire, E.G.H., C.B.E., Lieutenant Bailiff, sitting alone

DAVID ALAN ANDRÉ BARRETT

And

KAY MARY BARRETT Applicants

Versus

THE MINISTER OF THE ENVIRONMENT Respondent

And

OSPREY INVESTMENTS LIMITED Third Party

IN THE MATTER OF AN APPLICATION

by the Applicants herein for Judicial Review of the decision of the Department dated 10th May, 2005;

WHEREAS THE COURT, HAVING on the 14th, 28th,29th, and 30th days of December, 2005, HEARD the Applicants in person and Crown Advocate R.J. McMahon for the Respondent herein (the Third Party not

being represented at the hearing) DELIVERED Oral judgment in draft on the 13th day of April, 2006, ALLOWED the said Application and AWARDED the Costs thereof on the standard recoverable basis to the Applicants;

THE COURT this day issued formal written Judgment in the terms attached hereto.

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

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

(1) DAVID ALAN ANDRÉ BARRETT
(2) KAY MARY BARRETT — Applicants

and

(1) MINISTER OF THE ENVIRONMENT DEPARTMENT
(2) OSPREY LIMITED — Respondents

Judgment handed down by the Lieutenant Bailiff

1. This is a judgment on the matter which was concluded on 30th December last year in the Royal Court of Guernsey, Ordinary Division—David Alan Andre Barrett and Kay Mary Barrett being the Applicants, and the Minister of the Environment Department and Osprey Limited, who are named as Respondents, although in the injunction application Osprey were named as the third party. They were represented at the first Judicial Review hearing before Newman L.B on 30th June, 2003, by Advocate White, but were unrepresented on the subsequent appeal.

2. There is now before me an application for Judicial Review of the decision arrived at by the Planning Committee of the Department of the Environment (formerly the Island Development Committee ('the IDC') on 10th May, 2005, granting planning permission In Principle to Osprey Investments Limited (who, though named as the Second Respondent to the Application, has so far not taken any part in the instant proceedings although given the opportunity) to carry out certain development at the site known as Sandpiper Vinery, covering an area of over 7 acres, which abuts respectively on to the Route de Plaisance and the Rue des Heches in the Parish of St. Pierre du Bois.

3. For convenience I will frequently refer to the IDC and its successor as "the Planning Authority" or "the Authority". I should also state that I shall refer mainly in this judgment to Mr. Barrett because all the oral argument addressed to the Court was by him. This is not intended as any discourtesy to, and in no way minimises the part played by, Mrs. Barrett, the Second Applicant, in the preparation of the case and, manifestly, the great assistance she rendered during the hearing. Such references as I shall make are therefore to be deemed to include Mrs. Barrett where necessary and appropriate.

4. The area in question is shown in several plans and diagrams in exhibit AJR 2 to the affidavit of Mr. Rowles, the Development Control Manager of the States' Environment Department, which is contained in the Respondent States' bundle of documents in the Black lever arch file produced to the Court. These reflect the plans currently submitted to the Department and also the variations that occurred from time to time to meet points that were raised by the Planning Authority, but for convenience I shall mainly refer to the large scale layout plan of October 2004, included at folio 155. The application for the development which gave rise to the Planning Department's meetings of 10th and 24th May, 2005, was initiated by Messrs. Lovell Ozanne,

Chartered Architects, on behalf of Osprey, on 20th December, 2004. The decision reached at the first of those meetings is the subject of the instant Application.

5. However, the first approach to the States in connection with the development now in issue was over 2 years earlier. In a letter of 17th September, 2002, Lovell Ozanne, their architects, sought a preliminary declaration on Osprey's behalf, under Section 27(1) of the Island Development Law 1966, in respect of proposed works at Sandpiper Vinery involving the demolition of derelict timber glasshouses and a packing shed on the site, and the construction of a single storey building of 30,000 sq. ft. of floor space. This was to be apportioned as to 20,000 sq. ft. for packing and storage, 5,000 sq. ft. for offices and laboratories and 5,000 sq. ft. for processing. As, however, the footprint area was only 25,000 sq. ft. it would in fact necessitate a two-storey building for a part of the area.

6. As I understand it the process initiated by an application under Section 27(1) is in reality a manoeuvre to test the temperature of the water, as it were, as regards the States' reaction to the intending developer's proposals. This accords with the view of Mr. A.C.K. Day in his report *(see infra)* in which he said at paragraph 10:-

> *"The exact status of a preliminary declaration is central to this story and became, in 2003, an issue which the Island Courts had to determine. Whatever its precise nature, what a preliminary declaration is most certainly not is full planning permission or any equivalent of it, enabling development to take place."*

7. At all events, that application followed the launch of the project which began with a full meeting of the Committee of Horticulture on 2nd September 2002, at which Mr. Barry Smith, a research scientist from Durham University and other personnel from Nutralife (see *infra* paragraph 100) had participated. This was followed by a function hosted by the intending developers at the St. Pierre Park Hotel to which a selected audience had been invited. Presidents of the various committees that existed at that time, including the President of the IDC, were also present. The next day Ospreys associated company, Healthy Direct Limited, issued a Press release entitled:-

> *"Healthy Direct Group continues expansion with high tech horticultural initiative."*

8. After the usual announcements the First Applicant herein, Mr. Barrett, was swift to record his objection to the proposal. He had learned that Osprey's function in the United Kingdom was to supply vitamins, minerals and natural supplements by mail order to retail outlets. He and the Second Applicant had purchased an adjoining property in 1995 – as he said in Court, they had bought it in good faith, and did not expect to find themselves next to a chemical factory.

9. There were further reactions from other bodies and individuals in Guernsey.Those in favour of the proposal included the Guernsey Growers Association and the States Committee for Horticulture, but a Mr. Le Poidevin and (at that time) a majority of the Douzeniers for the Parish opposed it. Accordingly, on 22nd November, the Chief Planning Officer for the IDC, Mr. W.E. Lockwood, recommended that the application should be deferred for further information to be provided.

10. It must be said here that by August, 2004, the Douzeniers' attitude had changed, but (see folio 153 in the Grey folder) they still required that strict conditions to the grant of permission be imposed. Moreover, by that time, stiff opposition had materialised from close neighbours, namely, a Mr. and Mrs. Archard and a Mrs. Dunster. The latter raised four environmental considerations (folio 156) which I regard as relevant to Ground 2 (see *infra* paragraph 33), and to which I will refer again in due course.

11. At its meeting on 26th November the IDC accepted Mr. Lockwood's recommendation and Mr. Rowles, now Development Control Manager of the Environment Department, was deputed to convey to Osprey the various concerns which the IDC had entertained. Those concerns, and in particular the matters raised by Mr. Lockwood in his memorandum to the Authority, are summarised by Newman, LB, at page 3 of her judgment of 1st July, 2003, in which she dismissed the first application for Judicial Review of the Planning Authority's decision to grant the Second Respondent's application for a Preliminary Declaration under Section 27(1).

12. In making his submissions on behalf of the Respondent Department in opposition to this application, Crown Advocate McMahon emphasised the importance of arriving at a true understanding of the history and chronology of this matter in order to appreciate fully the position and sentiments of each of the parties hereto. I fully agree. While it might be said that the events leading to, and the setting aside of, the Preliminary Declaration by the Court of Appeal are now history, they are, in my view, relevant as showing all the circumstances surrounding the present application, particularly as Mr. Rowles had said in paragraph 6 of his affidavit of 15th July 2005:-

> *"The…[Environment]…Department has been conscious that on 18th December, 2003, the preliminary declaration was quashed by the Court of Appeal. Consequently, the Department has never considered subsequent applications by … [Osprey]… as if there already existed an indication to … [Osprey]… that the granting of its application was likely; it has considered each application afresh, although relevant information already known to the Department has been utilised in assisting determination of each application against the applicable material planning considerations."*

13. Mr. Barrett has also acknowledged this, for he said in paragraph 7 of his affidavit of 16th June, 2005:-

> *"I am aware that the Environment Department does not start with a clean file on every new application. Knowledge of previous applications and aspirations of the site's owners, together with previous consultations are to a greater or lesser extent carried forward when considering current planning applications."*

14. After 26th November, the next step chronologically was that Mr. Rowles held discussions with Osprey, as a result of which he arrived at a basic understanding of the background to the proposals and process by which Healthy Direct intended to grow medicinal herbs and harvest the crops therefrom. These would eventually become the vitamins, minerals, and natural supplements to be marketed through retail outlets in the United Kingdom.

15. As a result of these discussions Healthy Direct through its managing director, Mr. Winn, wrote a fully comprehensive letter on 28th November, showing the process by which its subsidiary, Guernsey Hydroponics, which had been established as the vehicle for the purpose, would grow the herbs, harvest them, store, grind and freeze-dry them. This forms the first 4 pages of AJR2, and describes the process in the utmost detail, with, *inter alia,* examples of the quantities of raw materials which would be needed to produce a given amount of finished extract and the apportionment of space in the proposed building to each activity described.

16. It seems to me that Healthy Direct was at pains, from the outset, to inform the Authority as to the nature of its objective which was, and here I quote from paragraph 2 of their letter of 28th November (Folio 1 [of AJR 2—hereafter I shall refer to 'the Black file']):

> *"To summarise the usage of the site, Healthy Direct Group confirm that we intend to cultivate medicinal herbs in the glass areas of Sandpiper Vinery. The venture will be undertaken by Guernsey Hydroponics, with the growing of these herbs to harvest, extract and store the active ingredients for the pharmaceutical market."*

And later on, at paragraph 6, Mr. Winn said (à propos of the suggestion that the industrial part of the operation be re-located to Pitronnerie Road):-

> *" …… most of the material produced will be sold to pharmaceutical companies for them to manufacture tablets and other medicines."*

17. It has thus, in my opinion, been clear from an early stage the objective which Healthy Direct wished to achieve by acquiring and developing the site at Sandpiper Vinery. The company intended, and still intends, to grow medicinal herbs in the building which is to replace the derelict glasshouses, although, as appears from the material produced to support the present application, the floor area and the size of the building required has varied with each successive application to the Planning Authority. The first application attracted mild criticism from Mr. A.C.K. Day in his report to the Bailiff of 30th March, 2005, in which, after reciting the terms of the first application he said at paragraph 31 (page 38 of Mr. Barrett's bundle):-

> *"Whilst the application ran to some 6 pages, it cannot be described as particularly illuminating, and thus helpful, with regard as to exactly what was being proposed' …(paragraph 32). " The accompanying location plan did little more than to indicate where the site was, which glass would be retained and which demolished,and and what was proposed to be erected in its place, namely a building incorporating 20,000 sq. ft. for packing and storage, and 5,000 sq. ft. respectively for offices and labs and processing."*

Mr. Day then continues (paragraph 32):

> *"Although there was an oblique reference to Durham University, there was no further explanation in the letter of application as to what crops were to be grown on the site, and thus packed and stored presumably, nor what the nature*

of any proposed processing was to be or why laboratories were required."

To this criticism Mr. Barrett added in his replying submission that the nature of the plant to be grown and the exact nature of the finished product has, as he said, always been shrouded in secrecy. He suggested that Mr. McMahon had glossed over the extraction process in his address.

18. In this connection there is a similar element of vagueness as regards the present Application, for in his affidavit of 15th July, 2006, Mr. Rowles does not give an exact description of the crops to be grown and, for example, in paragraph 7 talks of 'certain specialist activities' and 'natural pharmaceutical products'; and in paragraph 8 'growing of plants forming the crop' and 'the harvested plant'; 'the finished horticultural product' and 'the finished pharmaceutical product'.

19. It seems to me that a company such as Healthy Direct when applying for approval of a project involving development to an Authority which has to enforce those which have to be (by reason of the density of the population and of buildings in Guernsey) strict planning laws, may face a genuine difficulty. I can well understand that it may not be wise for them to specify with ultimate precision the crop to be harvested, or to give out too much information as to how the raw material becomes the finished product, or, indeed, the precise nature of the process by which it is grown, for perfectly valid commercial reasons.

20. Every specialised product, particularly in the medicinal field, must, to a certain extent, depend on a degree of security—otherwise its commercial viability would be in question. For example, however admirable may be the security achieved by the various States Departments, there is always the possibility of a leak. On the other hand too high a level of preserved confidentiality may operate against the interests of an applicant. It may, for instance, render it difficult to determine, to repeat Mr. Rowles' phrase, at paragraph 6, *"each application against the applicable planning considerations."*

21. On 13th December, 2002, the Authority notified Osprey through Lovell Ozanne that the Committee had decided that, subject to the submissions to it of a detailed application supported by such detailed plans and information as it might require, it would be likely to grant permission for the development sought in the application which had been initiated by the letter of 17th September. That notification, appearing at pages 83 to 85 of the Grey folder, was expressly subject to seven main conditions and, consistently with Mr. Day's conclusion cited at paragraph 6 hereof stated, *inter alia*, as follows:-

> *"2. Development shall not be commenced before fully detailed plans thereof showing the siting, design and external appearance of the building(s), landscaping, means of access, provision for parking and servicing, any outside storage area(s), any external plant or machinery, means of enclosure, drainage, and the design and siting of any electricity sub-station, have been submitted to and approved by [the IDC]."*

The nature of the sanction thus granted is made even clearer in Note 3:-

> *"THIS IS NOT A BUILDING PERMIT/LICENCE, NO WORK IN REGARD TO THIS DEVELOPMENT SHALL BE COMMENCED until plans of the above proposals have been submitted and approved."*

22. In view of these strictures it might at first sight be questioned that the notification of 13th December amounted to a conclusive decision (subject, of course, to the statutory right of appeal) which could form the basis for an application for a Judicial Review. The point was only touched on by Newman, LB, but it was clearly present to the minds of the Members of the Court of Appeal who overturned her decision on 18th December, 2003, for at paragraphs 8 to 10 of the report, Hodge, JA, who delivered the leading judgment, said that while the declaration cannot be equated with the concept of outline planning permission existing in English and Scottish Law, it nevertheless constituted a significant step on the road towards obtaining full permission and was, equally clearly, intended to have legal effect as it is given validity for three years by Section 27(2) of the Law.

23. An additional reason given by the Court for regarding the notification of 13th December as amenable to Judicial Review, at paragraph 10, was that the Authority, being under a duty to act both reasonably and consistently, could be challenged by an application for Judicial Review if it had given a declaration under Section 27 and subsequently refused full permission. Mr. Barrett, then as now representing both himself and the Second Applicant, and who had had extensive experience of the IDC, had never known of such a case.

24. It is common ground that Osprey made a second application for planning approval which, according to Mr. Rowles, was made by letter on 9th October 2003, and officially received on 30th of that month. There would appear to be an hiatus in this respect because in the matching paragraph in Mr. Barrett's affidavit (paragraph 8) he states that the second application was made 'following' the overturning of the Preliminary Declaration by the Court of Appeal. This cannot be right, for the Court of Appeal's decision was not given until 18th December, and, moreover, in his letter of 24th November to the IDC (Folio 53 in the Black File) Mr. Barrett says:-

> *"The Committee will also be aware that my wife and I are seeking the 'setting aside' of that Preliminary Declaration by the Court of Appeal next month. However, <u>if or until</u> that Court modifies the judgement of Lt. Bailiff Newman, her judgment on the matter of the issued PD stands."* My emphasis.

25. Very probably, the application made in October of 2003, was not an application made, as it were, *de novo*, but a follow-up of the Preliminary Declaration granted the previous December which, of course, had emphasised that fully detailed plans were still required. I note that the second application appears to have increased some of the measurements submitted for the proposed building and reduced others. That really matters not because, following the recommendation of Mr. Lockwood in his report of 19th March, 2004, which took into account not only further letters from Mr. Barrett and his then Advocate, Advocate Loveridge (Folio 57) but also the fairly strong views expressed by a Dr. Le Lisle (*infra paragraph 27*) the Authority refused permission to Osprey to carry out the development then proposed.

26. The comments made by the Authority (pages 80 and 81) of the Black file included the following:-

> *"That assessment…" [meaning the advice given by the Committee for Horticulture and Board of Industry] "… concluded that the application as submitted is for a post harvest facility, including laboratories, offices and packaging, which is of an excessive size for the proposed crop production and needs to be scaled appropriately in order for it to be considered as ancillary to crop production from the site.*
>
> *The Committee concluded that the development as proposed would not meet the terms of Policies CE7, HT1 or HT3 and consequently could not be approved within the terms of Rural Area Plan (Phase 2)."*

27. It is also worth setting out an extract from the views of Dr. De Lisle at folio 55 of the Black file, where he said:-

> *"This development is not in keeping with the thrust of the IDC Rural Area Plan (Phase 2).*
>
> *There is no problem with the greenhouses being rehabilitated and used for growing crops. But the laboratory and offices on this scale are more appropriately located in one of the urban area industrial parks. 3,000 square metres is a huge building. The growing operation conforms to the land use plan but the building use and activity certainly does not.*
>
> *If this goes ahead then any number of people have a right to have their vinery locations approved for industrial/commercial office development."*

This extract is an indication of the depth of the adjoining owner's feelings as regards the Sandpiper Vinery development proposals.

28. Undaunted by the Authority's refusal to consent to the second application of 30th March, Osprey instructed Lovell Ozanne to renew their application, which they did by letter enclosing a fresh application (Folios 88-91) dated 23rd June, 2004. Several modifications to the original proposal of 2002 were made. These included:-

(i) Reduction of the footprint area by 33%. Presumably this percentage area relates to the original application of 2002 in view of paragraph 2 of Lovell Ozanne's letter at folio 82 of the black file.

(ii) Reduction of the height of the proposed building by 1,200 mm, so that, as stated in Lovell Ozanne's letter of 15th December, 2004, (page 152 in the black folder) the proposed height will be 7.85 metres above floor level.

(iii) An assurance that there would be no excessive noise generated from the horticultural glasshouse (Folio 86)

(iv) It was anticipated that there would be only two deliveries into the site by a 20ft. container lorry and one collection from the site at the times stated.

29. Lovell Ozanne made it clear in their covering letter that modifications (i) and (ii) were made as a result of the comment in the refusal of 30th March, in addition to those I have mentioned at paragraph 26 hereof, that the proposed 'post-harvest facility' was 'of an excessive size for the proposed crop production'. This is also consistent with the review in the earlier estimate of space requirements as summarised by Mr. John Ogier, in conjunction with Dr. Andrew Marchant, in his technical comments at Folio 162.

30. After receipt of that which was in effect the third application made on behalf of Osprey, the Chief Planning Officer circulated the relevant Departments and Authorities for their comments and representations on the then current proposals. There then followed much correspondence between Lovell Ozanne and that which by then had become the Environment Department, and in particular Mr. Lockwood.

31. Frequently their representations re-emphasised factors of which the Applicants wished the Department to take particular notice, in order, doubtless to make them even more attractive than they seemingly were. In his connection I instance the Agent's letter of 15th February, 2005, (Folio 197) in which they draw attention to:

> *'.....the substantial reduction in size of the building from 3,369 sq. metres to 1,592 sq. metres'* (paragraph 2)

and to:

> "*the proposed demolition of the isolation shed and contain the isolation process within the building'* (paragraph 3).

Their contention that the proposed development would be a unique opportunity for the island was reiterated.

32. It is common ground that their efforts were successful at this third attempt and, as is the subject of the present application, In Principle planning permission was granted on 10th May, 2005, augmented, as Mr. Barrett contends, on 24th May of that year. It is also common ground, and has been the subject of particular concern in the Injunction Application made by Mr. Barrett which came up on 7th and 13th April, 2006, that that permission expired on 9th May, 2006. Hence the necessity for that which some might regard as imprudent haste for the Draft Judgment to be delivered.

33. It is with these background facts and considerations in mind that I now come to the main areas of complaint by the Applicants. According to my understanding of the Cause and his Affidavit of 16th June, 2005, Mr. and Mrs. Barrett's challenge to the decision of the Planning Authority of 10th May last to grant In Principle permission for the development at Sandpiper Vinery may fairly be said to be comprised in the following grounds:-

Ground 1: Given that the proposed Hydroponic process whereby the health supplements were to be produced falls within the definition of 'horticultural use' within the meaning of User Class 60, nevertheless it is obvious on consideration of all the material produced in support of the application that the predominating function of the

processing to be carried on within the proposed building is not horticultural but industrial, as outlined in paragraph 10 of the Cause. Consequently, the horticultural aspect was ancillary to the industrial activity, rather than the other way about, and the latter would not come within either 'essential ancillary works' so as to qualify under the 'gateway' policy, statement HT3, nor constitute 'a purpose which is ancillary or ordinarily incidental to the principal use' (i.e. of the land use for horticultural purposes under User Class 60) under the Use Classes Ordinance of 1991.

Ground 2: That in arriving at its decision the Committee, as the decision–making body of the Authority, failed to take into account all of the requirements set out in Section 17 of the 1966 Law, remembering that these are stated conjunctively and not disjunctively, and in particular the effect of the development on adjoining properties – notably the Applicants' dwelling house, which is an adjoining property, being situated near the boundary of the Site, as provided in paragraph (f) of that Section.

Ground 3: That the Environment Department for which the First Respondent is responsible as the Minister, in arriving at its decision, relied on consultations with the Commerce and Employment Department, officials in or connected with that Department having been paid advisers to the owners of Sandpiper Vinery with regard to the purchase of the site for the purpose of the development in issue. In particular that there was a conflict of interest with regard to:-

(a) Mr. John Ogier, who was the Economic & Strategic Adviser to the Board of Industry and who had substantial connections with Ospreys.

(b) Mrs. McNulty Bauer the Deputy Minister, had previously been employed by the Sandpiper owners, as Operations Director of the Zouche Group.

Ground 4: That the Authority acted outside its powers in re-visiting its decision of 10th May, two weeks later for the purpose of adding conditions to the [purported] permission so granted (I have added 'purported' parenthetically so as to reflect Mr. Barrett's principal contention).

34. Before considering these grounds individually and in any detail, or reaching any conclusion thereon, I propose to analyse the authorities which have developed the law of judicial review in the United Kingdom, and, in Lord Diplock's phrase in Council of Civil Service Unions & Others v. Minister for the Civil Service [1984] 3 AER 935, at page 949, have virtually transformed it since the end of World War II. Before doing so, as this is a comparatively new field of law in Guernsey, it is helpful to understand the origin of that which was formerly the writ of *certiorari* (the modern equivalent of which is sought here), and which in 1977 became one of the orders which could be made when the remedy of Judicial Review under Order 53 was invoked under the former Rules of the Supreme Court (obviously I am talking of the English Rules).

35. The historical background of the remedy is explained with great clarity in the speech of Lord Roskill in the Civil Service case at page 953 h to j, which I now reproduce:-

"Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over

> *inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government."*

36. Lord Roskill then distinguished the type of control exercised by the High Court over the decisions of inferior tribunals (with which the House was not concerned in the case in question) from that exercised over executive action. On the next page Lord Roskill enumerates the three separate grounds on which executive action can be judicially controlled. Briefly, they are where the Authority has committed an error of law, as where it purports to exercise a power which it does not have. The second is where there is 'Wednesbury' unreasonableness or perversion [Associated Picture Houses Ltd. v. Wednesbury Corpn. (1947) 1KB 223]. Thirdly, where it acts contrary to natural justice, as where it fails to allow the subject an opportunity of being heard before it makes an order to his prejudice.

37. However, none of those grounds is applicable here, because I regard the decision of 10th May, 2005 (I am so treating it due to the way the Cause is pleaded, without prejudice to the contention in Ground 4) as not constituting an action of the executive, but as a decision of a tribunal, namely, the Board (which has, *de facto* succeeded the IDC) whose functions since the Machinery of Government (Transfer of Functions) Ordinance, 2003, came into force on 6th May, 2004, have been transferred to the Department of the Environment and its Minister.

38. What, then, is the present nature of the former Committee which was constituted by, and acted under, the 1966 Law, as amended? Appeals brought against its decisions by aggrieved would-be developers named the President of the Island Development Committee (or, more frequently, the Island Development Committee) as the Respondent to their appeals prior to May 6th 2004. Consistently with this practice the former was cited as Respondent in the Application before Newman, LB, to set aside the Preliminary Declaration, and the latter as the Respondent in the appeal heard by the Court of Appeal, in June and December of 2003, respectively.

39. As I understand the situation the former IDC is now a board which is akin to a committee and which comes under the aegis of the Department of the Environment. Its composition has been varied so that instead of the former membership consisting of the President and five States members, all of whom had voting rights, plus three non-voting members, a total of nine (there may be an error there in view of what Mr. Barrett said during the injunction hearing) it now has the Minister and four other voting members and two non-voting, a total of seven. Obviously, applications for planning permission are matters which require to be adjudicated upon by a board (loosely termed a committee) which meets in order to consider them against the relevant statutory background.

40. The dictionary definition of "tribunal" is:-

> *"Board appointed to adjudicate regarding fair rents, exemption from military service, etc.."*

41. Consequently, the decision of the Department complained of was, in my judgment, nonetheless the decision of a tribunal, namely, of the Board, even though it

was promulgated by the Department which has as its political head the Minister of the Environment. It would, I imagine, be unthinkable, or almost unthinkable, for the Minister to override the decision of the departmental board charged with adjudicating on such matters. It will be seen that I have deliberately used the capital letter'B' and its small counterpart 'b' interchangeably. This is to denote the slightly uncertain terminology needed to describe the IDC's successor. It may be, as Mr. Day said in relation to the Preliminary Declaration (paragraph 6 above), that its exact title and status is unclear, but for the purposes of this case I think it must be right (and in view of the definition I have just cited) to regard the decision of 10th May as that of a tribunal rather than as an Executive act.

42. It therefore follows, in my judgment, that the law as stated by Denning LJ, in R. v. Northumberland Compensation Appeal Tribunal *ex parte* Shaw (1952) 1KB 338, in relation to inferior tribunals is that which should be applied here. In that case Mr. Shaw lost his employment with the local Hospital Board, and claimed compensation accordingly. The Board, and subsequently the Tribunal, assessed his eligible service from 1936 to 1949, which covered the period of his hospital service but not the whole of his local government service. Mr. Shaw then applied to the Divisional Court for an order of certiorari, which was duly granted.

43. It was conceded that that decision contained an error in law. At page 351 of the report of the Tribunal's appeal Denning LJ, said:-

> *"... throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law if the error appears on the face of the record. What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings; see Blackstone's Commentaries Vol. III at p.24."*

He then said:-

> *"Following these cases' [meaning those cited in the intervening text], 'I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons and those reasons are wrong in law, certiorari lies to quash the decision."*

Denning, L.J. then proceeded to consider when affidavit evidence would be admissible. Extensive affidavits have, of course, been filed by both parties to this application, and in view of the development of the law of Judicial Review I think it is perfectly proper to take them into account in deciding whether or not this application should be allowed.

44. Still more recently, under the Practice Note issued by Lord Woolf, CJ, (2000) 4 AER 1071, they became orders issued by a new division of the High Court, known as the Administrative Court, under the names of a mandatory order (formerly *mandamus*) a prohibiting order (formerly *prohibition*) and a quashing order (formerly *certiorari*). The type of order sought in the instant case would, under the new classification, be a quashing order. Manifestly it is open to an applicant to seek one or more of the orders available, which was done in the Electricity Commissioners and the

Hillingdon cases *(infra)* (in the first *certiorari* and *prohibition* and in the second *certiorari* and *mandamus*).

45. The *rationale* of these two former orders was lucidly and admirably set out by Professor S.A. de Smith in his book Judicial Review of Administrative Action at page 337 as follows:

> *"In administrative law the orders of certiorari and prohibition have so many chacteristics in common that they can well be discussed together. The one significant difference between them is that prohibition may, and usually must, be invoked at an earlier stage than certiorari. Prohibition will not lie unless something remains to be done that a court can prohibit. Certiorari will not lie unless something has been done that a court can quash. But it is sometimes appropriate to apply for both orders simultaneously—certiorari to quash an order made by a tribunal in excess of its jurisdiction, and prohibition to prevent the tribunal from continuing to exceed its jurisdiction."*

46. I therefore begin by referring to the earlier case, in which the power of the Courts to control administrative acts, or the decisions of inferior tribunals, was succinctly stated by Atkin, LJ, in the well-known case of R. v. Electricity Commissioners *ex parte* London Electricity Joint Committee (1920) Ltd. & Others (1924) KB 171. The Electricity Commissioners were a body created by an Act of 1919 and thereby entrusted with reorganisation of the electricity supply. In 1923 they published a scheme for improving the supply within London and the Home Counties. The object of the applications for *certiorari* and *prohibition* was to test the validity of the scheme. At page 205 of the report, Atkin, LJ, said:-

> *"Wherever any body of persons having legal authority to determine the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."*

The above passage was cited with approval by Lord Widgery, CJ, in R. v. Hillingdon London Borough Council *ex parte* Royco Homes Ltd. (1974) 1 QB 720 at page 728 B where, as here, *certiorari* was sought to quash the decision of a planning authority granting permission to build a number of residential homes, on the grounds that a number of *ultra vires* conditions had been attached to the grant.

47. In deciding that the concluding words in Section 29 of the Town and Country Planning Act 1971:-

> *" ……. [the local planning authority] 'may grant planning permission, either unconditionally or subject to such conditions as they think fit."*

were too wide to be given their literal meaning. Lord Widgery followed this *dictum* of Lord Denning in Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1958) 1 QB 554 at page 572:-

> *" ... nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."*

48. The fourth and fifth conditions which were attached to the grant of the permission to develop purported to restrict the occupation of the dwellings concerned (a) to those families who had been on Hillingdon Council's waiting list for housing for over twelve months, and (b) for a period of ten years thenceforth to persons who, in effect, would enjoy the protection of the Rent Act 1968. The Lord Chief Justice took the view that those two conditions (which he held were not severable from the others) were equivalent to requiring the applicants to shoulder a significant part of the Council's statutory duty to house people, and however laudable and well-intentioned, were *ultra vires* its powers.

49. In allowing the application, the Lord Chief Justice dealt with another aspect of that which was then *certiorari* but which is now part of the Judicial Review process, at page 728 F as follows:-

> *"In particular, it has always been a principle that certiorari will go only where there is no other equally convenient and effective remedy. In the planning field there are very often, if not in an almost overwhelming number of cases, equally effective and convenient remedies."*

He went on to instance the comprehensive system of appeals under the Town and Country Planning Act 1971. I therefore pose the question:-

> *"Is there another equally convenient and effective remedy available to the Applicants in this case?"*

50. It could be argued that in Guernsey there does exist another such remedy, because there is an express right of appeal under Section 26(1) of the Law. However, since the decision of Carey, DB, as he then was, in Green v. Island Development Committee & Winslow (1993) 15 GLJ No 36, whereby a person who wished to appeal against the granting, as opposed to the refusal of, permission to develop was held not to be a 'person aggrieved' within the meaning of the sub-section, the only remedy (I take as an example) to a neighbour whose property is said to be adversely affected by the development is by way of Judicial Review.

51. The reasoning behind that decision appears at page 6 of the judgment:-

> *"The first issue is how this Court could limit the classes of persons other than the applicant who could claim to be 'persons aggrieved' ... once parties other than the original applicant are treated as persons aggrieved one would be faced with a plethora of appeals by different persons all with different interests in the application the subject of appeal."*

52. He then cited from the judgment of Salmon, J, in Buxton v. Minister of Housing & Local Government (1961) 1QB 278 who, in turn quoted from James, LJ, in Re Sidebotham (1880) 14 ChD 458 at page 465, as follows:-

> *"The words 'person aggrieved' do not really mean a man who is disappointed of a benefit he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived*

him of something, or wrongfully refused him something, or wrongfully affected his title to something."

That is to say in Salmon, J's, words at page 283 of the Buxton report:-

"In my judgment, however, I am compelled to restrict the meaning of the words 'person aggrieved' to a person with a legal grievance."

53. Over ten years later in Old Government House Hotel Ltd. v. President of the Island Development Committee & Mighty Mouse Ltd. (2003) 17th December, leave to proceed with an application was refused by Day, LB, mainly on the ground that the delay which had occurred in instituting the proceedings would seriously prejudice the adjoining developers who had reached an advanced stage of the building works they had commenced in reliance on the approval of its application for planning permission. I add parenthetically that Day LB's decision preceded Guernsey Practice Direction 3 of 2004 (which requires the Cause to seek permission to proceed with the application) by four months, so at that time the previous English practice of obtaining leave to seek Judicial Review was followed. I note here that permission is not formally sought in the Cause here, but as Mr. McMahon did not take any objection to the form of the Cause, it has proceeded by tacit, if not express, consent to a full hearing.

54. There is one other English authority to which I desire to refer again before coming to the individual grounds of complaint, namely, the Civil Service Unions case *(supra).* The GCHQ at Cheltenham was virtually the nerve centre of the Civil Service Department charged with preserving the security of United Kingdom military and official communications and to provide intelligence information to Her Majesty's Government. Between 1979 and 1981 various forms of industrial action were taken by the relevant Unions.

55. On 22nd December 1983, the relevant Minister, who was also the Prime Minister, took the view that such disruptive action should be curtailed in the interests of national security, and directed that staff at the GCHQ would no longer, under their terms of service, be permitted to belong to national trade unions. This was announced in Parliament on 25th January, 1984. The Council accordingly obtained leave to seek Judicial Review on the grounds that the directive contravened Article 4 of the Civil Service Order in Council 1982. On second appeal to the House of Lords, which upheld the Governments' contention, Lord Diplock said at page 949 e to g:-

"Judicial Review, now regulated by RSC Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call 'decision–maker' or else a refusal by him to make a decision.

"To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision–maker, although it may affect him too. It must affect such other person either (i) by altering rights or obligations of that person which are enforceable by or against him in private law, or (b) by depriving him of some advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been commun-

cated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision–maker which will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn…"

[I do not need to set out the rest of the second part of this sub-heading in Lord Diplock's speech, because it is not suggested in this case that Mr. Barrett was given any express or implied assurance].

56. The Hillingdon case is of particular value in the instant one because it shows that, even in England, where there is a very comprehensive system of appeals in planning cases, the supervisory jurisdiction of the Courts extends not only to cases where permission has been denied, but also where it has been granted—not only when it results in possible or real detriment to the occupiers of neighbouring dwellings.

57. Although the mode of proceeding here was not challenged on behalf of the States, and aside from the issue of whether the application should be allowed, the extract from Professor Smith and the foregoing decisions make it perfectly clear that the process of Judicial Review is the appropriate way to seek the direction of the Court in this case. I therefore now turn to consider the individual grounds, as I have formulated them, *seriatim:*

Ground 1: Prior to the judgment of the Court of Appeal but after Newman, LB, had upheld the Authority's decision to grant the Preliminary Declaration of 13th December, 2002, so that at that time Healthy Direct may reasonably have assumed that their project was likely to go ahead, Lovell Ozannes forwarded a description of the processes to be undertaken in the proposed building (Folios 33 to 35 in the Black File) Mr. Barrett submitted that none of the six processes described namely, Herb Drying; Milling; Extraction; Evaporation; Extract Drying or Granulating could fall within the definition of horticulture and that all of them were clearly industrial processes within the definition.

58. I apprehend that in considering an application of this nature it is, first and foremost, essential to ascertain if the primary purpose contemplated (to which the use of the new building would be put) is truly horticultural, so as to bring it within the 'gateway' policy – namely HT3.

59. The definition of 'horticulture' is 'the art of garden cultivation' and the definition of 'cultivation' is 'the preparation and use of soil for crops' and also 'the preparation of crops by culture.' To my mind cultivation is not necessarily restricted to the preparation of crops from arable land or soil and can validly include the process I have referred to in Ground 1 at paragraph 33 above. I am reinforced in this view by the wording employed in the description of Class 60 in the Island Development (Use Classes) Ordinance 1991, which is:-

"Use of land for agriculture, horticulture or forestry (including afforestation) and use for any of those purposes of any building occupied together with land so used."

60. I have addressed this issue partly because horticulture is an essential ingredient of Policy Statement HT3, inasmuch as it is included in Chapter 5, which is

that part of the Written Statement published by the former IDC of the Rural Area Plan (Phase 2) which relates to horticulture, but also because in paragraph 11of the Cause Mr. Barrett claims that the Environment Department should have taken independent advice 'on whether the industrial processes could be considered genuinely horticultural.'

61. In the course of Mr. Barrett's submissions in the instant application, and throughout the passage of the case during the first Judicial Review, which was heard by Newman, LB, on 30th June, 2003, the successful appeal from her decision confirming the IDC's decision to approve the Preliminary Application, and the subsequent correspondence, records and minutes of the Planning Authority, references are made to various policies beginning with the prefixes HT, CE and IN (see paragraph 72 *(infra*). In order to understand these Policies it is necessary to refer to the Written Statement of the IDC of July, 1997, the opening paragraphs of which set out the evolution of the planning system which the Authority now applies in Guernsey.

62. In the course of the hearing it was suggested that the Department could have sought outside assistance from the United Kingdom Department of Environment Food & Rural Affairs (DEFRA) in order to get independent advice and thus forestall any suggestion of a conflict of interest. This would seem to have been appropriate as that Department's responsibilities are stated as:-

> *"UK Plant Breeders Rights Policy and Systems, international liaison with EC & UPOV member states. Maintaining UK National Lists of agricultural and vegetable plant species, liaison with EC Commission regarding Common Catalogue of varieties. Community Plant Variety Rights. Seed certification and enforcement EC Standing Committee and Management Committee on Seeds."*

63. À propos of the Gateway policy statement I note that Mr. Day devoted much of his report, from paragraphs 57 to 78, to discussing the horticultural process, not from the aspect of whether that which is proposed is not properly regarded as horticulture, but because of the issue which has been present throughout the passage of this case as to how large a part the industrial process played in, or indeed overlaid, the horticultural activities.

64. In this connection I cannot do better, once more, than to repeat a quotation by Mr. Day, at paragraph 81 of his Report, which appears in Mr Ogier's Comment at page 5 of the Black bundle, and is as follows:-

> *"<u>New Developments in the Horticultural Industry</u>*
>
> *The nature of horticultural production and the horticultural market is changing significantly. A very different type of horticultural business from that which the island has been used to will be needed for the 21st century. These businesses, though fundamentally horticultural in operation, will have particular site development requirements which are more advanced in scale and technical specification than many of the existing vineries established around the cropping requirements for tomatoes and cut flowers in the last century. The proposed production of pharmaceutical crops falls into this new category of crop production and site requirements."*

65. Mr. Barrett, however, argued that it would not be legitimate or even possible to bring the developer's proposed activities within the ancillary or ordinarily incidental provisions of Section 2 of the Island Development (Use Classes) Ordinance 1991 because, if it is accepted that the Second Respondent's activities will in reality be industrial, rather than horticultural, the proportion of the total area which will be used for that which is in truth an industrial process will greatly exceed any which can, even by stretching the imagination, be used for legitimate horticultural activity.

66. Mr. Barrett added that since horticulture clearly fell within Agricultural Use Class 60 there was no possibility of any of the twelve Industrial Use Classes enumerated in 48 and 59 inclusive in Schedule 1 to the Ordinance being confused with it. Consequently, if the Second Respondent was allowed to develop in the way it had proposed, that would constitute a change of use under Section 4 and would thus become 'development' under the definition in the Law.

67. As there is no issue as to whether the site is properly regarded as a prime horticultural site, especially in view of its past use (see Mr. Nash's description re-ferred to at paragraph 78 *(infra)* the Court should regard the instant application to dev- elop as a non *bona fide* attempt by Osprey (this is Mr. Barrett's submission) to create a loophole or 'policy gateway' for approximately 17,000 sq. ft. of industrial use.

68. Clearly, if that were so the activities contemplated in the proposals by Healthy Direct would not be permitted by reason of Policy Statement IN6, which expressly prohibits new industrial development within the area comprising Phase 2 of the Rural Area Plan. However, one difficulty is that there is no clear and comprehensive definition in the Written Statement of the meaning of 'industrial'. Mr. Barrett drew attention to the areas designated in the various plans and diagrams submitted in order to demonstrate that the predominating use to which the proposed building would be put was industrial and not horticultural.

69. According to paragraph 1.1 of the Written Statement the inception was a comprehensive review of land use and overall planning policy from 1988 onwards. At that time a broad distinction was made between the urban areas of St. Peter Port and St. Sampson's and the corridor lying therebetween, and the remainder of the island. As I understand it, these two main areas were the subject of Outline Development Plans, and, within those respective areas, a total of six Detailed Development Plans. Hence the wording of sub-section (a) of Section 17 of the 1966 Law, which was amended by Order in Council No. 1 of 1990.

70. The States then decided (paragraph 1.3) to replace this system with the Urban Area Plan, covering the urban areas, and a Rural Area Plan, which was then divided into the northern part of the island (Phase 1) and the southern part (Phase 2). It is common ground that the Sandpiper Vinery site falls within the scope of the island's Rural Area Plan Phase 2. This, in turn, is sub-divided, *inter alia*, into those which are classified as Green Zones which are appropriately depicted in different shades of green on the map attached to the IDC Statement. The conservation and built up areas are similarly shown in brown and beige shading respectively.

71. Green Zone 3, the relevant zone in this case, is the one which, under the Plan, merits the greatest flexibility of the three zones. Nevertheless, it is designated as an area of rural character. States Policy CE7 in respect of this area, which formed one of the Policy Statements on which the second application foundered (see *ante* paragraph 26) provides:-

> *"In areas of Rural Character (Green Zone 3) the policy will be to retain the predominantly open and undeveloped character of the land but also, where appropriate, to accommodate essential development related to the use of the land for agriculture, horticulture, outdoor recreation, tourism, or the provision of access to an otherwise acceptable designated site for new housing. The erection of new housing will not be permitted."*

72. It is necessary to be clear as to the prefixes which are used in formulating the respective policies refer to the individual sections in the Plan—thus, Section 2, entitled "Conserving and Enhancing the Rural Environment", contains policies with the prefix "CE"; Section 5 which relates to horticulture employs the prefix "HT"; Section 6, which covers tourism, uses the prefix "T"; industry (Section 10) is "IN" and commerce (Section 11) has the prefix "COM".

73. The policies enumerated in each section prescribe those which are in effect rules to which the Planning Authority is required to have regard when considering applications for development. The word is defined in Section 40 of the Law as:-

> *"... the carrying out of any building, engineering, mining or other operation in, on, or over land and includes the making of any material change in the use of any building or land."*

74. The importance of keeping this definition well in mind throughout when assessing the acts and conduct of the Authority in an application of this nature is manifest because paragraph (a) of Section 17, on which Mr. Barrett laid great emphasis, provides that the Committee (meaning the Planning Authority), when considering an application for planning permission, shall take into account:-

> *" ... the Strategic and Corporate Plan"* [which replaced the former Outline Development Plan] *"when approved by the States"* [as it has been] *"and any Detailed Development Plan when so approved."*

75. There then follow five other criteria, numbered (b) to (f), which the Planning Authority is also required to take into account, which are, as Mr. Barrett rightly submitted, cumulative, the conjunctive connecting word 'and' appearing between paragraphs (e) and (f). Of these Mr. Barrett laid particular emphasis on the requirement in (f), namely, that the Authority must have regard to the environmental considerations specified therein. He attempted to demonstrate by detailed references to correspondence in his bundle, in particular, to the letters and reports from Mr. T.P. Rowe, the Deputy Chief Environment Officer (EHO) that the Authority had singularly failed in its duty in this respect.

76. The other main plank of Mr. Barrett's submissions is that, as was stated both by Newman, LB, and by the Court of Appeal in their judgments of 1st July and 18th December, 2003, respectively (and also accepted by Crown Advocate, Mr. McMahon, who represented the Minister) the relevant policy against which his claims that the Authority's decision of 10th May should be set aside on the grounds set out in paragraphs 13 to 17 of the Cause, are to be tested at HT3, which was set out *in extenso* by Newman, LB, at page 7.

77. As is clear from the diagrams submitted from time to time by the Planning Authority, and the other documentation contained in Mr. Barrett's Grey bundle and the First Respondent's Black bundle, the site was and still is occupied by a substantial area of glass. Hodge, JA, who delivered the leading judgment in the Court of Appeal, had no difficulty in concluding (paragraph 40) that the first criteria in HT3 is satisfied. According to the report of Mr. Nash at Folios 134 and 135 of the Black bundle) of 16th August, 2004, the area covered by glass was then 6.6 acres, of which 4 acres consisted of derelict timber and 2.6 acres had metal framed glasshouses in good condition. Mr. Barrett, however, stated that this is factually inaccurate and that several of the previous existing glasshouses had been demolished.

78. The Court of Appeal also held that Sandpiper Vinery constituted a prime horticultural site within the second criterion of HT3, and, as I understand from Mr. McMahon's submissions, this is common ground between the parties [see page 50 of my own record]. It is also consistent with the fact that the glasshouses were previously used for commercial tomato production—see paragraph 2 of Mr. Nash's report. As Director of Primary Industries in the Department of Commerce and Employment he left no doubt that the welcomed the re-introduction of horticultural activity after, according to Newman, LB, a lapse of some three years on the Sandpiper site. Mr. Nash also enlisted the services of Dr. Andrew Marchant as a consultant.

79. As regards conditions (iii) and (iv) of the Policy Statement HT3, which Newman, LB, described as 'subjective elements' Hodge, JA, does not appear to have considered these in any detail, probably because he had already taken the view that the IDC (as it then was) did not have enough information before it so as to conclude that the envisaged application for planning permission was likely to be granted. Whether this is so or not, the aspects of whether the development of the site would intrude unacceptably into open areas of countryside or that it would have an unacceptable impact on open views in an otherwise developed glass area was not seriously argued before me. In my judgment the development meets the criteria for qualification within the 'gateway' policy of HT3. I will revert to the issue of whether the process of converting the plants into the finished products is 'ancillary' to the horticultural process shortly.

80. There were technical comments by Mr. Ogier on 12th March and 23rd December, 2004, and there was a joint report by Mr. Ogier and Dr. Marchant which, as I understand it, embraced 2003 and 2004. I regard the Ogier/Marchant joint report as having great importance in this case and I read from that now. This is page 72 of the Black Bundle:-

> *"Within the above finishing volume reduction had already been referred to in storage together with the associated controls necessary under good horticultural*

practice. It may be considered as a horticultural operation which is adding value as with transforming flowers into mixed bouquets. These operations have unusual space requirements which are primarily manifest in terms of laboratory facilities and quarantine areas.The latter are necessary to hold products at different stages to allow for analysis and possible objection before it proceeds to the next stage."

Then the space requirements in Guernsey are considered in some detail.

81. On the previous page, at paragraph 5, the Report deals with the post harvest preparation of ingredients in Guernsey, as follows:-

"The rationale for production in Guernsey relies entirely on the post harvest processing to reduce bulk and minimise transport volumes. This may be considered as akin to an agricultural operation where produce is harvested, main product separated from waste product and then graded to remove lower value product prior to storage and subsequent dispatch, as with corn for example where the sold product represents a fraction of the grown one."

[omitted]

[omitted]

"Production processes may be considered as having the following main components.

Propagation

Growing. "

82. In addition to detailing the new Unit here, and with the measurements, and referring to the sketch of the floor plan, earlier, at paragraph 2, (page 70) under the heading 'Operation' the Report says:

"The factory produces a variety of what may be summed up as health supplements, mostly in tablet or capsule form, although some as creams and liquid gels. These are sold to a variety of outlets, and are primary sales to wholesalers, but also via their own wholesale operation on site, via a direct sales division, and as production for larger retailers 'own brands'.The company exports across Europe and also into the USA, which is seen as a large potential market. The production comprises in excess of 170 different products."

83. Then the production system is considered in paragraph 3:-

"Due to the large number of products the factory employs a batch production system, with subsequent requirements for large storage to cope with this batch process. Production can loosely be defined as the following main operations-

Proportioning
Mixing
Pelleting/encapsulating, etc.

Package filling
Labelling
Storage
Dispatch."

84. As I say, this was the joint Report of Dr. Marchant and Mr. Ogier, which I was reading out, and which obviously related also to the site at Edenbridge, and the processes which I have described were carried on there.The authors state at the outset:

> *"The application for the operation is considered in the light of this."* [meaning Edenbridge].

(This is Dr. Marchant and Mr. Ogier talking). They reached the conclusion that the operations proposed were definitely legitimate ones to be carried out at the production site, Sandpiper, and there was no likelihood of operations at Edenbridge being transferred to Sandpiper. They continue (page 69 of the Black Bundle):

> *"The space requirements for the processing and product storage are considered, and the conclusion is that by use of contract growers there is justification for the level of production referred to in the application notes. With regard to the volume of processing space for this throughout it has not been possible to justify the Healthy Direct figures in relation to the scale of the proposed building An area of 17,500 sq. ft. is considered more justifiable in terms of current requirements compared with the 22,500 sq. ft. claimed."*

85. The authors go on to describe the Site:-

> *"The site comprises an existing production/office unit, plus a further larger industrial unit adjacent which has recently acquired and is in the process of being converted prior to moving some of the facilities into it."*

Then they describe the existing Unit, the area of office accommodation and deal with the operation and post harvest preparation to which I have already referred, followed by the relevant statistics.

89. In the March letter (page 66) Mr. Ogier had said:

> *"As many of the products will lose their active pharmaceutical properties shortly after harvest there is a need for post-harvest preservation treatments to be immediately available on site. However, neither Dr. Marchant nor myself…"* [that is Mr. Ogier talking] *"… can see any significant need for fresh crop storage as originally claimed by the company for most of the crops and have therefore given a significantly reduced space requirement for any pre-harvest treatments in the proposed building."*

90. The foregoing is an attempt to summarise the Reports by Dr. Marchant and Mr. Ogier in relation to the specific point raised by Mr. Barrett at paragraphs 9 and 10 of the Cause. This issue is neatly identified by Mr. Day in his paragraph 25:

> "*As far as he' [meaning Mr. Ogier] 'was concerned, the primary question to ask*

> *was whether what was being specifically proposed, in respect of the new building at the site, was horticultural. That is to ask (particularly in view of the approved strategic land use policy 8.4.6 on horticulture), could what was to happen to the crops post-harvest genuinely be regarded as part of, or ancillary to, the primary horticultural growing process?"*

Much of the material in the Reports is highly technical, but in my view the thread running throughout is that it is clearly regarded by them that the main operation to be carried out at the new factory at Sandpiper Site, if it is ever built, is horticultural.

91. There are further reports, in particular of 8th October, 2004, included in the Black Bundle, from which I had intended to quote, but I do not think they add anything to what I have already said, and I therefore come to Mr. Rowles' Affidavit of the 15th July, 2005, which deals with the proposed process—as to whether it is horticultural or not. I start with paragraph 8, which says:

"The group required a site at which appropriate growing activity could take place. It' (the Zouche Group) *'had identified Sandpiper Vinery as a suitable horticultural site"*

92. The growing of crops also required somewhere for the crops to be taken when harvested. And then at paragraph 18, to which I also refer:-

> *"Further information about the horticultural process involved was received under cover of the Second Respondent's agent's letter dated 3rd September, 2004 (see page 136 of AJR2). That information was forwarded to the Commerce and Employment Department and Environmental Health under covers of letters …"* (contained in AJR2.)

93. Then I come to the Zouche report, of which Group, of course, Osprey's are part. This is submitted by Lovell Ozanne under covering letter of 3rd September, 2004, and appears at Folios 137 to 139 of the First Respondent's Bundle. (duplicated at Folios 210 to 212). It states that the proposed hort-icultural processes to be undertaken at Sandpiper Vinery and *"that the chosen method for the Sandpiper site at this stage is alcohol extraction."* The general conclusion from the Report is that the process envisaged would be properly treated as horticultural. Further support for that is paragraphs 27 and 28 of Mr. Rowles' affidavit. Again, he talks about the significant glasshouse element on the site in which horticultural activity will take place.

94. Reverting to Mr. Rowles' Affidavit, at paragraph 30 he says that:-

> *"It is a further inference from the Permission in Principle……'* [that is the one which is the subject of the Application] *"granted that the Board concluded that the building for which permission was sought and the uses to which it would be put was to be regarded as ancillary to the site's primary horticultural use."*

95. Finally I come to paragraph 42 of the Affidavit, where Mr. Rowles sets out the position of Dr. Marchant, who is not a States employee although there was a fee charged by him to the States at one stage. Dr. Marchant is apparently one of the few qualified horticultural engineers in the United Kingdom providing specialised advice

and consultancy to the industry and both he and Mr. Ogier are Fellows of the Institute of Horticulture.

96. On full consideration of all those reports, including, as I say, the weighty Report, which admittedly is jointly prepared by Mr. Ogier, whose impartiality was questioned by Mr. Barrett, but with the influence of Dr. Marchant in that report, I, answer the question posed by Mr. Day (see paragraph 90 *supra*) in the affirmative. Therefore, reach this conclusion: That on full consideration of the foregoing and all the other documentary material produced by both parties, I conclude that the preponderance of the evidence before me shows that the processes proposed to be carried on in the premises at Sandpiper Vinery are properly termed as horticultural, that they do come within the Gateway Policy HT3, and that the other processes which may legitimately be regarded as industrial are, to borrow Newman, LB's phraseology, ancillary to the horticulture process, rather than the other way round. This being so the Applicants have failed to establish Ground 1, which, accordingly, fails.

97. I take Ground 3 next. Ground 3 was, of course, that the Environment Department, for which the First Respondent is responsible as Minister, in arriving at the decision, relied on consultations within the Commerce and Employment Department and officials of that Department had been paid advisers to the owners of Sandpiper Vinery as regards the purchase of the site for the purposes of investment. In particular, there was a conflict of interests as regards Mr. John Ogier, as I said, and by Mrs. McNulty Bauer. That part of Mr. Day's report which is most relevant to this Ground is that relating to the Vinery Valuation Service from which I will now quote:

> [Paragraph 18] "*Contacts developed between Mr. Smith and Mr. Ogier, both having common but reciprocal interests to pursue. On 19th July, Mr. Smith visited anumber of glasshouse sites in Guernsey with Mr. Ogier. It became clear, either at this time or somewhat later (it really matters not) that the Sandpiper Vinery site had particular attractions for the Group (in Mr. Ogier's assessment) by virtue of its size, location near other glass, that was free of pesticides and had been vacant for three years. It appears that an order for a vinery valuation service in respect of that site was placed at the end of July, a preliminary engineer's report was delivered at the end of August, a full and final report was delivered at the end of December (all 2002), and the company subsequently invoiced in January, 2003 (and the States paid in February."*
>
> [Paragraph 19] *"After those visits on 19th July, because the discussions had been so wide ranging, Mr. Smith, at Mr. Ogier's request, wrote to summarise his and his colleagues' intentions and requirements in the desire to move into horticulture. I say nothing more about that matter as clearly what was revealed about the Group's intentions and requirements was, certainly at that stage, of a confidential nature. The indication was given on 2nd September that the Group was intending to launch its project locally, comprising, amongst other things, the signing of an agreement agreement with Durham University…… and to announce their horticultural project to the press……"*

98. The Healthy Direct group of companies had identified, as I said, Sandpiper Vinery in advance and therein, so Mr. Barrett said lies the basis for his claim in

paragraph 11 of the Cause, which initiated the present proceedings in accordance with the Bailiff's Practice Directions and now forms Ground 3, that there was a conflict of interest, for the Board's successor, the States Commerce and Employment Department, had been paid advisers to the owner of Sandpiper Vinery regarding the purchase of the site for the purpose being proposed by Osprey and its Healthy Direct associate. Some support for this suggestion appears in Mr. Day's report when he says:-

> *"48 .Mr. Lewis* [who at that time was Chief Executive of Industry and Horticulture] *told me…"* [meaning Mr. Day] *"… that Horticulture was very enthusiastic about the proposals, indeed some of its members showed a great interest."*

99. To complete this aspect of the case as regards the allegation in paragraph 11 of the Cause, I turn to the account of the Establishment and Development of contact between Mr. Ogier and Healthy Direct as given by Mr. Day at paragraph 13 of his report. This followed his enquiry into the circumstances surrounding the grant by the Authority of the Preliminary Declaration on 13th December, 2002, which, of course, pre-dates the decision which is now sought to be set aside:-

> *"Mr. John Ogier was, officially, the economic and strategic adviser to the Board of industry. His job, however, was not limited to providing advice to that department but also to others effectively under the same umbrella. Horticulture, in particular (he was previously business adviser to that committee) were able to call upon his expertise both in horticulture and economics. Amongst other parts that he played was Development Promotion. His interests ranged widely over what might generally and loosely be termed as commerce and industry, and the development of particular areas were opportunities existed for growth. So, for example, specialist plant production had been identified as having a major part to play in the future of local horticulture; and Intellectual Property ("IP") was seen, under the aegis of the Board of Industry, as having a great economic potential for the island if developed with, and within, the right legislative base, and promoted properly. He was responsible to Mr. Nigel Lewis, the Chief Executive of Industry and Horticulture or his departmental deputies."*

That, of course, was Mr. Day's report.

100. Mr. Day then described how the predecessor of Healthy Direct, C.I. Nutraceuticals Limited and its marketing agent, Hubeeurope.com Limited, which were all part of the Zouche Group, having been established in the island as a "bulk mailer" of vitamin supplements for many years, was an enterprise in which the Board of Industry was most interested. For its part, as Mr. Day states, in the summer of 2002, the Group initiated discussions with Mr. Ogier regarding a business proposition directed at the marketing of herbal products in the light of impending EU legislation. Healthy Direct was already involved through a UK subsidiary ("Nutralife").

101. It was within Mr. Day's remit to enquire into the circumstances of the grant of the Preliminary Declaration in December, 2002, and, in effect, if there had been any improper pressure from the Zouche Group as regards the application, and if there had been any questionable contact between the States' officials and the various components of the Group. His Report is, therefore, directly relevant to that which I understand to be Mr. Barrett's complaint under Ground 3, namely that the improper conduct and/or

pressure that existed at the inception pervaded the Committee's behaviour throughout and vitiated the 10th May decision.

102. Mr. Day reached the following conclusions at paragraphs 143 to 148 of the report, which I now set out *in extenso:*

"143. A further matter to which I must refer, not as being a direct factor in reaching the decision of 13th December, 2002, in itself, but rather as an element in the process leading to that decision, is the effect of the pressures which the planning officers can or may encounter in exercising their duties.

144. They were, and are, constantly aware of the political atmosphere, both from within and without. As one put it, they are used to living in a 'pressure cooker'. Another used the word 'polarisation' to describe the potential friction between politicians and planners; yet another referred to the planners 'labouring in isolation'. It was something that the planners are used to and have to live with- they need 'backbone' as one said.

145. Important as it may be, the directly political aspect of pressure is not the only one which may arise. (I discount pressure which may inevitably be brought to bear by an applicant himself). There can be, often is, a more general, indirect pressure on the planners not to be seen to be negative. Asking for information or more information is almost invariably unpopular. This is a matter of particular significance in this case, where the lack of detailed information of what exactly was being proposed, with all due respect to Lovell Ozanne, was evident, even to me, from the start.

146. The necessity for requiring further information when there was such strong political support for the proposals was not likely to prove popular. Hence, I suspect, the decision of the planners – when they were already, I think unfairly, being accused of delay – to obtain a political decision from the full Committee, on 26th November, to defer the application to await further information; as also the decision to hold what I have described as the political meeting on 6th December, to explain at a political level the difficulties facing the Committee and its officers.

147. In conclusion, I have no doubt that the Committee reached its decision to grant the Preliminary Declaration unaffected by any pressure from Horticulture, and thus did so in a proper way without being influenced by irrelevant matters. That is not to gainsay, however, that the decision, in my assessment, was one with which those involved in it were, generally, pleased, for reasons out of pure planning considerations. Nor is it to deny the urgency with which the perceived essential issues involved in the application were addressed after 26th November, was spurred by political considerations (in their widest sense). Whether the influential legal advice would have remained the same if time had not been so pressing, providing the opportunity for longer consideration and, maybe, discussion, can only be a matter of conjecture. I suspect not- I put it no higher.

148. Nor do I find anything untoward, or sinister, in the manner in which the Committee, and its officers, approached the undoubted, and inevitable, difficulties in dealing with Osprey's application for a Preliminary Declaration for

future (my emphasis) development of the site at Sandpiper Vinery. As is almost invariably the case in any historical analysis, conspiracy theories can be firmly consigned to the dustbin. Essentially, it was the mistaken, albeit genuine, belief as to the nature of a preliminary declaration, which led the planners to recommend granting, and the Committee to grant, the application, bearing in mind the legal and technical advice and other information which had been received."

103. I will now cite, finally as regards the content of Mr. Day's Report, his comments on the rôle played by Mr. Ogier throughout the passage of the respective applications regarding Sandpiper Vinery. It appears at paragraph 142 and is as follows:

"To avoid any misconceptions, one must be absolutely clear as to the nature of the role which Mr.Ogier increasingly played towards the end of November and thereafter.It is true that one impression of his involvement might be that of a representative of Osprey, arising from the constant seeking of his views by the planning officers (as for example, with regard to the draft "letter of comfort" and the draft preliminary declaration). Such an impression would be wrong. In so far as he had two roles, the one was as an officer of and advocate for Horticulture; the other was as an independent horticultural advisor to the Committee. The energy which he displayed was, in my view, but a conscientious discharge of his duty to provide the very best advice which he could, by information and explanation. That advisory role, and its impact, was demonstrated even more clearly in early 2004, with the finalisation of his report (with Dr. Marchant) which led to the rejection of the application for outline permission."

104. It could be questioned whether I am entitled, in the instant case, to pay regard to the findings of Mr. Day in view of the decision in the Three Rivers District Council & 6018 Others v. The Bank of England (2001) 2 AER 513. That was a decision by the House of Lords as regards the report of Bingham L.J, as he then was, into the collapse of BCCI. At page 523 their Lordships then said this:-

"The Bingham Report.

"[28]The closure of BCCI on 5th July, 1991, provoked widespread concern in the financial community on the ground that this action was long overdue, yet the action that was taken was criticised by depositors, employees and shareholders as precipitate. In a prompt response to that concern Bingham, LJ, was invited to conduct an inquiry into the supervision of BCCI under the Banking Acts, to consider whether the action taken by all the UK authorities was timely and to make recommendations. Bingham, LJ, submitted his report to the Chancellor of the Exchequer and the Governor of the Bank in July 1992. Among the questions which he understood to call for consideration by his terms of reference were the following: What did the UK authorities know about BCCI at the relevant times? Should they have known more? And should they have acted differently?

[29] The report (Inquiry into the supervision of the Bank of Credit and Commerce International (HC Paper (1992-3) No. 198) contains a masterly and eminently readable account of the entire sequence of events from the establishment of BCCI in the UK in 1972 to its closure in July 1991. Bingham, LJ, took evidence both

orally and in writing from a large number of witnesses and he had access to many documents. In his covering letter he paid tribute to the very high level of co-operation…" with, *inter alia*, the Bank of England and Price Waterhouse & Company.

"[30] His report contains numerous findings of fact, expressions of opinion relevant to the questions which he understood to have been comprised within his terms of reference. The report was published in October 82, and there were 8 appendices. Much of the claimant's pleadings were based upon material taken from that report, that is unsurprising." That is paragraph [30] of the judgment.

105. Coming to paragraph [31], {I think the judgment was delivered by Lord Hope of Craighead}:

"[31] The first point that has to be borne in mind is that neither the report itself or any of its findings or conclusions will be admissible in any trial in this case. At this stage when the only material that is available for consideration apart from the plead ings is the report and incomplete bundle of relevant documents, I am tempted to fill in the gaps by reference to Bingham, LJ's, findings and conclusions, which he was able to draw from his review of the evidence. Nevertheless, a sharp dividing line must be observed between, on the one hand, its narrative on the evidence on the other hand, its findings and conclusions in the light of that evidence.

"[32] But as Bingham, L.J.'s findings and conclusions based on the narrative are inadmissible, they must be held to be incapable of either being led in evidence at the trial or being used by the other side any other way in support of the competing arguments. As Hurst, LJ, observed in the Court of Appeal in this case no comparable statutory provisions to those which are to be found in Section 44(1) of the Companies Act apply to the Bingham report. The investigation which Bingham, L.J. conducted was a private and not a statutory enquiry and rigorous attention must be paid to the distinction between what would and would not be admissible has always been observed in the written cases, and I had the impression it has not always been observed during oral argument. Nor do I think it was always observed either by Mr. Justice Clarke or the majority of the Court of Appeal in their judgment on the issues in relation to questions of strike-out……

" [33] A further point which is to be noted at this stage about the findings and conclusions of Bingham, LJ, is that they were the result of an investigation that lacked the benefit of statutory powers and was conducted behind closed doors……. ……But he had no power to compel the attendance of witnesses or to require the production of documents, and there was no counsel to the inquiry. As the appendices have not been published, the claimants have not had access to all the materials whichBingham, LJ, had before him…… I agree with the view of Auld, LJ, expressed in the Court of Appeal in this minority judgment when he said it would not be right to treat the Bingham report as effectively conclusive on the questions that arise in this litigation or to conclude that all the available evidence on those questions has been gathered in."

That was the conclusion of the House of Lords as regards the Bingham report; it should not be entitled to be treated in evidence in the case in question.

106. Now, then, I pose the question directly in this judgment: Am I entitled to pay regard to Mr. Day's findings? As I say, I have referred to the judgment in the Three Rivers case. But it is distinguishable, the essential distinction being that, here, the Day report is part of one of the agreed bundles put in by consent (which form the bulk of the evidence before me). Accordingly, in my judgment, I am so entitled. Mr. Day's inquiry may have been a non-judicial inquiry and witnesses were not called in the ordinary sense, with the right of cross-examination and so on. It is also perfectly true that there are similarities to the circumstances prevailing as regards the Bingham Report. For instance, as Mr. Day said at paragraph 6:

> "*This was not a Statutory Inquiry. I had no power to compel anybody to do anything, to produce anything, to say anything, or answer questions. In the event, as I would have expected, I have had, I truly believe, full and frank co-operation from all relevant States Departments (as successors to the previous committees or board), and more importantly their officers, as well as from the former President of the Committee (Mr. J.E. Langlois).*"

107. However, Mr. Day interviewed a number of the officers concerned, with the exception of Dr. Marchant, who can safely, in my view, be regarded as an independent professional expert. Mr. Day sets out his reasons for interviewing and not interviewing individuals at paragraphs 5 to 6, coupled with Appendix 2, of his report, which Mr. Barrett and Mr. McMahon will know, of course, because they each have the Grey Bundle. In the result, therefore, I consider I am entitled to, and I do, adopt Mr. Day's findings. I make the same finding as he did as regards the alleged collusion between the States and the Zouche Group of companies and its various components, and specifically as regards Mr. John Ogier, as he did. As a result Ground 3 fails.

108. This brings me to Ground 2. In my judgment the most relevant provision of the Law, on which I intend to concentrate is Section 17(f) with particular regard to adjoining properties and to a lesser extent, the character and amenity of the locality under Section 17(e).

109. It seems to me that here Mr. and Mrs. Barrett have a legitimate complaint, as set out in paragraph 14 of the Cause. I refer to letters from Mr. Rowe, and they begin at a letter of 16th December, 2003, which I recognise was just immediately before the Court of Appeal judgment. What Mr. Rowe says (he is the Deputy Chief Environmental Health Officer) and, as I said, environment is one of the chief considerations under paragraphs (f) and, indeed, (e), because they both come within the bracket of environment and adjoining the owners. On 16th December, 2003 (Folio 63 of the Black File) Mr. Rowe says as regards the then current proposal:

> *"The information provided does not advance the case much further from this Department's viewpoint…* [that is the Board of Health] *"… the schedule of delivery and collection indicates there should not be significant problems with this activity. However, no real information regarding types of plants and processes have been indicated, no noise levels have been provided and a statement that there is not expected to be any excessive noise is vague and virtually meaningless. Similarly, the statement that proposed external lighting*

will be low key provides no further information over the original application and is of no value when assessing potential nuisance effects."

10. The next letter from Mr. Rowe (Folio 118), dated 22nd July, 2004, is after the second application had been turned down. The most important part of the letter is:-

"It is noted that this application supersedes the preliminary declaration for this site that was set aside by the Court of Appeal on 18th December, 2003. However, it would appear that the concerns which this Department identified in dealing with that previous application remain unresolved. In particular, no information has been provided in relation to the type of plant to be used or the processes to be undertaken."

"The plans show two flues without indicating what plant they serve or their emissions. Details of the lighting scheme were not given in any detail and therefore no assessments can be made as to the potential for nuisance from this source. As previously…" and this is very important *"… no noise levels relative to the plant have been given and the statement 'there would be no excessive noise…'* which I've quoted and referred to on occasions *"… contains no information whatsoever. Until this Department is provided with more detailed information than is currently contained in the application I cannot attempt to assess the potential impacts and am therefore unable to support this application."*

That was after the second application had been refused, if it is right to call it the second application, and the third application had been lodged, because it was lodged in the June of 2004.

111. Mr. Barrett then writes in on 25th July, objecting in detail to and in relation to the various sub-sections of Section 17 (a) to (f), and then I come back to Mr. Rowe on 3rd October 2004 (Folio 143 to 144) when this present application was in being and there was correspondence between the two Departments:-

"The information to assess this application remains incomplete. However, some progress has been made. It is now established that the flues are for boilers that will provide heating for the proposed office and greenhouse. Provided that the fuel for these boilers is light fuel oil there is unlikely to be a public health impact from their operation. Nevertheless, no heat output or fuel consumption figures have been given and further I do not understand the reasons for lowering the flues so that they are in line with the ridge height. In my experience flues at or near ridge heights of adjoining buildings are likely to cause downdrafts that can increase the ground level concentration of fumes.

Exact details of the lighting scheme are still absent, although it is stated there will be a minimum provision for health and safety requirements. If the information with regard to positioning of lights, light outputs, shielding, etc. is known and available, it should be supplied to this department…" Again, he is writing from Health and Social Services.

"A statement of the proposed process is enclosed. This indicates that the preferred method of extraction/evaporation is an alcohol-based system that will be

re-used so that there are no emissions to consider. However, the ultimate disposal via the drainage system as proposed may be subject to restrictions by the Public Services Department. The process statement also states that the herb chopping process will 'probably require dust extraction' without any consideration of the details of such a system. The extract drying consideration states that there are three possible options without giving any details of them."

" Given the previous history of this application this department has carefully considered this further information. However, there is still no information whatsoever on the likely noise impact of the development, given that a factory process involving large scale machinery is proposed. The lighting scheme remains vague and potential process emissions are noted but not addressed."

So therefore, for nearly a year Mr. Rowe has been protesting on behalf of his Department about this development.

112. Then, again, there is a further letter from Mr. Rowe on 19th April, 2005, (Folio 250-1) which is when this present application was on the brink of being determined, and he makes the following comments:-

"Noise: Andrew Ozanne has stated that he is not in a position to undertake the work necessary to assess the potential noise impact of the building, processes and plant since a specialist contractor will need to be engaged. However, noise is a concern since no figures have yet been provided so that there is no indication whatsoever of the effects of noise on any local residents. It should not have been beyond the Applicant's ability to provide at least an informed estimate of the noise levels from similar plants and processes elsewhere."

[That was one of Mr. Barrett's complaints, it must be remembered]:-

"Light: I am reasonably satisfied that the lighting scheme can be designed to comply with the guidance notes issued by the Institute of Lighting Engineers (Obtrusive Light Limitations) with regard to illumination of particular areas, e.g. car parks, and the light intrusion into the windows of neighbouring properties. The current proposals would probably satisfy the criteria but this would need to be demonstrated before full permission is granted.

"Effect of flue height: A flue height calculation is a desk top exercise of a few minutes given the data regarding fuel used or heat input, local topography and building heights. Again, an informed estimate could have been provided given that the type of fuel and quantity used per hour is known. However, this element of the application is unlikely to have any significant public health impact if properly addressed.

Waste disposal: This aspect of the proposal has not been addressed at all. With the increasing controls over waste disposal which will be seen as a result of the implementation of the Control of Environmental Pollution (Guernsey)Law,2004, as well as a potential lack of on-island disposal facilities, an assessment of the impact of potential wastes would appear to be critical to the viability of the proposal."

And he uses the word 'critical' and that is 19th April, 2005, some three weeks before the deliberation of the Committee which is the subject of the present application. Those are two very important matters which have been stated by Mr. Rowe.

113. Finally, I will come to his letter of 21st April, two days later (Folio 252):

> *"The subject of noise nuisance is one of this Department's major concerns since the project was first envisaged. Throughout the subsequent procedures that have followed the initial application it has been impossible to quantify the noise aspect aspects of this proposal since no date on noise levels or potential operating hours has been forthcoming from the applicants other than vague and meaningless statements. Comparison could and should have been made with similar existing plants in alternative locations to give an informed estimate of the likely noise envelope.*
>
> *"However, it is likely that the current plant and equipment, together with adequate noise insulation where necessary, will be able to meet the requirements that noise nuisance is not caused at any time to local residents. I must emphasise that this aspect of the development, should permission in principle be approved, will be closely scrutinised to ensure the detailed proposals meet this criteria."*

But it is perfectly clear that at the date of writing that letter the criteria had not been met.

114. Now, then, I come back to a consideration of the current permission, the application for which was re-submitted in December. It is signed by Mr. Lockwood who had been involved with the matter throughout, and his recommendation (Folios 253 and 259) is to 'Grant with Conditions', but it has to be remembered that at that time the objections raised by Mr. Rowe, in particular, and by the other adjoining owners had not satisfactorily been addressed and neither had they been addressed by the time that Mr. Rowe wrote the last letter that I quoted. In fairness to Mr. Lockwood, I should mention that in his recommendation of the 22nd April, 2005, he recognised that the concerns of the Environmental Health Department (the EHO's) had not yet been overcome, he considered these could be satisfactorily concluded at the detailed planning stage.

115. I then come to Mr. Rowles' affidavit, I come back to it, although I have already quoted from it, because Mr. Barrett, in his submissions, emphasised various portions of this affidavit and he said, he drew my attention in particular to paragraphs 27 and 34. Now, 27 says:-

> *"From the decision of the members to grant the permission in principle sought, I infer they concluded that the proposed development could legitimately be regarded as part of a single horticultural enterprise…"* Well I have found in the Department's favour that it was a horticultural enterprise *" ... and they did not consider that the proposed building should be treated as an application for new industrial development…"*

That is all well and good and he goes on to say horticultural activity would take place, which, of course, is what I have already said.

116. Then at paragraph 29 he says:-

"... I infer that members concluded the Second Respondent's application did seek permission to erect new glass and they may well have regarded what was proposed for the existing glass as a form of redevelopment."

Then he deals with the ancillary aspects which I have already dealt with.

117. Then at 31:-

"The Board members were next advised to consider the criteria set out in Policy HT3 and reminded that each of those criteria had to be satisfied before the presumption in favour of granting the application arose."

Then he deals more or less in a similar way that the Court of Appeal dealt with them and then he goes on to say (paragraph 32):-

"... there is a large overlap with the matters that have to be considered under paragraphs (b)(c) and (e) of Section 17. Board members are required to make an assessment of what they regard as the natural beauty of the character and amenity of a location in order to determine what effect, if any, a development proposal has on any aspect of that……The assessment of planning professionals within the Department, as shown in the Chief Planning Officer's planning report, was that the Second Respondent's application did not conflict unacceptably with the overall policy objective to retain the predominantly open, undeveloped character of the land. Again, I infer that Board members agreed with that assessment."

118. And he goes on at paragraph 33:-

"In principle, the Board has accepted that a building of this scale in this place will not be unacceptable, whilst at the same time reserving for its futureconsideration the precise materials to be used externally..."

119. At paragraph 34:-

"I am aware from the discussions on these proposals that the Board members were fully alive to the issue of the effect on adjoining properties……" this is particularly emphasised by Mr. Barrett at page 19 of my notes *"..as they must be by virtue of Section 17(f)."*

120. Now, I agree with Mr. Barrett that the affidavit of Mr. Rowles does not, in my opinion, fill in the gap that the Board was required to, by law, to consider the effects on the adjoining properties; and in particular I have selected two of those aspects, the noise aspect and the waste disposal aspect, which, according to Mr. Rowe have still not been resolved. Apart from Mr. Rowles' personal inferences, (which in my view are clearly insufficient to satisfy the statutory criteria) there is nothing to

refute that, and this brings me really to Ground 4 where, of course, there are notes of the meeting—but there are no proper minutes of the meeting although they are described as minutes,

121. I am with Mr. McMahon as regards Ground 4 (contained in paragraph 16 of the Cause) in the sense that I do not regard the 24th meeting as adding further conditions. I think it was properly regarded as a sequel to the earlier meeting and as stated at the end of the minutes, so called, of 10th May, it was for the purpose of drafting conditions already decided upon in consultation with their legal adviser, Mr. McMahon, for whose assistance during this case the Court is indebted. It cannot, however, possibly be said that the record of the decision, the deliberations, is a satisfactory record of what took place. I refer again to Lord Denning's words in the Northumberland case as to what the record should contain, which is what this Court is required, under the law relating to judicial review, really required to examine: I repeat that which Denning, LJ, said in the Northumberland appeal case, he said: *"What then is the record?"* and he goes on to say:-

> *"I think the record must contain at least the document which initiates the proceedings and the pleadings, if any; the adjudication, but not the evidence nor the reasons unless the tribunal c'hose to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision."*

122. But the record does not state that the matters to which Mr. Rowe particularly drew attention, again I emphasise noise and waste as the two aspects of the environmental considerations that must be considered under the law—there is no option—it does not show they were considered. It seems to me in those circumstances that the preponderance of the evidence, unlike the three other Grounds, the preponderance of the evidence with regard to Ground 2, which is the failure to take into account the statutory provisions, shows that those outstanding objections were not, in fact, dealt with at that meeting. If they were dealt with there is no record thereof. Full transparency in such matters is essential. I therefore infer that they were not taken into account. Therefore, in my view, the second of Mr. Barrett's four Grounds succeeds.

123. In the result Ground 2 succeeds. Grounds 1, 3 and 4 fail for the reasons I have given. On Ground 2 alone, therefore, I grant the order sought by the Barretts' in the preamble to their Cause, and set aside the decision of the Department of 10th May, 2005.

124. As a Rider to this Judgment, which does not in any sense form part of the decision, and in relation to certain comments regarding the period which elapsed between the delivery of the oral draft Judgment and the perfected typed Judgment, it was made clear when the hearing concluded that, because of (i) the complexity of the issues, (ii) the procedure of Judicial Review was to some extent breaking new ground in Guernsey and (iii) the forthcoming Court move, the decision would take some time.

125. I have ascertained from the High Court in London, and by contacting one or two senior Leading Counsel, that the average time taken for preparation of a judgment in cases of medium complexity, is anything from three to five months. Frequently Draft Judgments are handed down before the faired copy is issued. For

instance in the London counterpart of the Guernsey action in Shamurin v. Base Metal and Zhivilo Tomlinson J. adjourned the hearing for Judgment on 4th July, 2003, and delivered it on 26th October, 2003, and the subsequent costs Judgment on 6th November, 2003, with the two month Long Vacation intervening.

126. By the 7th April, 2006, approximately two-thirds of the notes, in narrative form, for Judgment in the instant case had been prepared. On that day the First Applicant, Mr. Barrett sought an interlocutory injunction against the Respondent because the In Principle permission to develop was due to expire on the 9th May, 2006. The States had declined to give an undertaking not to consider any fresh application pending the Judgment, notwithstanding that this matter was *sub judice*. The Court made an order that the *status quo* should not be breached by either party until the 13th April. On that day the Court was informed that a fresh application for similar permission to develop would be considered by the Board on 26th April.

126. I was unable to gain access to the Court over the Easter week-end. There was, accordingly, no other course open but to deliver the Judgment *ex tempore*, in the interests of justice and in order to avoid Mr. Barrett having to bring a fresh application for judicial review—which I did from the prepared notes. The 'fairing' has taken until now, as many references in the 630 documents produced, and in the authorities, had to be checked, on many occasions more than once. The first draft from the tape, which was in parts unclear, was prepared by the Court Reporters' Department, which consists of only two officers. In addition there were several Court of Appeal judgments to be completed. The perfected copy, after several further drafts, is in substance the same as the *ex tempore* version, but there are, inevitably, some variations in wording and sequence.

A.R.W.Hancox.
Lieutenant Bailiff

[Oral draft Judgment delivered 13th April, 2006. Faired copy dated 22nd June, 2006].

