



**Groucutt v The Minister of the Environment Department**  
Royal Court  
8th July, 2015

**JUDGMENT**  
**30/2015**

**Judicial Review sought by Applicant of a planning decision of the Environment Department.**

**'Perfected Text'**  
**08.07.2015**

**IN THE ROYAL COURT OF GUERNSEY**  
**(ORDINARY DIVISION)**

**Between:** **MRS SUSAN GROUCUTT** **Applicant**

**-and-**

**THE MINISTER OF THE**  
**ENVIRONMENT DEPARTMENT**  
**OF THE STATES OF GUERNSEY** **Respondent**

**-and-**

**LAVINIA HOLDINGS LIMITED** **Interested Party**

**Hearing dates: 17<sup>th</sup> & 18<sup>th</sup> June 2015**

**Judgment handed down: 3<sup>rd</sup> July 2015**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Counsel for the Applicant: Advocate J P Greenfield**  
**Counsel for the Respondent: Advocate R Gist**  
**Counsel for the Interested Party: Advocate P T R Ferbrache**

**Cases, texts & legislation referred to:**

The Land Planning and Development (Guernsey) Law, 2005

The Town and Country Planning Act 1990

*R v Cornwall County Council, ex parte Huntington* [1994] 1 All ER 694

The Wildlife and Countryside Act 1981

*Bassington v HM Procureur* (1998) 26.GLJ.86  
*Barrett v Island Development Committee* [2003-04] GLR 152  
*Old Government House Hotel v Island Development Committee* (unreported, 9 December 2003)  
*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147  
The Island Development (Guernsey) Law, 1966  
The Human Rights (Bailiwick of Guernsey) Law, 2000  
The European Convention on Human Rights  
*Encyclopedia of Planning Law and Practice*  
Fordham, *Judicial Review Handbook*, 6th. ed., 2012  
*R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445  
*R v Wiltshire County Council, ex parte Nettlecombe Ltd* (1998) 96 LGR 386  
*R (Manydown Ltd) v Basingstoke & Deane Borough Council* [2012] EWHC 977 (Admin)  
The Civil Procedure (Amendment No. 4) Rules 2013  
Practice Direction No. 3 of 2004  
*Litchfield v Director of Health & Pollution Regulation* (unreported, 10 September 2014)  
*Finn-Kelcey v Milton Keynes Council* [2008] EWCA Civ 1067  
The Royal Court Civil Rules, 2007  
*R v Borough of Milton Keynes, ex p Macklen* (unreported, 30 April 1996)  
The Land Planning and Development (General Provisions) Ordinance, 2007  
*R (Batey) v Boston Borough Council* [2008] EWHC 3516 (Admin)  
*R (Georgiou) v London Borough of Enfield* [2004] EWHC 779 (Admin)  
*Oxton Farms v Selby District Council* [1997] EWCA Civ 4004  
*Morge v Hampshire County Council* [2011] UKSC 2  
*R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin)  
*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532  
*Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255  
*R (Lough) v First Secretary of State* [2004] EWCA Civ 905

## Introduction

1. By a Cause dated 24 February 2015, which was first tabled on 27 February 2015, Susan Groucutt, the Applicant, seeks judicial review of the decision taken by the Board of the Environment Department at an Open Planning Meeting held on 2 December 2014. By that decision, the Board resolved to grant planning permission to Lavinia Holdings Limited, the Interested Party, to demolish the existing dwelling known as Sea Lodge, erect a replacement and alter the existing access. That permission was granted subject to 12 conditions.
2. At a directions hearing on 13 March 2015, I ordered that the application for permission to proceed with the claim and, if permission were to be granted, the claim itself, should be heard at the same hearing. In England and Wales, I understand this is usually termed a “rolled-up” hearing. I decided on this course of action because I recognised that the application for permission fell on the cusp between being granted and refused. Had this obviously been a case where permission should be granted, I would have decided that element on the papers. Equally, had it been clearer that permission should be refused, I would have directed a

separate hearing to deal with that stage. In effect, it would be tantamount to refusing leave on the papers but offering the applicant the opportunity to renew the permission application orally. However, the facts pleaded fell into that difficult grey area inbetween and, in such circumstances, I consider that a “rolled-up” hearing offers the best prospect of doing justice between the parties.

3. Following the hearing on 13 March 2015, the Interested Party was joined to the action by consent on 20 March 2015. The evidence in support of the Application is contained in the Applicant’s Affidavit sworn on 6 March 2015 and an Affidavit of James Goodwin sworn on 19 March 2015. Each Affidavit exhibits the bulk of the documents relating to the planning application and its determination. On behalf of the Respondent Department, four Affidavits sworn on 27 March 2015 are relied on. They are from the Director of Planning, Jim Rowles, the planning officer, Stephen Hartman, the Principal Conservation and Design Officer, Alun White, and the Landscape & Countryside Officer, Alan Ritchie. Evidence on behalf of the Interested Party has been given through an Affidavit of Michael Grunberg, who is its beneficial owner, sworn on 25 March 2015 and a recent update relating to the works that have taken place prior to the hearing, provided in an Affidavit of its architect, Jamie Falla, sworn on 16 June 2015. I admitted that last Affidavit into evidence following an opposed application heard at the beginning of the hearing on 17 June 2015.
4. At the conclusion of the hearing on 18 June 2015, I reserved judgment. This judgment contains the full reasons for the decisions I have reached.

### **Jurisdictional bar**

5. The first basis on which the Respondent Department resisted the Application was to invoke section 75 of the Land Planning and Development (Guernsey) Law, 2005 as having created a blanket prohibition on the Court reviewing the planning permission granted to the Interested Party. Whilst he recognised that it was not an attractive argument, Advocate Gist has stated that it behoves the Respondent to make the submission. Neither Advocate Peter Ferbrache, appearing for the Interested Party, nor Advocate Greenfield on behalf of the Applicant supported the contentions of Advocate Gist. The consequences would be that every decision made under the 2005 Law would only be challengeable in accordance with the terms of that Law and, because no provision had been made for appeals or other challenges to be made by third parties, such persons would be precluded from any form of legal redress. Such an outcome would be absurd unless it were the only possible interpretation of the statute.
6. Section 75 of the Law provides:

*"Except in so far as is specifically provided by this Law or any other enactment, the validity of -*

- (a) the Strategic Land Use Plan,*
- (b) any Development Plan,*
- (c) any Subject Plan,*
- (d) any Local Planning Brief,*
- (e) any order, direction, permission, condition, notice or agreement of the Department or any other States department, which is or purports to be made, given or imposed under this Law,*

*is not open to question in any legal proceedings whatsoever."*

This provision is in similar form to section 284 of the Town and Country Planning Act 1990, which deals with the validity of development plans and certain orders, decisions and

directions. The formulation in subsection (1) of that section also provides that "*Except in so far as may be provided by this Part, the validity of ... shall not be questioned in any legal proceedings whatsoever.*" At para. (f), reference is made to "*any such action on the part of the Secretary of State as is mentioned in subsection (3).*" This will, as I understand it, cover some planning permissions. However, the scope of section 284(1) of the 1990 Act does not appear to have been cast as widely as the inclusion of para. (e) of section 75, which covers any permission.

7. In making the submission, Advocate Gist refers to the approach taken in *R v Cornwall County Council, ex parte Huntington* [1994] 1 All ER 694. The provision falling to be construed in that case was para. 12(3) of Schedule 15 to the Wildlife and Countryside Act 1981: "*Except as provided by this paragraph, the validity of an order shall not be questioned in in any legal proceedings whatsoever.*" As Simon Brown LJ stated (at page 697d):

*"... it seems clear as a matter of construction that Parliament intended - and, indeed, to my mind for good reason - that the remedy by way of statutory application provided by para 12 of Sch 15 (the preclusive clause here in question) should be the exclusive avenue of redress available to those aggrieved by modification orders of this kind if and when such orders come to be confirmed."*

8. Advocate Gist submits that the same intention can be attributed to the States of Deliberation when it approved the inclusion of section 75 in the 2005 Law. The legislative history is said to support that contention. The Policy Letter of the Island Development Committee in Billet d'État No. XXII of 2001 indicated at para. 3.5.3 that modifications would be needed to *inter alia* clause 74 (which became section 75), but when the subsequent policy letter was put before the States of Deliberation (Billet d'État No. XI of 2002), the draft Law was unmodified. This was despite the Courts having accepted by that time (in *Bassington v HM Procureur* (1998) 26.GLJ.86) that judicial review existed in Guernsey law. He has highlighted para. 3.6 of that later policy letter, which describes the system of appeals and reviews to be included at Part 6 of the draft Law as being that "*These provisions will reflect the development of review by the Courts in the Island's legal system*". In due course, the draft legislation was presented for approval with no change having been made. In the meantime, of course, there were cases in which persons aggrieved at the granting of planning permission had sought to challenge those decisions by instituting judicial review proceedings, eg, *Barrett v Island Development Committee* [2003-04] GLR 152 and *Old Government House Hotel v Island Development Committee* (unreported, 9 December 2003).
9. At face value, Advocate Gist's simple submission on section 75 appears to have substance. Advocate Greenfield's attempt to avoid the conclusion that this is a valid clause ousting the jurisdiction of the Court by relying on *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 ("*a provision ousting the ordinary jurisdiction of the court must be construed strictly*" per Lord Reid at page 170C) does not necessarily assist given the apparent unambiguity of section 75. However, the construction given to the similar wording in *ex parte Huntington* only had the practical effect of delaying the time at which a challenge to the orders in question could be instituted (and provided a statutory route rather than reliance on general principles of judicial review, hence the ouster of the judicial review jurisdiction by the enactment of an exclusive means of seeking redress). This is clear because the wording of para. 12 of Schedule 15 to the Act gives the right of challenge to any person aggrieved. The provision does not limit the persons who can seek legal redress, just the time at which the challenge can be mounted and the means by which to do so. To that extent, the consequences of the preclusive clause are far less significant than section 75.
10. Section 68 of the 2005 Law confers a right of appeal in respect of the decisions specified therein only on "*the applicant*". There is, therefore, no provision in the Law for appeals by persons who have made representations against the grant of the planning permission sought by the applicant. Indeed, the advent of open planning meetings, at which the political Board of the Department listens to a presentation from its officers following which those who have

intimated their wish to do so are entitled to speak, either in person or through a representative, means someone like Mrs Groucutt can articulate her objections to the application made before the Board but cannot subsequently take any legal action in the event that the outcome is the grant of planning permission. As I have indicated, before the 2005 Law entered into force, a legal challenge to a planning decision by a third party was available, not under the statutory appeal route of section 26 of the Island Development (Guernsey) Law, 1966, but through judicial review proceedings. Accordingly, Advocate Gist's suggested construction of section 75 entails the legislature having removed a right of access to the Court at a time when the Human Rights (Bailiwick of Guernsey) Law, 2000 had been enacted but not then brought into force.

11. The relevance of the Human Rights Law is that Article 6 of the European Convention on Human Rights confers the right to a fair hearing. As such, it can be regarded as an access to justice provision. At para. 2-3856 of the *Encyclopedia of Planning Law and Practice*, the position is referred to in this way:

*"It also appears that Art. 6 does not require that disappointed third party objectors to a planning application be given the right to appeal the grant of permission. Indeed, the availability of judicial review and the composite approach lead to that conclusion. However, the issue was addressed by Kerr J. in the High Court in Northern Ireland in Re Ronald Foster's application for judicial review [2004] N.I.Q.B. 1 at paras 38-51 and the need for a third party right of appeal rejected. Kerr J. held at para.49:*

*"It is, of course, also relevant that decisions on planning applications are subject to a fairly elaborate system of checks, both internal and external ... The procedure ... if properly operated, should ensure the full investigation of an objector's opposition to the grant of planning permission. If the planning authority fails to apply its own procedure it will be amenable to judicial review. I am satisfied, therefore, that if the decision on the application for planning permission in this case does involve a determination of the applicant's civil rights, the availability of judicial review is sufficient to meet the requirements of Article 6."*

The implication of this passage is that, absent the availability of judicial review, whether the process is compatible with Article 6 of the Convention is open to question.

12. If I assume for present purposes that the Applicant's Article 6 rights are engaged on the basis that she wishes to challenge the decision to grant planning permission to the Interested Party, but the Department is opposing her bringing proceedings by way of ordinary judicial review relying on the preclusive terms of section 75 of the 2005 Law, a number of issues arise. As it is set out in Fordham's *Judicial Review Handbook*, 6th ed., 2012, in section 28, "*Head-on statutory exclusion of judicial review is theoretically possible but constitutionally dubious.*" The learned author cites R (G) v Immigration Appeal Tribunal [2005] 1 WLR 1445 (at para. [13]):

*"The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously. If Parliament attempts by legislation to remove that power, the rule of law is threatened. The courts will not readily accept that legislation achieves that end."*

Even without referring to such statements for support, my starting point would inevitably be that it would be unjust to afford Mrs Groucutt the opportunity to raise her objections to the Interested Party's planning application before the original decision-maker but then to deny her the opportunity to develop legal grounds of challenge to the ensuing decision contrary to those objections before another forum. Accordingly, only the clearest statutory wording would displace the presumption, founded on the rule of law as it is respected in this jurisdiction, that there must be an avenue by which she can mount her challenge through proceedings before this Court or some other appropriate body. Section 68 of the Law does not confer on her a right of appeal to the Planning Tribunal, so the avenue open to an

aggrieved applicant is not available to an aggrieved objector. Accordingly, using the interpretation obligation in section 3 of the Human Rights Law, I would potentially need to see if that produces a Convention-compliant construction of section 75, failing which I would have to consider whether or not to make a declaration of incompatibility pursuant to section 4 of the Law, entailing following the procedural steps of inviting HM Procureur to be joined to the proceedings. Further delay of that nature was not favoured by Advocate Greenfield or Advocate Ferbrache.

13. As it turns out, in my view, there is no need to engage in any such mental gymnastics. That said, whilst leaving the issue unanswered, I fear I would have struggled to give section 75 a Convention-compliant interpretation. The key words seem to me to be "*validity*" and "*permission*". The latter term is not expressly defined in the 2005 Law. It could perhaps be argued that in order to avoid the consequences of what is otherwise an ouster provision, the word could be interpreted as not including planning permission, but to do so would, in my judgment, stray beyond what is permissible. The most significant permissions to which the 2005 Law refers are planning permissions granted in accordance with its provisions and it would, I think, be doing unwarranted violence to the statutory framework to read words into section 75(e) so that it becomes "*permission (other than planning permission)*". Similarly, any attempt to read "*validity*" as not including a challenge to the lawfulness of the permission in question would also unduly strain the language of the provision. For these reasons, subject always to hearing fuller argument in a case where it matters, I doubt whether section 75 can be perfected so as to be Convention-compliant through section 3 of the Human Rights Law.
14. The reason why I reject the Respondent's preliminary objection to the Application is that section 75 refers to the validity of the permission not being open to question in any legal proceedings whatsoever, whereas the Applicant's Cause refers to it being a challenge to the decision of the Board of the Department taken at its Open Planning Meeting on 2 December 2014. The relief sought is the quashing of that decision and further relief is for any re-consideration to take place at a further open planning meeting. The taking of the decision being challenged, ie, the vote on whether or not to grant the application for planning permission, is an antecedent step and is susceptible to review because it is not covered by any of the words in section 75(e).
15. In reaching the conclusion, I have adopted the approach in England and Wales as summarised at para. 28.1.10 of Fordham's *Handbook*. In particular, a copy of *R v Wiltshire County Council, ex parte Nettlecombe Ltd* (1998) 96 LGR 386 was requested by me and made available, in which Dyson J (as he then was), dealing with a case relating to the same provision as in *ex parte Huntington*, stated that "*There has to be a good reason to deny jurisdiction. Prima facie, a party is entitled to have recourse to the courts.*" Accordingly, the decision prior to making the order was held to be challengeable in that case. In the context of planning, *R (Manydown Ltd) v Basingstoke & Deane Borough Council* [2012] EWHC 977 (Admin), albeit in relation to the statutory ouster in respect of a development plan, which of course is part of the provision on which Advocate Gist relied to draw a comparison to section 75 of our Law, the court admitted a claim of judicial review of the antecedent decisions (see, eg, paragraphs 83 and 85). Whilst the distinction in the present case is not as clear-cut as in the English cases to which I have just referred, I take the view that it is incumbent, where appropriate, for the Court to find a construction of section 75 that affords the Applicant access to the Court. Section 75 falls to be construed strictly and, because "*permission*" can be given a limited meaning not extending to the resolution of the departmental Board, I consider that appropriate and fair.
16. In these circumstances, although the wording of section 75 is unambiguous and establishes the residual validity of a planning permission, because the statutory wording does not cover the resolution of the Board (or a decision of an officer acting under delegated powers) reached prior to the actual preparation and granting of the document that constitutes the permission, I am satisfied that the Respondent's preliminary opposition to the Application falls to be

rejected. This Court does have jurisdiction to entertain the Application and decide whether leave should be granted and, if so, whether to grant the substantive relief sought.

### Permission and delay

17. The basis on which it is then suggested that permission should be refused is that the Applicant has delayed instituting her proceedings. In that regard, the parties disagree as to the date from which time might be considered to run and also whether the periods concerned constitute delay at all and, if so, whether there is a satisfactory explanation for each of the time periods concerned.
  18. The first thing to note is that there is in Guernsey no time limit specified against which decisions can be taken about whether the proceedings have been commenced out of time. The number of judicial review cases is still quite low and it is recognised that this is a developing remedy. In England and Wales, claims generally have to be filed promptly and, in any event, not later than three months after the grounds to make the claim first arose. More recently, Part 54 of the Civil Procedure Rules has been amended so that the time limit in respect of planning decisions has been reduced from three months to six weeks. Advocate Greenfield pointed out that the press release from the Ministry of Justice before the Civil Procedure (Amendment No. 4) Rules 2013 were made shows that the underlying reason for this shortened period was as an attack on the culture of using meritless judicial review applications holding up development, which would also reduce the number of cases burdening the court, which had increased considerably from 2007 to 2011. The same position has not yet been reached in this jurisdiction. Indeed, the legislature has not enacted any provisions relating to the remedy of judicial review and neither has the Court seen fit to make any rules of court. The only material is Practice Direction No. 3 of 2004, which states (at para. 6) that "*proceedings must be instituted promptly*".
  19. The Court of Appeal recently considered the issue of promptitude in *Litchfield v Director of Health & Pollution Regulation* (unreported, 10 September 2014). The following guidance was offered in the Court's judgment delivered by the Bailiff:
    - "54. *It would not be for this court to specify a time period within which an application must be brought. ... In my view, a period of three months may be considered an appropriate guide as to what is meant by "promptly". However, there may be cases which are so urgent that even a delay of three months may be too long.*
    55. *Where there has been delay, the court will have to examine the reasons for the delay and the burden will be on the applicant to show that it can be explained for good reasons. The prejudice to any third party if the relief is granted will be a factor to consider although the extent of prejudice or detriment may not be known at the leave stage and may have to be considered as part of the substantive decision.*"
- Bearing in mind that this judgment was given within just three months of the date of the Open Planning Meeting, it should have been in the forefront of the minds of the Applicant's Advocates contemplating how to assist the Applicant in the event that permission was granted. As such, three months from the date of the decision should have been firmly in mind as a loose guideline, together with the advice that this might be a case where even greater urgency will be required.
20. In the absence of any domestic express reference to the six-week period for planning decision challenges now operating in England and Wales, in my view, the Respondent and Interested Party ask too much to say that that shorter period should be substituted for the general three-month period. I note first that the Court of Appeal in *Litchfield* has not specified that there is a three-month time limit, within which an applicant must proceed promptly, but instead has adopted the three-month time as a guide associated with promptitude. In those circumstances, there is still no formal time limit in Guernsey. To seek to introduce one in this case would, of

course, be unfair to the Applicant, because she did not know when she was contemplating instituting her proceedings that such a formal time-limit existed. Further, because there is no formal general time-limit in Guernsey of three months, it follows that there cannot be any shorter formal time limit when seeking a judicial review of a decision to grant planning permission. To purport to introduce such a short limit after the event would be doubly unfair to the Applicant. In these circumstances, when considering whether the Application was instituted promptly, as set out in *Litchfield*, I will use a three-month period as a guide, recognising that I will also have to consider whether this is one of those cases when a delay of around three months between the decision being challenged and instituting proceedings is still too long.

21. In that respect, I take the view that I can properly have regard to judicial comment in England and Wales before the shorter time-limit was introduced in 2013 as potentially being of further assistance. Without referring to every passage quoted, but by way of example, in *Finn-Kelcey v Milton Keynes Council* [2008] EWCA Civ 1067, Keene LJ stated (at para. 22):

*"The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R v. Exeter City Council, ex parte J.L. Thomas Co Ltd [1991] 1 QB 471, at 484G, Simon Brown J (as he then was) emphasised the need to proceed "with greatest possible celerity", as he did also in R v. Swale Borough Council, ex parte Royal Society for the Protection of Birds [1991] 1 PLR 6. Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission will normally wish to proceed to implement it without delay."*

His Lordship then referred to a six-week time-limit that existed at that time for permissions granted by the Secretary of State as not meaning that there was a general rule of six weeks, but that it emphasises the need for swiftness of action (para. 24), before adding (at para. 25): *"What satisfies the requirement of promptness will vary from case to case. In Burkett the House of Lords held that the three months period runs from the formal grant of planning permission, rather than from the resolution of the local authority to grant ..."*

22. Although Advocate Greenfield sought to persuade me that time should only start running from when the documents requested from the Respondent were received on 29 December 2014, because what has to be challenged is the resolution of the Board made at the Open Planning Meeting and known at that time to the Applicant through her representative, I take the view that consideration of promptness must begin on that date. (As it happens, this was also the date on which the planning permission document was issued.) What happens thereafter is of relevance in deciding whether the Applicant acted with appropriate diligence or has been responsible for undue delay. It would, in my judgment, be artificial to disregard the period of almost four weeks in December, albeit that the Christmas holiday came towards the end of it, because certain things could be done in that time to prepare the way for an eventual challenge once the decision to do so had finally been taken. It is, therefore, necessary to have careful regard to what happened immediately following the Open Planning Meeting in order to determine whether or not permission should be refused on the basis of delay.
23. The Applicant explains in her Affidavit that she was away from Guernsey at the date of the Open Planning Meeting travelling in India and was not due to return until just before the New Year. However, with modern means of communication, that absence in itself offers no good reason for any of the early period. Indeed, the Applicant explains that she instructed her Advocates by e-mail on 10 December 2014 *"in contemplation of possible judicial review proceedings"*. Therefore, on 11 December 2014, the Applicant's Advocates wrote to the Respondent requesting voluntary disclosure by the end of the year, citing that this was being done as consistent with the overriding objective set out in the Royal Court Civil Rules, 2007. Accordingly, it is apparent that the Applicant had identified early on that she felt aggrieved at the grant of planning permission. This is hardly surprising because Mrs Rachel Jones on the

Applicant's behalf had made oral representations, supplementing the written Statement of Objection previously lodged, referring to the Applicant's belief that that the proposed development would have an overbearing effect on the Applicant's living space, that the landscaping screening proposed was inadequate and that the planning report itself was incomplete and contained inaccurate information. Quite why it was thought appropriate to permit almost three weeks, even allowing for the forthcoming holiday, for that exercise to be undertaken has not been explained. It rather suggests to me that there was an inadequate appreciation of the need to move with all despatch right from the outset.

24. On behalf of the Respondent, Advocate Gist replied on 12 December 2014, seeking agreement that Carey Olsen would be responsible for any copying charges incurred. When agreement to meet these expenses was forthcoming on 15 December 2014, a list of documents available for copying was supplied by e-mail on 18 December 2014. This list is significant because, for the first time, the Applicant's advisers will have seen reference to documents of which they were previously unaware. In particular, the internal consultation of Mr Ritchie, the Landscape & Countryside Officer, was disclosed. Because Mrs Jones had expressed her astonishment that there had apparently been no such consultation, there having been no reference to it appearing on the face of the planning report, something she repeated in her oral representations, the disclosure that such a document existed and would be provided to the Applicant's Advocates was potentially of huge significance. It must, therefore, have focused their minds on another potential avenue of challenge, which would then have crystallised on actually seeing the document at the end of December.
25. Despite that, following receipt of the batch of documents, it was not until 27 January 2015 that a step was taken to articulate the basis on which it is said the planning decision was flawed. This was not the institution of proceedings, but a letter to Advocate Gist, inviting the Department to consider afresh the application for planning permission. A response was requested within the next 10 days, ie, by 6 February 2015, failing which the indication was that the Applicant "*will have no alternative but to issue judicial review proceedings*". Advocate Greenfield has explained that the Applicant had instructed him to send a letter before action so as to avoid the costs associated with instituting proceedings. In doing so, regard was had to the English procedural requirements under the Pre-Action Protocol for Judicial Review. That letter set out the contention that the planning decision was liable to be set aside because it was ultra vires the Department, was an unreasonable exercise of the Department's powers, was flawed by reason of procedural impropriety and/or was an unlawful interference with the Applicant's Convention rights. It also raised the potential for seeking damages "*for the loss represented by the diminution in value of her property*", which was (conservatively) estimated to be in the region of £1 million.
26. There are several points that can be made about the Applicant's Advocates choice to proceed in this way. The first is that there is no Protocol in Guernsey as there is in England and Wales. This Court requires the parties to cooperate with each other to ensure that cases are dealt with justly. That in itself can, where appropriate, involve exploring alternative ways of resolving the parties' differences without recourse to the Court. However, it is important for parties to be realistic and to have in mind any deadlines by which action must be taken. In the absence of any direction to send a letter before action, the party choosing to do so runs the risk that the Court will conclude that it has chosen an inappropriate course of action. As Advocate Ferbrache noted in his e-mail response on 28 January 2015, the Respondent has no power to re-open decisions it has taken in the manner suggested on behalf of the Applicant. Consequently, Advocate Gist refers to the passage in the Pre-Action Protocol as it applies in England and Wales which states that following the Protocol is not appropriate where the defendant does not have the legal power to change the decision being challenged. Further, as of today, it is said that it may not be appropriate to follow it where one of the shorter time limits for instituting proceedings applies. Bearing those points in mind, and recognising that the Applicant's Advocates appear to have had an eye towards following the procedure that would operate in England and Wales, where Guernsey has not proceeded to dictate what should happen, the choice to delay matters in this way appears to have been misguided.

27. One concession, however, not on the face of the evidence, is that I was told there was a telephone conversation between Advocate Gray and Advocate Gist on 15 January 2015 in which Advocate Gray raised the possibility of re-consideration and Advocate Gist indicated he would consider the point if it were to be raised. On the one hand, this stance strikes me as being generous in the circumstances, but on the other hand perhaps Advocate Gist was cautiously leaving open the possibility that some meritorious argument would be advanced as to how this could be done legally. Given Advocate Gist's reliance on section 75 of the 2005 Law as offering a complete answer to any proceedings, it is also possible he did not focus on any effect this stance would have on the question of delay. In any event, I note that this telephone conversation did not take place until around two weeks after receipt of the material disclosed and it still took a further ten days approximately for the letter before action to be despatched.
28. Another point of note about the Advocates' letter of 27 January 2015 is that it sets out fully the various bases on which it is said the planning decision was flawed. Although the approach taken in the Cause is not identical to the content of this letter, there is nothing in the Cause that suggests there were additional grounds on which to challenge which were identified subsequently. Put another way, it is clear that the material from which the grounds of challenge were prepared had been reviewed sufficiently thoroughly to prepare this letter and there was little or nothing that came to light thereafter to change the grounds set out in the Cause.
29. A detailed letter running to 14 pages in response was sent by the Minister of the Department on 3 February 2015. The opening paragraph sets out the Department's view that it considered that the Applicant may already have delayed instituting proceedings for longer than she should have. The Minister explicitly referred to the Department reserving the right to raise delay in the event proceedings were issued. The Applicant was, therefore, clearly on notice from receipt of this letter that delay was most likely to be raised in opposition to any judicial review claim. The letter then proceeded to set out the Department's version of events leading to the Board's vote on the application and addressed the various grounds that had been raised on behalf of the Applicant.
30. The current proceedings were commenced when the Summons, as required by the Practice Direction, was handed to HM Sergeant for service on 24 February 2015, which is the date on the Cause. I have referred to that date because it is consistent with the terms of rule 89 of the Royal Court Civil Rules, 2007. However, it is also fair to point out that the Application at that stage did not comply with the terms of the Practice Direction because there was no supporting affidavit evidence, as required by para. 5. I commented on this requirement of the Practice Direction when the Cause was tabled on 27 February 2015, directing that evidence needed to be filed within one week. It is arguable, therefore, that all the necessary procedural steps had only been completed when this was done on 6 March 2015. The significance of that date is that it falls outside the three-month period following the Open Planning Meeting, whereas the handing of the Summons to HM Sergeant and the first hearing occurred just within that three-month period.
31. For the purposes of the present case, I do not need to decide whether the proceedings had been properly commenced on 24 February or only 6 March 2015 because, even taking the earlier date, I am satisfied that there has been undue delay in bringing this Action. In my judgment, the proceedings should have been commenced no later than approximately one week after receiving the Minister's letter of 3 February 2015 at the very latest. In the particular circumstances of this case, I regard a period of around 10 weeks as being more than ample in which to formulate the claim and to convene the parties before the Court. Indeed, the comprehensive setting out in the letter of 27 January 2015 of what was subsequently put into the Cause strongly indicates that the grounds had already crystallised and it was simply a case of transposing the content into the style of a formal pleading.

32. I am prepared to acknowledge that, in the immediate aftermath of the Open Planning Meeting on 2 December 2014, the rest of December could properly be used for the information-gathering purposes that occupied the Applicant's Advocates. This was the time period during which the Applicant's wish to challenge the decision would be hardening into firm instructions. It is quite clear that the Applicant did not accept the grant of planning permission from the moment it occurred. The fact that the application was granted by a bare majority of the members of the Board would, I strongly suspect, have only reinforced her desire to overturn it. Some of the grounds of challenge subsequently advanced were obviously known to the Applicant's advisers from immediately after the decision was taken. Although the principal ground of challenge has become the alleged deficiency of the planning report and the process in not disclosing that the Landscape & Countryside Officer had raised concerns, and even gone as far as recommending refusal or deferral for significant modification, whereas the planning report recommended granting permission with conditions, all of which had only come to light at the end of December 2014, the time taken to put these objections into the letter before action was already starting to stretch the bounds of promptness. First, the option of writing that letter before action appears to have been taken by 15 January 2015, at which time Advocate Gray was enquiring of Advocate Gist as to the possibility of re-consideration, yet the letter itself took more than ten days to prepare and despatch. Further, I do not accept the suggestion from Advocate Greenfield that it was only once this attempt at resolving matters without recourse to the Court failed that any period of delay can be considered. In so far as it was reasonable to write to the Department and invite re-consideration, at the same time the Applicant, through her Advocates, should have been prepared to move with appropriate speed if that course of action did not bear the desired fruit. A short delay to finalise the pleading (and accompanying evidence) can be permitted, but a further delay of approximately three weeks is, in my judgment, simply too long. When coupled with the period taken in January to prepare the letter before action, the time from late December through to late February is, in my view, considerably longer than ideal and goes beyond what can properly be regarded as instituting proceedings promptly.
33. In saying that, I have borne in mind the guidance contained in Fordham's *Handbook* at para. 26.3.7 under the heading "Alternative solutions/pursuit of other avenues", to which Advocate Greenfield has referred:

*"(A) GENERAL. R v Hammersmith and Fulham London Borough Council, ex p Burkett [2001] Env LR 684 (CA) at [14] ("Judicial review is in principle a remedy of last resort. It follows, as it always does when a potential [claimant] for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the expedient fails"); R v University College London, ex p Ursula Riniker [1995] ELR 213, 215 ("the discretion to enlarge time ... will be sympathetically approached by the court where the [claimant] in the meantime has not been sleeping on her rights but has been attempting to canvass by other legitimate means"); R (Cowl) v Plymouth City Council [2001] EWCA Civ 1935 [2002] 1 WLR 803 (judicial review should not have been pursued where complaints procedure available); R v Stratford-on-Avon District Council, ex Jackson [1985] 1 WLR 1319, 1323E-F (claimant was making an approach to the Secretary of State); R v Customs & Excise Commissioners, ex p Eurotunnel Plc [1995] CLC 392, 402D ("an attempt to resolve one's problems by extra-judicial activity may amount to sensible and reasonable behaviour and give grounds for extending the period"); Catchpole v Buckinghamshire County Council [1998] ELR 463, 471E ("a complainant must first avail himself of any appropriate remedy made available by statute"); R v Education Committee of Blackpool Borough Council, ex p Taylor [1999] ELR 237, 240H (need for promptness even where exploring other avenues).*

*(B) DELAY DURING COMMUNICATIONS WITH DEFENDANT. <26.2.6> (delay and Pre-Action Protocol); R v Borough of Milton Keynes, ex p Macklen 30th April 1996 unrep. (if pre-action correspondence "turns out to be unsuccessful then there*

*would surely be little danger of the application for judicial review being turned down on grounds of delay, because the [claimant] had followed the very desirable procedure of seeking to have the dispute resolved by other means"); R (British Aggregates Associates) v Her Majesty's Treasury [2002] EWHC 926 (Admin) [2002] EuLR 394 at [155] ("The claimants have been far from idle. The long lead-in time has been used for substantial consultation and negotiation ... It is trite to observe that claimants cannot delay making claims merely because they are seeking to persuade the decision-maker to change its mind. But such negotiations are a relevant factor"); R v London Borough of Harrow, ex p Carter (1994) 26 HLR 32 (good reason for extending time where during the delay the claimant had been in communication with the defendant (and another authority), during which there appeared to be some prospect that the matter would be resolved); R v Greenwich London Borough Council, ex p Patterson (1994) 26 HLR 159, 167-168 (delay when district judge requested authority to reconsider the matter was "good reason"); R v Law Society, ex p First National Commercial Bank Plc [1996] COD 22 (attempt to negotiate a settlement arguably a good reason to extend time); R v Ministry of Agriculture Fisheries and Food, ex p Bostock [1991] 1 CMLR 687, 695 ("those advising the [claimant] here believed in a perfectly proper and reasonable time for the Minister to consider his position and, if he formed the view that he should take legislative action to implement the European regulations, to do so"); R v Department of Transport, ex p Presvac Engineering Ltd (1992) 4 Admin LR 121 (as to delay while adopting a conciliatory approach)."*

Advocate Greenfield relies particularly on the principle derived from *R v Borough of Milton Keynes, ex p Macklen* (unreported, 30 April 1996). As I have already indicated, it is not necessarily wrong for an aggrieved person to explore other avenues, but the entire approach must be placed into context. I note that the majority of the cases summarised in these passages are, in judicial review terms, comparatively old. The majority also pre-date the CPR. The implication is that fewer cases now turn on the issue of delay because practitioners have become accustomed to the need to react swiftly. The scope of seeking resolution by other means is, it seems, now somewhat reduced. In the context of planning decisions, the introduction of a shorter time-limit demonstrates that aggrieved third parties must do more than simply inform the person who has obtained planning permission that a challenge is likely and start engaging with the decision-maker and then turn their attention to formal proceedings. The need for certainty is such that if some approach to the decision-maker is thought appropriate, it must be done almost immediately so that there is still plenty of time to demonstrate that proceedings have been commenced promptly within the specified time-limit.

34. Drawing some of these principles together, I question the sense in the present case of making no headway with the preparation of proceedings whilst writing to the Department and awaiting a response. I take the view that the two courses of action may be sequential but cannot be entirely separated. The reasonableness of communicating with the decision-maker will depend on the likelihood of getting a positive outcome. In this case, there really was no scope for the Department to re-consider its decision of its own motion. This is because third party rights were engaged and because the statutory framework under which planning decisions are taken leaves little scope for such a course of action. Section 20 of the 2005 Law, which enables the Department to revoke or modify a planning permission it has granted where “*it later appears to the Department that by reason of any change in any matter to which it was required to have regard in determining the application for the grant of that permission, it would no longer grant the application*”, is not engaged in the circumstances in which the parties found themselves. In any event, the sequence of events from 2 December 2014 to 24 February 2015 does not clearly show that the Applicant and her advisers were actively pursuing matters throughout. There were lulls in what was being done and I incline to the view that there was an element of the Applicant “*sleeping on her rights*”. Accordingly, rather than supporting any indulgence on the time at which to institute proceedings, I have formed the impression that at best the proceedings should have been commenced two weeks

earlier. Whereas two weeks may not sound a particularly long time, when one is considering the time for acting promptly, it is, in my judgment, more than de minimis.

35. A further factor I have borne in mind relates to the merits. Had I reached the conclusion that the Applicant's case had substantive merit, because the commencement of proceedings was at around the three-month guideline time-limit taken from the *Litchfield* case, I would probably have given permission and allowed the Application, whilst at the same time indicating for the benefit of future applicants challenging the grant of planning permission that this was very much at the outside limit of what could be regarded as prompt. I would have done so because the periods in previous cases have tended to be longer than in the present case and there is, as yet, no definitive period for potential applicants to have in mind. I would have been inclined to take that more lenient view of what has happened because I would have been satisfied that the Department's decision could not properly be sustained. However, that is not the position I find myself in. Consequently, I consider that the appropriate decision to take for the sake of all parties is to refuse to grant the permission to proceed that was sought, rather than to grant permission and then dismiss the substantive application.
36. Before turning to the merits of the challenge, the final comments I make on delay relate to the principle set out by Lieutenant-Bailiff Day in *Old Government House Hotel Ltd v Island Development Committee* (unreported, 9 December 2003): "*the greater the delay, the greater may be the inevitable detriment to a third party who has placed legitimate reliance upon the apparent validity of the impugned act.*" As is explained in the evidence on behalf of the Interested Party, having obtained planning permission, steps have been taken to progress the works approved. Although I have not seen it, I understand that the Department has indicated in writing that the pre-conditions before demolition works could be undertaken have been satisfied. The original dwelling-house on the site has been demolished. Whilst this is something to bear in mind, if the merits of the Application had been with the Applicant, I would have regarded the decision to proceed to demolish at a time when the hearing dates were known and just a short time away, was something done entirely at the risk of the Interested Party. These developments would not have affected my decision on whether to grant or refuse permission to proceed. They would probably not have affected the exercise of my overall discretion. In a case where the window of opportunity to undertake works is further removed from the date of the hearing, a different approach might be appropriate but the timing of what has happened strongly implies that the Interested Party had been advised as to the likely outcome and so had proceeded in that knowledge. In a more borderline case, the risk taken would have been considerable and I would not like to think that those having obtained planning permission would undertake works when a judicial review hearing is imminent in the hope that it procures some advantage to avoid the quashing of an unlawful permission.
37. For these reasons, the first paragraph of the prayer to the Cause, asking the Court to grant permission to bring the judicial review claim, is dismissed.

### **Substantive merits**

38. Although I do not strictly need to do so, I will set out the approach I would have been minded to take on the substantive relief sought of a quashing order had I granted permission to proceed. In doing so, I am conscious that under the regime created by the 2005 Law it is now rare for planning matters to reach this Court and so have set out certain aspects in more detail than would normally be the case. The relevant facts are as follows.

#### *Facts*

39. The Applicant's home is Adolphus House. This property is adjacent to Sea Lodge, which is owned by the Interested Party. Both properties form part of Fort George. Adolphus House had been extended and altered pursuant to a 2006 planning permission so that it is now a three-storey dwelling. Prior to the planning application with which these proceedings are concerned, in 2008 the Department had renewed an earlier permission to demolish Sea Lodge

and replace it with a single storey dwelling. In 2009, there was permission in principle to erect a garage, alter entrance walls, fell trees and extend the driveway at Sea Lodge. Finally, in 2012, planning permission was granted to extend and alter Sea Lodge at first floor level, which incorporated three separate pyramidal hipped roofs with balconies to the eastern and southern eastern sides. The Applicant did not object to any of these applications.

40. The site description of Sea Lodge set out in the planning report states that:

*“Sea Lodge is a single storey detached dwelling on the Fort George Estate. It gains access from Rue Adolphus, which is defined by stone boundary walls. The access leads to a paved parking and turning area, the eastern boundary of which is marked by the existing flat roofed single storey dwelling with garden walls to each side.*

*Sea Lodge has its main aspect to the east with secondary aspect to the south. The land falls away steeply on its southern, eastern and northern sides, which are heavily treed. In front of the house is a flat area, part of the former battery. The application site includes part of the sloping area with steps leading down to a magazine built into a retaining wall.*

*To its north-west is a former elevated fort, the high stone walls of which form part of the northern and eastern site boundaries. This elevated area includes a dwelling, ‘Adolphus House’, which has been extended to a significant degree and is a particular feature in the area, extending to three floors.*

*There are existing dwellings on higher land to the west on the opposite side of Rue Adolphus and which front onto Princes Close. There is a dwelling on the lower ground to the south, ‘Les Roches Fleuries’, which has its main aspect and garden to the east.*

*The eastern part of the site is in an Area of High Landscape Quality.”*

41. The planning application was valid with effect from 22 August 2014. As Mr Grunberg explains in his Affidavit, the submission of this planning application was the culmination of nearly one year of discussions between Mr Falla, the Interested Party’s architect, and the Department. The first of those meetings was with Mr Hartman on 19 September 2013. The record of that meeting includes the comment that *“Landscaping would be an integral part of the design.”* Various options for a replacement dwelling were explored over the subsequent months before the final version was submitted and became the application. Mr Falla’s accompanying letter explained that the volume, scale and mass of the proposal had been reduced since the initial sketches and the top level of the proposed building had been dropped by 1 metre. Further revisions were made before the application was treated as being a valid one.

42. The description of the proposed development contained in the planning report stated:

*“The application seeks planning permission to demolish the existing single storey dwelling and erect a replacement, but extending to three floors with a basement.*

*The new dwelling would occupy a similar footprint to the existing. The main accommodation would occupy two floors with bedrooms at first floor above the main living areas. An enclosed sitting area would be created at roof level with an associated roof terrace. The roof to this sitting area would be a little lower than the ridge height of Adolphus House. A larger roof terrace would be formed to the south served by a separate staircase enclosed in glass. The roof to this enclosure would extend to the east to provide shelter to part of the terrace. A basement, built into the hillside, would accommodate a swimming pool, gym and other facilities together with a “housekeeper suite”.*

*The building would include flat roofs and considerable areas of glazing, particularly on the eastern side. The other external materials would comprise Portuguese limestone, polished concrete and composite panels finished in concrete and timber.*

*The existing vehicular access from Rue Adolphus would be slightly re-positioned and a new pedestrian access would be created. The courtyard parking area to the rear would remain largely unchanged.*

*The existing terrace area to the front (east) of the dwelling would be extended out towards the sea with a small viewing platform. This and the construction of the basement would result in both a change to the contours of the land and a loss of some vegetation. However, the battery area, which contains a gun, would remain unchanged. The magazine at sub-basement level would be retained.”*

The planning report then summarised the Planning & Design Statement, which had accompanied the planning application.

43. The Department initiated some consultations. These included La Société Guernesiaise and the States Archaeologist, Dr de Jersey. In a letter dated 9 September 2014, Dr de Jersey confirmed that he had been involved in discussion prior to the submission of the planning application and noted that the principal element of interest, the magazine on the northern boundary, would be unaffected by the proposed works. He requested the opportunity to make a photographic record of the magazine in advance of any modification, including repairs, rendering or painting, to that structure. Within the Department, the case officer, Mr Hartman, sought input from Mr White.
44. Publication in the usual way followed and objections were sent on behalf of the Applicant and received from five other persons who have properties in the neighbourhood. It was intimated on behalf of the Applicant through Andrew Ozanne’s letter dated 10 September 2014 that the Applicant’s “*objection will be comprehensive*”. In a further letter dated 12 September, Mr Ozanne requested that site poles be erected by the developer so that “*all parties [are] able to fully appraise themselves of the effect the development will have with regard to scale and mass in relation to not only [the Applicant’s] immediately adjacent property but also within the landscape from both seaward and land-side*”.
45. Mr Hartman sent an e-mail to Mr Falla on 26 September 2014, in which he indicated that “*it has been suggested in representations that site poles are erected on site to help in the assessment of the application. We think this would be a good idea and perhaps you can discuss this with your clients.*” Mr Falla indicated that he would discuss the question of site poles that day. On 30 September 2014, Mr Rowles sent a letter to each of the six persons from whom objections had been received explaining that “*The Department has asked the applicant to arrange for the erection of site poles to indicate the height of the proposed building and thus help assess its impact on the character and appearance of the surrounding area and on neighbours. I understand that these will be erected later in the week and will remain in position for two weeks.*” Mr Rowles invited any further representations to be made within the 14 days following.
46. Mr Hartman and Mr White visited Fort George on 8 October 2014. Mr Hartman then went on Mr Ozanne’s boat on 10 October 2014 so that he could view Sea Lodge and its surroundings from the sea. Photographs taken during that trip by one of Mr Ozanne’s colleagues were subsequently submitted to the Department. Mr Hartman also arranged with Mr Ozanne to attend at Adolphus House. His request on 10 October stated that he thought “*it might be useful if I inspect the site from your client’s property as she is the one who is probably the most affected*”. That visit took place on 14 October 2014. Mr Hartman returned to the application site and its surrounding area on 22 October 2014. Mr Rowles also visited the area in the meantime.

47. The Statement of Objection on behalf of the Applicant, prepared by Mrs Jones, was submitted under cover of a letter dated 15 October 2014. It sets out in considerable detail the strong objections being raised, setting out the legal framework under which decisions have to be reached (ie, section 16(5) of the Land Planning and Development (Guernsey) Law, 2005 and sections 12 and 13 of the Land Planning and Development (General Provisions) Ordinance, 2007). It highlighted four main issues: the principle of the proposed development; the effect of that development on Adolphus House; the effect of it on the landscape character and amenity of the area; and the effect of it on public views. The Statement of Objection then covered the policy considerations set out in the applicable Development Plan (the Rural Area Plan (Review No. 1)) in relation to each of these four areas. In doing so, detailed comment was offered on policies RCE13, RGEN11, RCE2, RGEN5, RCE3, RCE8, RCE4, RCE12 and RCE7. Paragraph 4.2.8 of the Statement of Objection explained that:

*“The Planning Application Form refers to trees being removed as part of the Proposed Development but details of those trees are not given (the block plan does not show them). Further information should be obtained to find out which trees the Planning Application proposes to remove. Any tree removal is likely to negatively impact the reasonable enjoyment of [Adolphus House].”*

A particular comment on policy RCE8 (Landscape Design) was (at para. 4.3.7):

*“The Proposed Development is significant in terms of its size, scale, mass and appearance and given that it is in an environmentally sensitive location, the Planning Application should have considered landscape design. The landscape character and the type of vegetation in this area and the significant height, scale and mass of the Proposed Development mean that it is unlikely that any landscape design could integrate the Proposed Development into its surroundings.”*

Paragraph 4.3.13 then highlighted the objections in relation to landscape character and amenity of the area:

*“In summary, the height, scale and mass of the Proposed Development is excessive and the design is inappropriate in this location. The Proposed Development would have a detrimental, unacceptable and irreversible effect on the landscape character and amenity of the area and is contrary to policies RCE2, RCE3 and RCE 12 of the RAP and together with the consideration of general policies RGEN5 and RGEN6, planning permission should be refused.”*

Appended to the Statement of Objection was a series of photographs showing the scaffolding poles that had been erected from various views, particularly from Adolphus House, together with a commentary explaining what they depicted. The Statement of Objection also invited the Board members to undertake a site visit, including viewing the site of Sea Lodge from Adolphus House.

48. Mr White’s input was provided in the form of an internal consultation report dated 27 October 2014. His report shows that he appreciated that the application site is “*extremely sensitive to new development*” and so “*warrants a thorough assessment*”. His personal assessment was:

*“I consider the effect of the proposed building on the landscape character, natural beauty of the landscape and the AHLQ will be to extend the built-up character of the context to the application site. Furthermore, due to this being the last site available for development along this part of Fort George it will not set a precedent for future buildings (ie the built-up character cannot creep further south). I therefore consider the proposed building will not have a significant impact on the landscape character, the natural beauty of the landscape of the locality and the AHLQ.”*

He further considered that “*it will be necessary to survey the existing trees and landscape so that the impact of the development can be assessed*” and made his recommendation offering

no objection conditional upon that happening because “*Any adverse impact of the trees and vegetation must be mitigated*”.

49. The Interested Party’s planning application was referred to the Board members on 4 November 2014 for them to consider whether to attend a site visit. They agreed to do so. Mr Rowles wrote to Mr Falla on 5 November 2014 informing him of the deferral of the application to the December Open Planning Meeting because the Department had insufficient information. In particular, he highlighted that:

*“As the application does not include a tree survey identifying all the trees potentially affected by the development, their condition and proposals for their retention, replacement or enhancement, a full assessment of the impact of the proposed development cannot be made. As such, I would be grateful if you could provide four copies of a comprehensive tree survey identifying the location, size, species and condition of all trees both within the application site and likely to be affected by the proposed development. The survey should show those trees to be removed and those to be retained, including tree protection measures to be implemented during development, together with any proposals for new planting as part of the proposed development.”*

Mr Falla was informed that the Board members had agreed to undertake a site visit. It was considered likely that the site would also be viewed from the Clarence Battery, the Military Cemetery and, subject to owners agreeing, the two dwellings to each side. By a further letter dated 10 November 2014, a site visit during the afternoon of 14 November 2014 was proposed.

50. On 6 November 2014, Mr Ozanne sent an e-mail to Mr Hartman querying that the scaffolding did not depict the full extent of the proposed development and raised his concern that the scale and massing could not be fully appreciated. Mr Ozanne was sent an e-mail on 10 November 2014 and a letter dated 11 November 2014 proposing that the Board members be permitted to access Adolphus House during their site visit on 14 November 2014. Mrs Jones informed Mr Hartman by e-mail on 13 November 2014 of the Applicant’s ongoing concerns that the site poles did not accurately represent the full scale and massing of the proposed development. She suggested the poles should actually be higher. She requested that the positioning of the poles be corrected before the site visit took place or, if they were not, sought assurances that the Board members were to be advised of the inaccuracies.
51. The site visit duly took place on 14 November 2014. Mr Hartman and Mr Rowles were also in attendance. Whilst at the application site, Mr Hartman explained to the Board members the purpose of the scaffolding poles, namely that they were intended to indicate only the front (east) elevation. The site visit then proceeded to Adolphus House. The Applicant and one of Mr Ozanne’s colleagues were present. During that part of the visit, Mr Hartman was asked questions by Board members, including questions relating to the scaffolding poles. He repeated that the poles only showed the front elevation and that the height did not include the proposed screens on the upper level. The Applicant told Mr Hartman that she did not understand what the scaffolding poles showed and the extent of the proposed development in relation to the proximity to Adolphus House. The Minister of the Department noted that the Applicant did not appear to understand fully the explanation given, so she suggested to Mr Hartman that he visit the Applicant subsequently to explain further. The Board members then proceeded to view the application site from the property on the other side of Sea Lodge, Les Roches Fleuries, and also from the nearby War Cemetery.
52. Following the site visit, the application was referred to at the Board’s meeting on 17 November 2014. The Minute records:

*“The Planning Officer (Mr Hartman) advised Members that there had never been an intention to erect scaffold poles to indicate the whole proposed building, the poles were in place simply to reflect the projected height of the front (east) elevation of the*

*proposed development, a fact which neighbours had found difficult to understand. He stated that he would again approach the neighbours to explain this to them.”*

Mr Hartman visited the Applicant on 18 November 2014, at which time he explained again the purpose of the scaffolding poles in the context of the proposed development. Mr Hartman also met with the Applicant and her son on 24 November 2014 to show them a model that had been made depicting the proposed new dwelling.

53. The tree survey requested by the Department was prepared by Tree Dimension (Richard Loyd) and is dated 13 November 2014. It was received at the Department on 17 November 2014. The survey sets out the classification of 22 trees on the application site in accordance with BS5857 (2012). Only two of those 22 trees are classified as being of high quality, two as of moderate quality, nine as of low quality or young and the remaining nine as unclassified, because they cannot realistically be retained as living trees in the context of the current land use for longer than 10 years. The tree survey also offered guidance as to the root protection areas around those trees that were classified and steps that could be taken to for the care and protection of the trees and roots affected by the proposed construction work.
54. Upon receipt of the tree survey, on 18 November 2014 Mr Hartman issued an internal consultation to Mr Ritchie. The form indicated that there were two matters on which Mr Ritchie (and, it seems, Mr White) should concentrate, namely landscaping and design, supplemented by the wording:

*“Alun/Alan We have now received a tree survey from Jamie [Falla]. This is obviously a key document in relation to the conclusions about the impact of this proposal and I would welcome your comments. I need to finalise my report by Friday!! Thanks, Steve”.*

This effectively gave Mr Ritchie two days in which to respond. Mr White was on annual leave at this time and so took no further action.

55. In order to prepare his input, Mr Ritchie first read Mr White’s earlier internal report, noting his recommendation, studied the redevelopment proposal and the tree survey and undertook a site visit on 19 November 2014. He also looked at Ordnance Survey maps from 1898 and 1938, an aerial orthophoto from 2013, the States of Guernsey Historic and Buildings Sites and Monuments Records and a report from 1991 entitled “*Fortifications of Guernsey*”. He returned to the application site on 20 November 2014 to investigate further how the site would be affected by the excavation works and the likely tree removal.
56. The opening paragraph of Mr Ritchie’s internal consultation report dated 20 November 2014 confirms that the content of the tree survey is reasonable and his second paragraph offers his view as to how the trees will affect the impact of the proposed development:

*“The tree survey gives reasonable conclusions about the state of the trees to the north west and south of the existing house. Those recommended for removal currently make a contribution to reducing the visual impact of the existing single storey house, but have generally been very badly managed and/or are soon likely to decline and will have no capacity to screen the replacement three storey house. The arborist’s recommendation to remove 15 (and later, a 16<sup>th</sup>) out of 22 trees and plant replacement trees as part of a new landscape scheme is reasonable. It reflects the poor species selected initially and the poor management of the trees subsequently. Only two trees, a Beech (T2) and a Cedar (T3) are classified as Category A, a Pine and a Birch are classified as Category B, while two Sycamores are Category C, and also recommended for extensive pruning to improve light ingress to the property.*

*Few of the existing trees would have much effect in reducing the visual impact of the proposed three storey building. The removal of most of the trees as recommended will result in the proposed building being largely open to view from the adjacent*

*road, and from many points along cliff paths and other roads and viewpoints around Fort George. It is possible that, with considerable remedial pruning, the five misshapen Sycamore trees (T16 - T20) could be retained, as indicated in the proposed scheme, in order to maintain the arboreal ambience of the entrance court. However, their retention would have little effect on reducing the wider impact of the proposed building.”*

After quoting some passages from the materials to which he had referred about the significance of the historical features on the application site, he continued:

*“The higher trees around the earth rampart have been (and still are) regularly cut back to maintain sea views, so they merge together with Brambles, Blackthorn, Elder, and Buddleia as a covering of scrub around the upper slopes. Consequently, the tree cover in this area provides no screening potential for the proposed building, but serves merely to obscure the earth rampart slopes.”*

57. In relation to the element of the proposals described as the “*lower basement*”, the evidence of Mr Hartman and Mr Rowles shows that Mr Ritchie had misunderstood the development proposals because Mr Falla had confirmed that there was no proposal for the magazine, but, in any event, Mr Ritchie commented that “*The landscape impact of this work is difficult to quantify, but the outcome may result in further clearance of trees (albeit from an adjacent property) to create walls from the terrace/windows, in addition to the loss of historically significant structures.*” In relation to the basement level of the proposals, Mr Ritchie commented that “*it is likely that the vegetation from the west half of the north rampart will be removed and this will probably extend right down to the top of the lower retaining wall. The impact on existing views from the north would be dramatic, with the proposed removal of vegetation resulting in very significant loss of landscape character and visual amenity, together with encroachment of the works into the SNCI, as well as damaging loss of and changes to the historically important rampart slope.*” In the final paragraph before his recommendation, Mr Ritchie commented in similar terms about the further loss of vegetation cover and its adverse impact, again referring to the Cliffs Site of Nature Conservation Importance (SNCI).
58. In his Affidavit, Mr Ritchie has corrected those references to the SNCI, acknowledging that he meant to refer to the Area of High Landscape Quality (AHLQ), ie, the area forming the eastern part of the application site, rather than the area further to the east that is designated as a SNCI. As Advocate Greenfield noted, having made this correction, Mr Ritchie did not resile from the recommendation in his internal report which was to “*Refuse, or defer for very significant modification, to minimise loss of vegetation and to avoid alterations to all surviving elements of the Fort George defences, whether masonry or earthworks.*”
59. Mr Hartman then finalised the draft of his planning report on 21 November 2014 and submitted it to Mr Rowles, who had the opportunity to make any further amendments before it was distributed prior to the Open Planning Meeting scheduled for 2 December 2014. That distribution to members of the Board and to the Applicant and the other persons who had made representations took place under cover of a letter dated 24 November 2014.
60. The planning report recommended granting planning permission but subject to 12 conditions. Of particular note are the conditions numbered 4 to 7 which were being proposed for the reasons given:
- “4. *No development, including demolition and site works, shall begin on site until the area of excavation and construction works has been defined in a manner and to an extent agreed in writing by the Environment Department. The area shall be defined in the agreed manner for the duration of the building operations on the application site. No work shall be carried out outside the agreed area.*

*Reason – The trees and vegetation within the application site are important features in the area which will help to assimilate the new dwelling into its landscape setting and this condition is imposed to make sure that they are properly protected while building works take place on the site.*

5. *No development, including demolition and site works, shall begin on site until a landscaping scheme, to include those details specified below, has been submitted to and agreed in writing by the Environment Department:*
- i) the treatment proposed for all ground surfaces, including hard areas;*
  - ii) full details of tree planting;*
  - iii) planting schedules, noting the species, sizes, numbers and densities of plants;*
  - iv) finished levels or contours;*
  - v) any structures to be erected or constructed;*
  - vi) functional services above and below ground; and*
  - vii) all existing trees, hedges and other landscape features, indicating clearly those to be removed and those to be retained.*

*Reason – The site occupies a prominent position while the proposed development represents a significant development. A satisfactory landscaping scheme is required to help assimilate the new dwelling into its landscape setting.*

6. *The landscaping scheme shall be fully completed, in accordance with the details agreed under the terms of the above condition, in the first planting season following the first occupation of the new dwelling or in accordance with a programme previously agreed in writing by the Environment Department. Any trees or plants removed, dying, being severely damaged or becoming seriously diseased, within 5 years of planting shall be replaced in the following planting season by trees or plants of a size and species similar to those originally required to be planted.*

*Reason – The site occupies a prominent position while the proposed development represents a significant development. A satisfactory landscaping scheme is required to help assimilate the new dwelling into its landscape setting.*

7. *No development, including site works, shall begin until each tree shown to be retained on the approved landscaping plan has been protected, in a manner previously agreed in writing by the Environment Department. Each tree shall be protected in the agreed manner for the duration of the building operations on the application site. Within the areas agreed to be protected, the existing ground level shall be neither raised nor lowered, and no materials or temporary building or surplus soil of any kind shall be placed or stored thereon. If any trenches for services are required in the protected areas, they shall be excavated and back-filled by hand and any tree roots encountered with a diameter of 5 cm or more shall be left unsevered.*

*Reason – The trees are important features in the area which will help assimilate the new dwelling into its landscape setting and this condition is imposed to make sure that they are properly protected while the building works take place on the site.”*

Under the heading “INFORMATIVES”, a further explanation of condition 5 relating to landscaping is given: *“any scheme must include detailed proposals for the sloping area immediately to the east and north-east of the ground floor terrace/garden and the terrace to be formed at basement level. The scheme must compensate for the loss of planting in this area and provide suitable screening to the terrace.”*

61. The planning report highlights the grounds raised by the six objections to the grant of planning permission and summarises the issues for the Board members to consider when determining the application as follows:

- “1. whether the principle of demolition is acceptable;*
- 2. whether the principle of a new dwelling is acceptable;*
- 3. the impact of the development on the appearance and character of the area, including landscape character;*
- 4. the impact of the development on the amenity of people living in the area;*
- 5. the impact of the development on archaeology; and*
- 6. parking and access issues”.*

In relation to the third matter, the report first explained that:

*“The application site occupies a very prominent position on an outcrop along the east coast, just above the cliff path. In addition to the need to assess the proposal against the relevant planning policies, there is a statutory duty to seek to protect and enhance the natural beauty and amenity of Guernsey’s coasts, cliffs, countryside and other open spaces. In addition, the Department must have regard to the likely effect of the development on the natural beauty and landscape quality of the locality in determining planning applications.”*

The report then proceeded to set out the planning officer’s assessment of what was involved and how this element of the application might be approached:

*“The proposal involves a significant increase in the scale and massing of the building and extensive excavation and re-shaping of the existing contours. It would extend the visible built-up area of Fort George development further to the south. However, the topography of the area is such that the application site is the last one available allowing a form of development that would be seen to extend the existing built-up area. A permission would not set a precedent for future similar development, that is the built-up character cannot extend further south.*

*The landscape character of the cliffs in the vicinity of the application site is dominated by existing tree and vegetation cover. As the PDS indicates, mature landscaping extends along the north, south and west boundaries. The proposal is unlikely to have a significant effect on the natural beauty and landscape quality of the locality, but only if the development does not have an adverse impact on tree and vegetation cover within and around the application site.*

*The submitted tree survey concludes that a number of the trees within the site are in poor condition and have been poorly maintained. They have a limited life and the contribution they make to the appearance of the area has been reduced by works previously carried out. The survey suggests they should be removed and replaced.*

*The survey does not make specific reference to the vegetation to the front (east) of the new dwelling. Towards the top of the slope, this comprises mainly small trees and*

*shrubs to which there has been little maintenance. The construction works, which involve an expansion of the flat area to the front of the house and the excavation of a basement level with outside terrace, would have a significant impact on the existing vegetation.*

*Limiting the construction area to the minimum possible and implementation of a comprehensive landscaping scheme to provide adequate compensation for the loss of existing planting are critical to the success of this scheme.”*

A similar paragraph to the last one was included following the section dealing with the five important public views covered (from Clarence Battery, the cliff path, the Military Cemetery, La Corniche and from the sea). The importance of providing for the retention of the existing tree cover and landscape was mentioned more than once.

62. The various strands covered in the planning report are then drawn together in a conclusion leading to the recommendation to grant planning permission subject to conditions. Albeit at the risk of a little repetition, the relevant paragraphs are as follows:

*“Previous permissions allow a replacement building or alternatively its extension to add a first floor level. The principle of demolition and the erection of a replacement dwelling are acceptable and provided for by planning policies.*

*The new dwelling would be higher and have a larger mass than the existing. Its contemporary design and prominent location mean that it would be clearly visible from the sea and certain viewpoints in the area. However, the application site is part of the Fort George development, which includes large houses of various forms and styles often set within substantial grounds. The new dwelling would be seen with the adjoining Adolphus House which has a similar height and appears as a prominent and unconventional building.*

*This development is seen in the context of the steeply sloping and heavily landscaped cliffs. Provided the impact of construction and excavation is controlled, existing planting is retained where possible and new appropriate planting is introduced, the proposal would be a satisfactory addition to the Fort George development.*

*The nature of the new building is such that it would have some impact on a number of dwellings in the vicinity. However, any significant effect would be limited to the adjoining dwellings to the south and north-west. The impact on the former would be limited by the distance involved, the difference in level and the presence of planting.*

*The main impact would be on the amenities of Adolphus House. The proposal would result in some loss of aspect and light and would tend to dominate the south-east corner of this property. However, much of this existing dwelling would remain unaffected as it benefits from unobstructed aspects from much of the habitable room space and outside terraces.*

*The proposal provides an opportunity for the renovation and recording of the magazine, while there is adequate parking and satisfactory access is available.”*

63. Following circulation of the planning report, Mrs Jones e-mailed a letter dated 28 November 2014 to Mr Rowles setting out her serious concerns on behalf of the Applicant. She highlighted a number of deficiencies and sought comment or clarification. The first issue addressed related to the scaffolding poles. The second was landscaping and, in particular, the tree survey, which Mrs Jones suggested should have been disclosed to the Applicant beforehand and her comments invited. She wrote *inter alia*:

*“The Report repeatedly comments that the landscaping scheme is critical to the success of the proposed development and that most of the existing tree and vegetation*

*cover must be retained or replaced for the development to be acceptable. Consequently, I am astonished that you have not consulted your landscaping officer for his comments on the proposals and the tree survey.”*

Mrs Jones also commented on the omission of explicit reference to Policy RCE8, drawing attention to how that had been covered in the original Statement of Objection. She noted that the way Policy RCE13 had been dealt with seemed incomplete and she turned finally to the effect on adjoining properties.

64. Mr Rowles forwarded a copy of this letter to the members of the Department’s Board that same day. He suggested that the points raised would be dealt with at the Open Planning Meeting. However, the Minister responded the following day requesting that a draft of the answers to the points be circulated beforehand. This was done by Mr Rowles on 1 December 2014 in a series of bullet points. He indicated that there was no evidence that the scaffolding poles were incorrect or misleading. He dismissed Mrs Jones’ suggestion that comments should have been invited from objectors about the contents of the tree survey and summarised the conclusions of it. He suggested that *“There is no evidence to suggest that landscaping cannot be dealt with satisfactorily in accordance with conditions”*. He made no mention about there having been an internal consultation report prepared by Mr Ritchie. He commented about Policies RCE8 and RCE13 and the effect on adjoining properties, reminding members that they had attended a site visit.
65. The Minute of the Open Planning Meeting held on 2 December 2014 is accepted on behalf of the Applicant as an accurate record of what took place. Mr Hartman made a presentation using PowerPoint slides. Mrs Jones next addressed the meeting. She indicated that the development would have an overbearing effect on the living space at Adolphus House, both inside and out and repeated her concerns about the misrepresentation of the proposal due to the incorrectly located scaffolding poles. She stressed the Applicant’s belief that the landscape screening would be unsatisfactory and the development was not in keeping with the location. She *“stated her client’s belief that the Department’s Landscape and Countryside Officer should have been utilised as the consultant for assessing the trees”*. She concluded by inviting the Board members to regard the information given to them as incomplete and inaccurate. Miss Haynes of Les Roches Fleuries spoke next, followed by Mr Falla and finally Advocate Ferbrache.
66. In accordance with the Department’s *Protocol for the Operation of Open Planning Meetings*, members of the Board were then able to *“seek clarification from the planning officers present on any points made”* (para. 19). Further, pursuant to para. 20: *“Should the Board seek advice or clarification from the planning officers present in response to comments made by speakers, speakers shall not comment further unless specifically requested to do so by the Board.”* Although the Minute does not set out the questions asked, the topics covered can be inferred from the responses recorded. Deputy Harwood asked about the designation of areas of the application site, the prominence of the roof levels, what the scaffolding poles represented and how much contribution to the area was made by the current single storey dwelling. Deputy Gollop’s questioning related to the other representations made, the screening of the roof terrace near Adolphus House, the significance of the cliffs in assessing the character of the area and possibly something to do with design, eliciting a reminder from the planning officer that it was not the Department’s responsibility to say what should be built at any given location but rather to assess what was proposed in accordance with the legislative and policy framework. Deputy Le Lievre asked about the location of the trees to be felled and the relationship of the proposed development to Les Roches Fleuries. Deputy Brehaut also asked about the screening of the roof terrace. Deputy Burford asked about what had been approved at Les Roches Fleuries, about some aspects of the tree survey, about Policy RCE2 on landscape character and the proximity of the SNCI (Policy RCE4), and the size and screening of the outside southern terrace, to which the planning officers responded that this was a matter for the judgment of each member. Each member then summarised their views, before proceeding to vote. The application for planning permission was approved by a 3:2 majority.

67. The Notification of the granting of planning permission is dated 2 December 2014 and contains the same 12 conditions, with the reasons therefor, as appeared on the face of the planning report.

*Grounds of challenge*

68. The Applicant has raised four grounds under which she submits that the Board's resolution in favour of granting planning permission falls to be quashed. The first is that the Board failed to take into account relevant considerations. In particular, it is asserted that the Board should have been made aware that Mr Ritchie's landscaping report existed because it has been recognised that landscaping was critical to the Interested Party's planning application. The omission to mention the report has resulted in the planning process being flawed and the Board's decision taken ultra vires. Further, the Applicant's Cause refers to the failure to take into account, or attach sufficient weight to, certain policies of the Rural Area Plan (Review No. 1), the character and amenity of the area, the effect of the proposed development on Adolphus House and on public views. By reason of the same matters, it is said in the second ground that the Board's decision was unreasonable and/or disproportionate. Because the existence of the landscaping report was not disclosed, the third ground advanced is that there was procedural impropriety, rendering the decision liable to be quashed because there was no fair hearing. The fourth ground is that there has been a violation of the Applicant's Convention rights (Articles 6 and 8 of the Convention and Article 1 of the First Protocol). The Applicant has also claimed damages pursuant to section 8 of the Human Rights Law, but that element of her claim was deferred pending consideration of the application to quash the Board's decision.
69. As is apparent from the summary of the grounds advanced on behalf of the Applicant, there is a degree of overlap between them. The root of them is that the Board was misled by the terms of the planning report and, in particular, by the failure to deal with the concerns raised by Mrs Jones on behalf of the Applicant that there had apparently been no consultation with the Landscape & Countryside Officer, Mr Ritchie.

*Deficiencies in planning report*

70. In making his submissions, Advocate Greenfield has relied heavily on two English law decisions: *R (Batey) v Boston Borough Council* [2008] EWHC 3516 (Admin) and *R (Georgiou) v London Borough of Enfield* [2004] EWHC 779 (Admin). However, before considering either of those decisions, it is appropriate to place them into context by referring to what had been said in the English Court of Appeal previously in *Oxton Farms v Selby District Council* [1997] EWCA Civ 4004.
71. In that case, the appellants were aggrieved that the court refused to quash a planning permission granted after consideration of a 13-page planning report and, in particular, about the way in which policy issues had been dealt with in the report. The principal judgment was given by Pill LJ. In his conclusion, he stated:

*“It is important that those who make determinations under the planning acts are familiar with sections 70(2) and 54A of the 1990 Act and apply the test imposed by Parliament. It follows that a planning officer reporting to and advising council members who are to make a relevant decision must keep the test in mind in the information and advice he provides and in the manner in which he provides it.*

*Clear mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed. The overall fairness of the report, in the context of the statutory test, must be considered.*

*It has also to be borne in mind that there is usually further opportunity for advice and debate at the relevant council meeting and that the members themselves can be expected to acquire a working knowledge of the statutory test.*

*In my view the report itself in the present case was not only comprehensive in its treatment of the facts but sufficiently advised the Committee upon the statutory and policy framework within which the decision was to be taken. The Committee were adequately advised and their decision should stand.”*

Judge LJ added his own comments in a similar vein:

*“The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury.*

*From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer’s report. This reflects no more than the court’s conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.”*

72. More recently, the importance of focusing on the proper purpose of a planning report was explained in the Supreme Court in Morge v Hampshire County Council [2011] UKSC 2, in the judgment of Lady Hale (at para. 36):

*“Democratically elected bodies go about their decision-making in a different way from the courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows to them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court’s to weigh the competing private and public interests involved.”*

The final decision of this type to which Advocate Gist has drawn my attention is R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin). The judgment of Holgate J draws together a number of citations from the cases which confirm that it is part of the functions of the officer preparing the report to assess what matters need to be included in the planning report, remembering that the report must be read as a whole and not deconstructed in the same manner as one might a statute.

73. I am satisfied that the principles derived from these English cases can be adopted and applied as a matter of Guernsey law. The statutory framework is not identical but it is similar. The two provisions of the Town and Country Planning Act 1990 referred to in the judgment of Pill LJ in Oxton Farms (section 70(2), which provides that regard must be had to the development plan so far as material to the application and to any other material consideration, and section 54A, which provides that where regard must be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise) are reflected in section 16(5) of the 2005 Law and sections 12 and 13 of the 2007 Ordinance, to which Mrs Jones had expressly referred in the Applicant’s Statement of Objection.

74. Section 16(5) of the 2005 Law provides:

*“In determining an application for planning permission or outline permission, the Department must have regard –*

- (a) to the purposes of this Law,*
- (b) subject to the provisions of section 77(9) (which relates to strategically essential development), to any relevant Development Plan, Subject Plan or Local Planning Brief, and*
- (c) to such matters relating to the purposes of this Law as may be specified by Ordinance of the States under this paragraph.”*

The purposes of the Law are set out in section 1:

- “(1) The purposes of this Law are to protect and enhance, and to facilitate the sustainable development of, the physical environment of Guernsey.*
- (2) In this regard the Law will seek –*
  - (a) to protect and enhance the natural beauty and amenity of Guernsey’s coasts, cliffs, countryside and other open spaces,*
  - (b) to protect and enhance Guernsey’s heritage of buildings, monuments and sites of historic, architectural or archaeological importance,*
  - (c) to preserve and promote biological diversity,*
  - (d) to achieve quality in design and implementation of development so as to respect Guernsey’s historic, architectural and archaeological heritage and make a positive contribution to the built environment,*
  - (e) to maintain balance between the competing demands of the community for the use of land,*
  - (f) to ensure that all development is carried out in a sustainable manner and in such a way as to achieve a safe and healthy living and working environment.”*

By including the requirement that regard must be had to the purposes of the Law in addition to the relevant Development Plan, the legislature has placed the protection and enhancement of Guernsey’s physical environment as the foundation for decision-making. In the strategic context of the Rural Area Plan (Review No. 1) this is replicated at paragraph 1.3 of the Written Statement, where it is stated that *“the primary objective of the Rural Area Plan is the conservation and enhancement of the rural environment”*.

75. Section 12 of the 2007 Ordinance covers *inter alia* the status of Plans and deals with how to manage any departure from a Plan, which is not in issue in the present case, before providing in subsection (3):

*“For the avoidance of doubt, where, pursuant to section 16(5)(b) of the Law, the Department has regard to any relevant Plan or Local Planning Brief in determining an application for planning permission for development which –*

- (a) would not involve a departure from such a Plan or Local Planning Brief,*

- (b) *would involve a minor departure from such a Plan or Local Planning Brief but the Department exercises its discretion in subsection (2), or*
- (c) *is strategically essential development,*

*then the Department shall have regard to such Plan or Local Planning Brief and to any other matters to which it is required to have regard under the Law and this Ordinance in determining the planning application and the weight to be given to the Plan or Local Planning Brief and any other matter shall be for the Department having regard to the particular facts and circumstances of the case.”*

In my view, this subsection is of significance because it spells out that the weight to be given to the matters to which the Department is obliged to have regard is for the Department to determine, having regard to the particular facts and circumstances of the case. Accordingly, any complaint made by the Applicant as to the sufficiency of the weight given by the Department to, eg, the relevant policies, is governed by this provision. If it can be shown that the Department took into account something it should not have taken into account or failed to take into account something it was obliged to take into account, the decision is susceptible to challenge on that basis. However, if the complaint is that the Department should have given something clearly and properly taken into account more or less weight, it strikes me that the Court should defer to the assessment made by the Department, unless perhaps it can be shown through the type of intensity of review to which Lord Steyn referred in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, that the Department has erred to such an extent that its assessment is so plainly wrong as to be incapable of being sustained. It is important to recall that the function of the Court is to review the Department’s decision having regard to established legal principles adopted from the position in English law and is not to reach its own decision on the planning application and to substitute that decision for the decision taken by the Department.

76. Section 13(1) of the 2007 Ordinance sets out the general material considerations to which regard must be had:

*“Subject to section 12, in addition to the matters to which the Department is required to have regard under the Law and this Ordinance, in determining an application for planning permission, the Department must have regard to –*

- (a) *the likely effect of the development on the natural beauty and landscape quality of the locality in question,*
- (b) *the character and quality of the natural and built environment which is likely to be created by the development,*
- (c) *the appropriateness of the development in relation to its surroundings in terms of its design, layout, scale, siting and the materials to be used,*
- (d) *the likely effect of the development on the character and amenity of the locality in question,*
- (e) *the likely effects of the development on roads and other infrastructure, traffic and essential services,*
- (f) *the likely effect of the proposed use to which the application site is to be put and the likely effect of any other use to which it could be put without obtaining a further planning permission,*
- (g) *any proposed planning covenant which can be entered into in accordance with section 23 of the Law –*

- (i) *which provides a benefit having regard to the purposes of the Law or any other purpose for which a planning covenant may be entered into, and*
- (ii) *which would have a material connection with the development,*
- (h) *the likely effect of the development on parks, playing fields and other open spaces, and*
- (i) *the likely effect of the development on the reasonable enjoyment of neighbouring properties.”*

This subsection sets out a number of specified areas to which the Department must have regard when determining a planning application. Although it is not as open-ended as section 70(2) of the 1990 Act, I do not consider that that difference affects the general applicability of the principles set out in the cases to which I have referred, building on the comments of the Court of Appeal in Oxton Farms.

77. In this context, it is important to remember that the Minister and the four other members of the Board of the Environment Department have been elected to those offices by their colleagues in the States of Deliberation in the knowledge that they would be charged *inter alia* with reaching decisions under Guernsey’s planning legislation. Save to the extent that decisions are taken by officers under powers delegated to them, but for which the political members remain responsible and so accountable, the Board members decide the more significant or contentious applications for planning permission. In doing so, they inevitably develop a degree of expertise. They have substantial local and background knowledge which they utilise in the decision-making process. They are advised by professional planning officers. Those officers are entitled to work on the basis that the Board members constitute an informed readership when it comes to the officers’ assessment of what should be included in a planning report. When considering the overall content of the planning report, reading it as a whole and in a commonsense manner, I have borne all these factors in mind.
78. Having set out that background to what I regard to be the appropriate general approach to take to planning reports, I turn to the two cases on which Advocate Greenfield relied. Both of those cases cited the passages from Oxton Farms I have already set out (see paragraphs 56 and 57 in the Georgiou case and paragraph 30 in the Batey case). Because both of these cases are first instance decisions, I regard them as examples of the ways in which the principles derived from Oxton Farms have been applied to the facts of those cases (see, eg, paragraph 69 in Georgiou confirming that view).
79. One of the issues in the Georgiou case related to concerns that had been expressed by an official in the council’s transport planning team, Mr Roger Juer, which had not been communicated to members of the planning committee, resulting in a challenge that the committee had not properly discharged its obligations under section 54A of the 1990 or in a failure to take into account material considerations. Richards J had already decided that the planning committee’s decision, taken by a majority of 8:7, fell to be quashed by virtue of an appearance of bias, so his analysis of this aspect of the case was not determinative of the outcome of those judicial review proceedings. The concerns of Mr Juer about certain transport-related aspects of the application falling to be determined were expressed from the outset. He engaged directly with the applicant for permission, which resulted in revised drawings being submitted. The applicant believed that its revisions addressed the issues raised by Mr Juer. However, Mr Juer prepared an internal memorandum dated 30 May 2003 and followed that up with an e-mail three days later. He made a recommendation that the application should be refused consent. He gave his view that the proposal was contrary to two policies in the council’s development plan relating to access and servicing and contrary to three policies concerning hazards to pedestrians. The basis of the claimant’s challenge is summarised in para. 47 of the judgment:

*“The claimant’s case is that Mr Juer’s views, in particular on the lack of conformity with UDP policies, were something that the planning committee needed to be aware of and to take into account. By s. 54A of the 1990 Act the application had to be determined in accordance with the development plan unless material considerations indicated otherwise. It was therefore necessary for the committee to interpret the development plan properly, decide whether the proposed development accorded with the development plan, identify and take into account all other material considerations, and decide whether the development plan should be accorded the priority given to it by statute. Yet neither the fact nor the substance of Juer’s views was drawn to the attention of members for the purposes of their decision on 17 June. Indeed the impression given in the officers’ report to the committee was that there were no highways or related difficulties in relation to the application.”*

80. Although Richards J did not accept all the submissions made on behalf of the claimant about the failure in the report to raise the concerns mentioned by Mr Juer, he reached the conclusion that there had been a failure to place adequate information before the committee members. In particular, His Lordship identified that some of the matters raised called for the members to reach planning judgments in the context of the plan policies to which reference had been made. From the evidence given in the case on behalf of the council, it had been acknowledged that the points being made by Mr Juer were not without substance. In relation to the suggestion that those concerns could be met by conditions, he stated (at para. 65):

*“As to the council’s evidence that it was that [sic] thought that the matters raised by Mr Juer could be covered by planning conditions, there is of course no problem in principle about the use of appropriate conditions to deal with matters that might otherwise justify the refusal of planning permission. Where, however, it was being said that the proposals were contrary to policies in the UDP (as was the case with some of Mr Juer’s concerns, even if one discounts the point about gradients), it seems to me that the attention of members ought to have been drawn to the concerns expressed and to the way in which it was said that they could be met by conditions. The relevant judgment was for them to make, even though they would no doubt rely heavily in practice on the advice given to them by senior officers. As it was, the report not only failed to draw their attention to the concerns or to the view (in so far as this was the case) that they could be met by conditions, but gave very little information about the conditions themselves. It referred to them only in summary form, e.g. “6. C13 Details of Loading/ Unloading/ Turning Facilities” and “7. C14 Details of Access and Junction”, these apparently being the headings of the council’s standard conditions. The full text of the conditions and the statement of reasons only came later, with the actual grant of planning permission.”*

81. There were two other grounds of challenge raised by the claimant alleging deficiencies in the planning report. The first, in respect of health care need and service impact, resulted in the conclusion that (at para. 85):

*“... on the issue of need the report to members was materially deficient and misleading. It resulted in the committee proceeding on a mistaken factual basis and failing to have proper regard to a material consideration in reaching its decision.”*

The second ground related to the alleged inadequacy of the summary of consultation responses. Richards J regards the failure to send the notes of the panel meeting to the new members of the planning committee as a material failure. His Lordship’s overall conclusion was given in para. 94:

*“Taking everything into account, I have come to the conclusion that the members of the planning committee were not given sufficient information to ensure the proper discharge of their functions in relation to this planning application. It was plainly a difficult and highly controversial decision, reached by the narrowest of majorities. Members needed to be fully aware of the nature and extent of concerns expressed on*

*all material issues, so that they could perform the requisite judgments both as to compliance with the UDP and as to the nature of, and weight to be given to, other material considerations. I accept that what was said in the report and at the meeting itself must have alerted them to the extent of the opposition and to most of the important issues. I also accept that, as was made clear in Oxton Farms v. Selby DC, a sensible and practical approach must be adopted towards officers' reports and too much should not be expected of them. On the particular facts of this case, however, I take the view that the report did not do enough. The deficiencies identified in relation to the highways/access issue (ground 1), the issue of need (ground 3) and the overall public response to consultation (ground 4) are substantial when viewed individually. When aggregated they give rise to a strong case that the committee was not made sufficiently aware of relevant information and that its decision was flawed in consequence."*

82. Having set out the issues and decisions in Georgiou in this way, it is obvious that the deficiencies there were more significant than the deficiencies advanced on behalf of the Applicant in the present case. Accordingly, starting with the principles of Oxton Farms and applying them in a similar manner to Richards J, I am not persuaded that it can be said that the Board members have proceeded to fail to have regard to a material consideration. The content of the planning report places the impact of the proposed development on the appearance and character of the area, including landscape character, at the heart of the issues to be considered. Unlike in relation to Mr Juer's concerns, which were disregarded or minimised in the planning report in Georgiou, the concerns about the significance of the loss of vegetation mentioned by Mr Ritchie were translated into the planning report presented by Mr Hartman and Mr Rowles. Those officers shared the concerns, but recognised that this was a matter for the planning judgment of the Board members. The report fairly presents that retention of the existing landscape was critical to minimising the impact of the development. The significance of the public views was addressed. Moreover, the members of the Board had undertaken a full site visit where they had each personally had the opportunity to consider public views and the impact on Adolphus House. I am satisfied the Board members were fully aware of the nature and significance of the concerns that Mr Ritchie had and that they had been properly placed into the framework of the statutory considerations they were obliged to follow. In my judgment, it cannot be said that the planning report, as supplemented by the other material before the Board members and the oral presentations made at the Open Planning Meeting has resulted in insufficient relevant information being provided prior to the decision being taken.
83. Another distinguishing feature between the Georgiou case and the present one is that Mr Juer's concerns went to compliance with plan policies. There is the suggestion in that case that the misleading or incomplete information provided meant that the planning committee could not properly form the types of planning judgment that those policies required them to form. The way of addressing the concerns through proposed conditions was also less informative than in the present case, where the reasons for the conditions proposed to support the planning officer's recommendation that permission be granted were set out in full and were, it seems to me, consistent with the description contained in the body of the report.
84. For these reasons, I do not regard Georgiou as being of particular assistance to me and I reject Advocate Greenfield's submissions relying on it.
85. The issues in the Batey case were whether the council failed to have proper regard to a relevant material consideration, being the effect of overlooking/overshadowing on the claimant's property and whether there was a procedural irregularity because it did not have before it the claimant's letter of objection. It was acknowledged that there was some overlap between those two issues. Again, there was also an issue of apparent unlawful predetermination involved, although in this case the claimant's submissions on that element were rejected.

86. In relation to the issue of overlooking or overshadowing, Stuart Isaacs QC, sitting as a Deputy High Court Judge, took the view that the planning report did not deal adequately with this and that the failure to address this had not been corrected subsequently. For example, it was not addressed in the planning officer’s slide presentation and the learned judge appears to have taken the view that, because the planning officer had recently assumed responsibility for the application from a colleague who was much more familiar with the application site and the claimant’s premises, this had created a disconnect in knowledge such that the committee’s discussions and vote took place without them being informed about a material consideration. In respect of the committee not having a copy of an earlier letter of objection, there is no standalone finding that this constituted a procedural irregularity, but it was a further reason why the claimant’s concerns about overshadowing had not been taken into account, which is why the planning decision was quashed.
87. That case is not on all fours with the present case. It has not been suggested on behalf of the Applicant that the Board of the Department took its decision without having regard to any material consideration it was obliged to consider. Section 13(1)(j) of the 2007 Ordinance (“*the likely effect of the development on the reasonable enjoyment of neighbouring properties*”) and Policy RGEN11 to similar effect were clearly both engaged because of the proximity of the proposed development to Adolphus House. The planning report sets out the considerations the Board members were required to take into account. Accordingly, unlike in *Batey*, which like *Georgiou* is a case where the court found that a material consideration had not been taken into account, the present challenge is not put at that level. As I have already stated, a challenge based on the weight given to a material consideration is always likely to struggle. In my judgment, that is why reliance on *Batey* does not assist the Applicant here. Because the alleged deficiencies of the planning report and the process do not allege that there was a contravention of the statutory framework for taking a decision, when looked at in the round, I take the view that the planning report was not misleading in any material way.
88. The strongest point advanced on behalf of the Applicant relates to the omission to respond to Mrs Jones in respect of astonishment that there had apparently been no consultation with Mr Ritchie following receipt of the tree survey. Had that point in her letter of 28 November 2014 been covered in Mr Rowles’ bullet point responses, or even clarified at the open planning meeting, it is quite possible that the principal basis for the Applicant bringing these proceedings would have disappeared. The only comment in Mr Rowles’ Affidavit about this aspect of Mrs Jones’ letter has been that it was clear to him that her concerns were all addressable, and will be addressed, by the landscaping scheme. His response to Mrs Jones, following a request from her on 1 December 2014 for some feedback to assist her in preparing her presentation to the Open Planning Meeting, was to attach a copy of the document he had prepared, adding that these were “*initial comments*”. Mrs Jones enquired as to whether anything further might be expected later that day, referring to “*outstanding replies*”, to which Mr Rowles responded that he would not be sending out anything further before the meeting the following day. He commented that he thought the bullet points considered or addressed all Mrs Jones’ points.
89. In the context of the Open Planning Meeting, where Mrs Jones repeated her astonishment that there had apparently been no consultation of the Landscape & Countryside Officer, I accept that the Protocol indicates that planning officers respond to questions rather than volunteer information. It is, however, unfortunate that something as simple as explaining that there had been consultation but that the officers present stood by their assessment of the planning application as set out in the planning report and developed through Mr Hartman’s presentation and their answers to questions from members of the Board was not done. That said, I disagree with Advocate Greenfield’s submission that it was incumbent on the officers to place Mr Ritchie’s report before the Board. The purpose of the planning report, applying the principles to which I have previously referred, is to explain in an appropriate level of detail the material considerations to which the decision-makers must have regard. Internal disagreements happen. The substance and quality of the disagreement is what matters. In *Georgiou*, Mr Juer’s concerns had a direct impact on whether or not the proposals were consistent with

certain policies. Here, the concerns are about how to assess what was being proposed through commenting on the tree survey. The bulk of Mr Ritchie's report agreed with the contents of the tree survey and supplemented it by noting that there was scope to preserve more trees if that was considered appropriate. His comments about the critical importance of considering landscaping matters, particularly the loss of vegetation, were translated into the report. This was not a case of the planning officers choosing to omit the concerns expressed. Where Mr Rowles and Mr Hartman considered that Mr Ritchie had misunderstood the effect of the planning application, I am satisfied that it was open to them, as the officers taking responsibility for the report, to assess what information properly needed to be placed before the Board for members to reach a decision. In particular, I do not consider that it was necessary for them to alert the Board, or Mrs Jones on behalf of the Applicant, that one of their colleagues had expressed a different view as to what the recommendation should be. The position is different from *Georgiou* because the planning officers were not excluding the considerations raised in Mr Ritchie's report from consideration by the Board members but rather presented the material in a fair way, highlighting the landscaping concerns, but proposing that what would otherwise lead to refusal could be managed through stringent conditions, and setting out the reasons for making that recommendation.

90. If Advocate Greenfield were correct that Mr Ritchie's full report should have been placed before Board members, then the logical extension is that Mr White's internal consultation report should also have been placed before them. A further extension would be that all other consultation responses should be provided in full rather than summarised. This would potentially result in the paperwork accompanying an application to be determined at an open planning meeting becoming more voluminous than is strictly required. Echoing the words of caution sounded by Lady Hale, the risk is that Board members would choose not to read everything provided to them. The preferable approach, as demonstrated in this case, is for there to be a comprehensive planning report which sets out all the relevant considerations enabling the Board members to form their own judgments on those issues. Indeed, the questions posed, the way each member summarised their position, and the resulting vote, all show that this is exactly what happened.
91. In these circumstances, whilst it would have been better to have acknowledged that there had been consultation and then addressed anything further arising from that acknowledgement, which I am satisfied would not have resulted in Mr Ritchie's report being placed before the Board in any event, I take the view that the planning report was not inadequate or deficient in not setting out the entire contents of Mr Ritchie's report. The planning report provided a full picture of the relevant facts to enable the Board members to determine the Interested Party's planning application within the statutory and policy framework. The Applicant has not demonstrated that the effect of the report misled the Board members in any way, let alone significantly.

#### *Planning policies*

92. A further complaint of the Applicant is that certain policies were not addressed by the planning report. In particular, Advocate Greenfield has highlighted the omission to refer to Policy RCE 8, compounded by the response of Mr Rowles in his bullet points that "*RCE8 is not considered to specifically apply*" and the fact that, in a letter dated 3 February 2015, further reference is made to the policy, explaining that the importance of there being a comprehensive landscaping scheme had been emphasised on several occasions in the planning report. He also refers to Policy RCE4 and Policy RCE2, criticising the fact that they were not mentioned in the planning report. None of these policies is in the list of 10 policies under the heading of Relevant Policies in the planning report. They were, however, addressed in Mrs Jones' Statement of Objection and Policy RCE8 was raised again in Mrs Jones' letter dated 28 November 2014. Board members had both documents included in their packs of papers for the Open Planning Meeting.
93. Policy RCE8 provides:

*“Proposals for development that the Department considers to be significant in terms of scale, setting and/or appearance will normally be required to incorporate landscape schemes where:*

- a) landscape treatment is a necessary or intrinsic part of the design;*
- b) it will reduce the impact of the development;*
- c) the development would affect either a Conservation Area or the setting of a building of architectural or historic interest;*
- d) there are public open areas within the site; or*
- e) the site contains an important landscape feature which contributes to the appearance, character and historical interest of the local area.”*

In paragraph 3.8 of the Written Statement, there is an explanation that *“the Department will assess whether there is a need for landscape design proposals on a case by case basis”* and that *“It should also be noted that landscape / planting schemes alone cannot render an otherwise poor development proposal acceptable.”*

94. The planning report refers to Policy RCE8 only in the context of the Applicant’s Statement of Objection. However, when the report is read as a whole, it is quite clear that a satisfactory landscaping scheme was of critical importance. The proposed conditions to attach to the recommended grant of planning permission were set out at the beginning of the report. It follows, therefore, that these were the first considerations of members of the Board. Condition 5, to which I have already referred, requires approval of a landscaping scheme before any development, including demolition and site works, is permitted on the site. Accordingly, there is no merit in the Applicant’s complaint that this policy was not taken into account. By resolving to grant permission subject *inter alia* to condition 5, I am satisfied that the Department properly had regard to this policy.

95. Policy RCE4 concerns Sites of Nature Conservation Importance:

*“Development that would adversely affect a Site of Nature Conservation Importance will not be permitted unless:*

- a) the benefits to the community are clearly demonstrated to outweigh the nature conservation interest of the site; and,*
- b) adequate provision is made within the development for the protection and enhancement of existing features of nature conservation interest and/or for the establishment of new features of nature conservation interest.”*

Whilst paragraph 3.4 of the Written Statement clarifies that *“Where a development is proposed within, close to or potentially affecting, an SNCI, it will be the responsibility of the developer to demonstrate, as part of the planning application, the likely impact of the development on the nature conservation interest of the site”*, and the Statement of Objection indicated that the application did not do so, there has been no evidence advanced that the proposal of the Interested Party had any adverse effect on the nearby SNCI. This was mentioned in a paragraph towards the end of the planning report:

*“Reference has been made to a possible impact on nature conservation. The Site of Nature Conservation Interest is located some distance to the east of the proposed new dwelling on the other side of the cliff path. This is no evidence to suggest that the proposal would have any significant impact on nature conservation.”*

96. There is, therefore, clear evidence that Policy RCE4 was being addressed in the planning report, and not only in the context of being one of the policies to which the Statement of Objection referred. It was also mentioned by Mr Rowles in response to a question from the Minister. It was a matter for the members of the Board to consider the proximity of the SNCI and whether they felt the proposed development would adversely affect it. If they concluded, as it must be inferred they did, that there was no such adverse impact, then nothing further needed to be said about it. Had the proposal adversely affected the SNCI, it would have created a rebuttable presumption against granting permission. The Department would then have had to consider whether the factors specified were met. If not, permission should not have followed unless it was regarded as a minor departure from the Development Plan. However, none of that needed to be addressed unless there was a finding that the development adversely affected the SNCI, which no one had suggested was the case. Accordingly, I am satisfied that there is no merit in the Applicant's challenge to the Board's resolution arising from failing to take into account Policy RCE4.
97. Advocate Greenfield has also mentioned Policy RCE2, which deals with landscape character:

*“The Department will require proposals for development to:*

- a) take account of the relevant landscape character type in which it is set,*
- b) take account of any specific features that contribute to the landscape character;  
and,*
- c) take advantage, where practicable, of opportunities to create or improve features of landscape interest.”*

As is abundantly clear, even without addressing this policy expressly (save for mentioning it as having featured in the Statement of Objection), the significance of the landscape character of the application site and the surrounding area was adequately covered in the planning report and the other material placed before the Board members before they took their decision. Once again, there is ample evidence that the terms of this Policy were pervasive throughout the planning report, that it was referred to by Mr Rowles at the Open Planning Meeting in response to the same question from the Minister to which I have just referred, and that the material considerations derived from section 13(1) of the Ordinance were also adequately covered without being referred to explicitly. I am satisfied that the Applicant's complaints about Policy RCE2 are without merit.

98. In summary, the planning report, the other materials under consideration and the process of the Open Planning Meeting combined demonstrate that there were no deficiencies in the relevant information presented to the Board and on which the members reached their decision. Having regard to the statutory provisions setting out the matters to which the decision-makers had to have regard, the overall fairness of the planning report is, in my judgment, quite clear. The only element on which the Board members could possibly have been misled was in not having it clarified that Mr Ritchie had been consulted. As I have stated, in my view, there can be no suggestion that this amounts to significant misleading of the decision-makers about a material matter, which has been left uncorrected. Accordingly, I would, if needed, have rejected ground 1 of the Applicant's challenge on this basis.

#### *Other grounds*

99. I can deal more briefly with the other aspects of the Applicant's substantive challenge. In some respects, there is a considerable degree of overlap between the grounds. For example, having rejected the submissions made about the alleged deficiencies in the planning report resulting in the Board members failing to take into account matters they should have, similar reasoning applies to my rejection of the challenge that the decision was unreasonable or disproportionate. Far from being a decision that no reasonable decision-maker could have reached, having undertaken the depth of review of what was before the Board members that I

have, I am satisfied that the decision to grant planning permission subject to the stringent conditions imposed was well within the band of reasonable responses open to the Department. In reaching that conclusion, I repeat that the weight to be given to the matters the Board members were obliged to take into account has been conferred on them by the statutory framework and so I have exercised proper deference to that fact and cautioned myself against undue judicial influence in policy judgments conferred on the Board members within their area of special competence.

100. I am also of the view that the Applicant's complaints about the scaffolding poles are misconceived. No evidence has been produced to show that they were placed incorrectly. The basis of the complaint appears to be that the Applicant expected a full three-dimensional outline of the proposed new building to be erected, whereas what was done, at the request of the Department, was confined to the front elevation on the east side. To the extent that the Applicant remained confused at what had been erected and what it represented, Mr Hartman took steps to try to explain this to her. More importantly, however, there is no evidence to suggest that the members of the Board were misled. Advocate Greenfield has attempted to draw an inference from the fact that Mr Rowles explained in his bullet point responses to Mrs Jones' further concerns about the scaffolding poles that the scaffolding poles were "*sufficient to help enable assessment of the impact of the proposal on visual and neighbour amenity*", when the poles themselves did not show what the impact on Adolphus House was. However, with respect to him, even though scaffolding poles may not be erected regularly for the benefit of Board members undertaking site visits, the explanation offered each time appears to have been quite clear. The Board members were, I am satisfied, well aware what the scaffolding poles showed. Through using the plans in support of the application in conjunction with the poles they witnessed and their own experience of visualising buildings from plans, I am persuaded that they were not misled as suggested, or indeed at all, by the poles being only a two-dimensional representation of one elevation. Moreover, the fact that the Minister directed Mr Hartman to return to visit the Applicant after the Board members' site visit shows that the Minister appreciated that the explanation given by Mr Hartman had not been fully understood by the Applicant, which implies that the Minister herself had understood it.
101. As regards the Applicant's ground based on procedural unfairness, there is again a significant overlap with the issues I have already covered. Advocate Greenfield submits that the Board was denied the opportunity to consider certain material, such as Mr Ritchie's report, which in turn meant that the Applicant and her advisers were unaware of material on which there should have been an opportunity to comment. In that context, reliance is placed on principles of natural justice. As it was put by Lord Russell of Killowen in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255, they should have had "*a fair crack of the whip*".
102. My assessment of the procedure followed by the Department is that the Applicant had access to all the information that she should have had. As is clear from the Statement of Objection, Mrs Jones' letter of 28 November 2014 and her oral representations at the Open Planning Meeting, the Applicant and her advisers had a full appreciation of what the Interested Party's development proposals entailed. They had a comprehensive planning report identifying the issues the Board members needed to consider before reaching a decision on the planning application. They had a copy of the tree survey provided and they had the comments about it contained in the planning report from which to make contrary representations. As I have said, I am satisfied that it was not necessary for the Department to disclose the internal consultation report prepared by Mr Ritchie. If it were, the same obligation would extend to Mr White's internal consultation report. What matters is whether or not the concerns expressed by Mr Ritchie were properly translated into the body of the planning report. I am satisfied that they were. There was no absolute requirement on Mr Hartman or Mr Rowles to disclose that Mr Ritchie had reached a contrary conclusion about what recommendation should be made to the Board members, which in turn would have meant them having to explain why a different recommendation was being made. In general, The Board members need a single

recommendation with an adequate explanation as to why it has been reached and identifying what matters calling for their individual planning judgments they are being asked to consider. The Applicant had, in my view, had a full opportunity to present an alternative approach to the issues that had been raised. She had the “*fair crack at the whip*” required. The Board members can, I think, be taken to understand that written letters of objection, especially when supplemented by oral presentations at open planning meetings are indicators that they need to reach conclusions on the issues of contention raised. The importance of the tree survey and how the proposals had an impact on landscaping were central to those objections. This was not a case where the Board members themselves were provided with material to which the Applicant and her advisers had not had access. In those circumstances, I am satisfied that there has been no procedural impropriety.

103. The final ground raised on behalf of the Applicant, based on the alleged failure to respect the Applicant’s Convention rights, has largely been addressed in the analysis I have already undertaken. Having concluded that there has been no procedural impropriety, it follows that I do not find that there has been anything other than a fair hearing for the purposes of Article 6 of the Convention. In any event, it is necessary to look at the entire process rather than just considering what happened at the Open Planning Meeting, in order to consider whether Article 6 rights have been violated. The availability of a review before the Court of the decision taken by the Department falls to be taken into account and there is, therefore, no violation of the Applicant’s Article 6 rights.

104. In relation to the balancing exercise that needed to be undertaken relating to the likely effect of the development on the reasonable enjoyment of neighbouring properties, such as Adolphus House, I note the summary of the position derived from the authorities in England given at para. 43 of the judgment in *R (Lough) v First Secretary of State* [2004] EWCA Civ 905:

- “(a) *Article 8 is concerned to prevent intrusions into a person’s private life and home and, in particular, arbitrary intrusions and that is the background against which alleged breaches are to be considered.*
- (b) *Respect for the home has an environmental dimension in that the law must offer protection to the environment of the home.*
- (c) *Not every loss of amenity involves a breach of Article 8(1). The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances but it must be substantial.*
- (d) *The contents of Article 8(2) throw light on the extent of the right in Article 8(1) but infringement of Article 8(1) does not necessarily arise upon a loss of amenity and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the respect required by Article 8(1) has been accorded.*
- (e) *It is also open to the public authority to justify an interference in accordance with Article 8(2) but the principles to be applied are broadly similar in the context of the two parts of the Article.*
- (f) *When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered.*
- (g) *The public authority concerned is granted a certain margin of appreciation in determining the steps to be taken to ensure compliance with Article 8.*
- (h) *The margin of appreciation may be wide when the implementation of planning policies is to be considered.”*

Provided the Board members were given the information they needed to have in order to balance the competing rights of the Interested Party to develop its property and those of the Applicant to respect for her home and her private life, and they reached a decision which is rational, which I have found to be the case here, then the decision falls within the legitimate margin of discretion afforded to the primary decision-makers. It is the type of decision with which this Court should not interfere. In this regard, I bear in mind that the Board members viewed the application site and even went to the Applicant's property to make an assessment from within her dwelling and from outside it of the potential impact, and so the likely effect, of the proposed development. Further, the pros and cons of the consideration of loss of neighbouring amenity were addressed fully in the submissions made by the planning officers and Mrs Jones. Finally, the fact that the Board members were split is a further indication that each of them undertook an individual balancing exercise before deciding which way to vote. In those circumstances, I am satisfied that respect has been afforded to the Applicant's Convention rights.

105. For these reasons, had I needed to address the second, third and fourth grounds advanced by the Applicant, I would have rejected each of them.

### *Conclusion*

106. For the reasons I have set out, had I decided not to refuse permission to proceed with this judicial review claim, I would have concluded that the substantive claim failed. The majority decision reached to grant planning permission subject to conditions was not irrational, or unreasonable, and did not flow from any procedural irregularity, as alleged. Accordingly, I do not need to consider whether any such flaw was a material one, in the sense of querying whether, had things been done as Advocate Greenfield submits they should have been, the outcome would still have been the same, as Advocate Gist suggested would be the case. However, given the summaries of their individual positions recorded in the Minute of the Open Planning Meeting, it appears to be the case that the members who voted in favour of granting planning permission would not have been persuaded to vote differently. Further, whilst the decision-making process has clearly engaged the Convention rights of the Applicant, I do not find that any of her rights have been violated. In summary, this was a challenge without merit.

### **Outcome**

107. Having rejected Advocate Gist's submission that the effect of section 75 of the 2005 Law operates as a jurisdictional bar to the Applicant's claim, I have decided that the proper decision in this case is to refuse permission to proceed with the claim on the basis that the proceedings were not instituted promptly. As can be seen, I have not done so in the face of a meritorious claim, because, as I have explained in some detail, I would still have declined to quash the Department's grant of planning permission subject to conditions had I dealt with the substantive claim. Accordingly, it would have resulted in the same outcome in that the Applicant's claim would stand dismissed. However, given that there is not as yet a substantial body of judicial review cases in Guernsey, where the commencement of proceedings has been delayed beyond the time that can be treated as being for good reason, in my view, it is better to say so rather than finesse the permission stage.

108. The issue of delay in this case was raised from the outset on behalf of the Department. At first sight, the question appeared to be a borderline one. The proceedings were commenced at around the three-month mark from the decision being subjected to review. As such, it was not clearly a case where permission was probably going to be refused. However, on a close analysis of what steps were taken at what time, and bearing in mind the principle that a challenge to the grant of planning permission potentially has an impact on the ability of the party having obtained it to progress the development for which that permission has been given, I have concluded that there was a delay of at least a fortnight from when the proceedings really should have been commenced. In reality, the delay for which there is no good reason is probably longer than that and aiming to have commenced proceedings by

around the end of January 2015 would probably have not resulted in permission being refused. The failure to serve evidence in support of the Cause only added to the Applicant's problems over delay. Whilst it might be thought that a fortnight (or thereabouts) is de minimis, especially in the absence of any time-period having been specified, I am satisfied that, especially in the context of a period of approximately 12 weeks, it amounts to exceeding what would otherwise have been regarded as prompt by some 20% and so is not de minimis but significant. Moreover, proceedings are either commenced promptly or they are not. In my judgment, this action was not commenced promptly as required, hence the decision to refuse permission. In any event, these judicial review proceedings were without merit because the decision taken by the members of the Department's Board was, in my view, a lawful one.

109. The outcome, therefore, is that permission to proceed with the claim is refused and the Applicant's claim is dismissed.