



# In the Royal Court of the Island of Guernsey

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**The** 8th day of July, 2002 before Andrew Christopher King Day, Esquire, Deputy Bailiff, sitting alone.

Between

MARGARET HENDRY CAMPBELL

Appellant

v

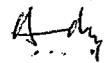
THE STATES HOUSING AUTHORITY

Respondent

WHEREAS on the 20th day of June, 2002 the Deputy Bailiff, in the absence of the Jurats, heard legal argument in the above Appeal from Advocate P.T.R.Ferbrache and H.M. Comptroller on behalf of the Apellant and Respondent respectively and concluded that as a matter of law the decision of the States Housing Authority not to grant the Applicant a Licence under Section 3 of the Housing (Control of Occupation) (Guernsey) Law 1994 was fundamentally flawed and accordingly allowed the Appeal and remitted the matter back to the said Authority;

The Deputy Bailiff this day handed down a written judgment for the said decision in the terms attached hereto.

Her Majesty's Deputy Greffier.



IN THE ROYAL COURT OF GUERNSEY

SITTING AS A FULL COURT

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APPEAL

Between

MARGARET HENDRY CAMPBELL

Appellant

V.

THE STATES HOUSING AUTHORITY

Respondent

Judgment of Day D.B.

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Advocate P.T.R. Ferbrache appeared for the Appellant.

H.M. Comptroller appeared for the Respondent

Legislation referred to:-

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Housing (Control of Occupation) (Guernsey ) Law, 1994 (the "1994 Law")

Cases referred to:-

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Walters v. States Housing Authority – Guernsey Court of Appeal 23/7/1997

Matheson v. States Housing Authority – Guernsey Court of Appeal 24/7/1998

Perkins v. States Housing Authority – Guernsey Court of Appeal 20 GLJ 66

Gillow v. U.K. ECHR (1987) A. 109

Ward v. States Housing Authority - Guernsey Court of Appeal 8 GLJ 50

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The submissions of Counsel on this appeal were heard by the Court on the 19<sup>th</sup> June, 2002. Prior to commencing my summing up to the Jurats on the 20<sup>th</sup> June, I invited further argument in the absence of the Jurats, and concluded that, as a matter of law, the decision of the Housing Authority, as communicated to the Appellant's Advocates by its letter of the 30<sup>th</sup> May, 2002, was fundamentally flawed and that the Authority had accordingly acted *ultra vires*, in the broadest sense of that expression as interpreted by the Court of Appeal in Walters. Accordingly, I allowed the appeal, to the extent that I remitted it back to the Housing Authority for proper consideration to be given to Mrs. Campbell's application. I stated that I would in due course issue a written judgment, which I now do.

A . occupy an “open market” dwelling can ever achieve the prescribed residential qualifications (in contrast to licence holders). Children, however, of such adults who occupy open market accommodation in the prescribed circumstances, which essentially relate to length of residence and arrival in the Island as a minor and as a member of the household of such adult, can acquire residential qualifications in their own right. The  
B foregoing, is the basic framework of the 1994 Law, ignoring its intricacies.

Anyone, without exception save for those with residential qualifications, who wishes to occupy local market accommodation (i.e. not inscribed on the Housing Register) must  
C obtain a housing licence from the Housing Authority in order to do so. Section 6 of the 1994 Law provides the procedure for consideration of applications. This is a section crucial to this appeal to which I will be returning shortly. Section 56 provides that, subject to certain other provisions of the Law which are irrelevant for present purposes, a  
D person aggrieved by any decision of the Authority, i.e. in this case not to grant a licence, may appeal therefrom to the Royal Court on the grounds that the decision was *ultra vires* or otherwise flawed as a matter of law, or was an unreasonable exercise of the Authority’s powers. In all cases, the burden on an appeal rests upon the Appellant. I  
E would add that, in this case, what is sought by the Appellant is the grant of a housing licence in principle, rather than with regard to any specific local market dwelling. In other words, what this Appellant is seeking is that she may, as a matter of principle, be allowed to occupy a local market dwelling; if that licence in principle was granted then she would thereafter have to apply to the Authority for a housing licence in respect of a  
F specific property, which the Authority might grant or refuse, guided by the relevant provisions of the Law. (It is generously and appropriately conceded by the Authority that the Appellant is entitled to ask for a licence in principle, though in her circumstances that may not fall strictly within the terms of the Law).

G The Appellant is 48 years of age, having been born in the United Kingdom on the 28<sup>th</sup> March, 1954. She first became resident in Guernsey on the 4<sup>th</sup> April, 1980, and remained here until the 1<sup>st</sup> October, 1987. For personal reasons she then left the Island, where she returned on the 3<sup>rd</sup> June, 1988 and has continuously resided ever since. She has therefore  
H resided in Guernsey, with the exception of those eight months in 1987/1988, for a period of twenty-two years. Throughout that time, she has apparently resided with a Mr. Sinclair-Kerr. Neither of them are qualified residents by virtue of the provisions of the 1994 Law and she has occupied, as a tenant, property inscribed on Part A of the Housing Control Register. The current flat which she occupies is Flat 12 situated at Maison Haro,  
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## 1. Background to the Appeal

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Ever since 1945, there has been legislation in force of some kind controlling occupation of Guernsey dwellings. The general thrust of all that legislation, namely that the occupation of any dwelling is only permitted by licence of the appropriate States Committee, Authority, or any such other body, continues to be reflected in the 1994 Law, which, in its very first section, states:-

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*"1. Subject to the provisions of this Law, no person shall occupy or cause or permit another person to occupy a dwelling in Guernsey otherwise than under and in accordance with the conditions of a licence (a "Housing Licence") granted by the Authority under section 3."*

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There are now two broad, automatic, statutory exemptions to this requirement for a housing licence, the first of which relates to the status of the individual, and the second to the status of the dwelling. Thus, which regard to the first, qualified residents, as they are described and defined in the Law (principally s.10), do not require a licence to occupy any dwelling. It is not necessary, for the purposes of this appeal, for me to examine the intricacies of how residential qualifications may be obtained; save to say, in simplistic terms, that they are based upon a person's connection with Guernsey, by birth, family, etc., and thus can extend to children and spouses. Those who originally take up occupation by virtue of a housing licence can also achieve residential qualifications, so that they are thereafter free to occupy any dwelling in the Island, which ability also extends to their children and spouses. Various conditions are prescribed, largely relating to period(s) and circumstances of residence, in respect of all the routes to obtaining residential qualifications.

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The second automatic exemption from the requirement for a housing licence is, as I have said, the status of the dwelling concerned, namely because it is what we know as "Open Market", that is to say it is inscribed on the Housing Register maintained under the Law for that purpose. There are some 1,600 dwellings of that nature; the Register basically is closed, and has been for a number of years, so that it cannot generally be added to, for example by the inscription of new houses, regardless of size or rateable value. There are four different types of dwellings which may be inscribed in the four different parts of the Register. For present purposes I need only say that a dwelling inscribed in Part A of the register can be occupied by anybody without a housing licence and without any further conditions imposed. I should also add, again relevant to present purposes, that the Law does not provide any way in which a person who comes to the Island as an adult to

A Mont Plaisir, St. Peter Port, one of a number of “open Market” flats at that address. She  
has two children by her previous marriage, the elder being a daughter aged 29 who has  
lived in the United Kingdom for the last seven years, and a younger son born in  
B December, 1973 (so he was virtually seven when he first came to the Island with his  
mother) who has resided in the Island for exactly the same periods as his mother. He  
lives with a locally qualified partner (they have a one-year-old son), and he is now a  
qualified resident. Both he and his sister were educated for the most part in Guernsey.  
C In the middle of March, 2000, the Appellant wrote to the Housing Authority requesting  
information as to her position in respect of obtaining a housing licence, because by the 4<sup>th</sup>  
April, 1980, she would have been resident and working in Guernsey for 20 years (not  
strictly quite accurate but virtually so).

## 2. The law

D It is appropriate at this stage to examine the relevant provisions of the Law and the wider  
legal principles involved, bearing in mind throughout that this appeal involves an  
application for a housing licence to occupy a “local market” dwelling by an “open  
E market” resident, that is someone who has occupied as an adult “open market”  
accommodation throughout the period(s) of her residence in Guernsey.

F Section 6 of the 1994 Law, as I have already indicated, provides the procedure for  
consideration of applications for a housing licence. The relevant provisions, for the  
purposes of this appeal, are as follows:-

*“6. (1) The Authority, upon receipt of an application under section 2, shall proceed to  
decide whether or not to grant a housing licence or to grant a housing licence  
subject to conditions in accordance with the provisions of this section.*

G *(2) The Authority shall firstly consider –*

*(a) (These provisions refer to employment related applications and are not  
in issue for present purposes)*

*(b) In any other case, all or any of the following matters –*

H *(i) whether the person who would be permitted by the  
housing licence to occupy a dwelling has familial or like  
connections with Guernsey of sufficient strength to justify  
I the grant of a housing licence;*

A (ii) *without prejudice to the generality of sub-paragraph (i), the periods during which and the circumstances in which that person has been resident in Guernsey or elsewhere.*”.

B In the case of Matheson, (where I appeared for the Authority), the Court of Appeal gave guidance as to the proper application of section 6(2)(b) to “open market” residents who might apply for a housing licence. (It should also be noted in passing that section 53 of the 1994 Law also contemplates the possibility of an open market resident being granted  
C a licence to occupy a local market property). With regard to section 6(2)(b) Beloff JA, giving the judgment of the Court, stated this (at p. 3 B):-

D *“I make three observations upon those provisions: firstly, they specify considerations which it is mandatory for the Authority to take into account; secondly, the matters listed under (b)(ii) do not qualify or limit the consideration to be given to the matters listed under (b)(i); and thirdly, that the circumstances of residence referred to in (b)(ii) make a relevant but not a decisive or overriding factor in the equation, the status of residence of the Applicant.”.*

E Beloff J.A emphasised the extent and nature of the powers vested in the Housing Authority by reference to Perkins and Gillow (he might also have referred to Ward), so as to emphasise that, in the words of Southwell JA in Perkins, such powers “*must be exercised with care and sensitivity to avoid any abuse of those powers.*”.

F Beloff JA continued (at p. 4 C):-

G *“Notwithstanding those words, I recognised that it is a well established principle of public law, applicable to Guernsey, that a public authority such as the Respondent Housing Authority, can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; a policy cannot modify, extend, still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it should not be applied in a particular case and in consequence, in appropriate circumstances, to make exceptions to it.”.*

H At p. 4 G Beloff JA stated, with regard to the particular facts in that case:-

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A *"I am compelled to conclude for my part that the Housing Authority in its discretion fell into material error. It is clear from at least two passages that it considered that the fact that an applicant was not a potential qualified resident under S.10 in as much as his or her residence had hitherto been in open market housing, was itself a factor which dictated (my emphasis) refusal of his or her application, whatever its other merits."*

Beloff JA then quoted (at p. 5 D) a passage from one of the letters written by the Authority in Matheson as justifying refusal, where the Authority stated:-

C *"Occupation of an open market dwelling as an adult whether as an owner or tenant, does not lead to residential qualification, and in the Authority's view such a circumstance of residence outweighs other factors such as strength of connections and periods of residence."*

D Beloff JA commented on that passage (at p. 5 E) as follows:-

E *"I for my part cannot read that passage as the Procureur invited us to read it, as an appropriate balancing exercise of facts peculiar to this Appellant. It is phrased unambiguously as a general principle or rule applicable to all cases. In these and in other passages...the Respondent Authority appears to allow the S.6(2)(b)(ii) criteria to trump (my emphasis) the S.6(2)(b)(i) criteria, even though S.6(2)(b)(ii) is expressly prefaced with the words: 'without prejudice to the generality of (S.6(2)(b)(i))' and then to extract a particular circumstance in 6(2)(b)(ii), that is to say, occupation of open market housing, as overriding all others. Hence, in my judgment, the Respondent Authority clearly misdirected itself in law."*

G In conclusion, Beloff JA stated (at p. 11 H):-

H *"In essence the fact that an applicant is 'an open market resident' is a relevant but not an overriding factor in the assessment of his application under S.6(2)(b) and that any potential incapacity to achieve S.10 status as a qualified resident requiring no housing licence is not conclusive against him. The Authority is obliged to take account of the factors set out in S.6(2)(b) and is entitled to take into account the factors set out in 6(5) including as per para. (e), such other factors as it may deem 'necessary or expedient'."*

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A Accordingly the appeal was allowed and the matter was remitted to the Housing Authority to re-determine the application in accordance with the ruling of that Court.

B In my respectful understanding, what the Court of Appeal was saying in Matheson, which is binding both on this Court and the Housing Authority, was that on the particular facts in that case, as demonstrated by the terms of the Authority's letters of refusal, it had "unambiguously" applied a policy, namely that a person's period of residence in Guernsey, however long, as an adult in "open market" accommodation (i.e. the circumstances of residence under s.6(2)(b) (ii)), overrode all other considerations, regardless of what they might be in any particular case (i.e. familial or like connections under (b)(i)). The application of such a policy in such a way, so as to "dictate" refusal of an application for a licence, was unlawful.

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D The Authority, the Court of Appeal concluded, must undertake a proper balancing exercise between all relevant factors in any particular case, those factors prescribed in s.6(2)(b) being mandatory. It was proper to take into account as a relevant factor the circumstances in which a person had been resident in Guernsey, but that factor could not "trump" the familial or like connections with Guernsey of that person which might have sufficient strength to justify the grant of a housing licence (nor, in my view, could those circumstances "trump" his period(s) of residence). Additionally, the Authority could, at its discretion, take into account other factors, namely those specifically identified in s.6(5) (a) to (d) inclusive (irrelevant in this case), and also, under (e), "*such other factors as it deemed necessary or expedient*".  
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F Clearly, if the Authority took into account any such other factor, it also must form part of the equation in determining any application.

### 3. The facts in the Appeal

G Bearing all the legal considerations in mind, I return to the facts in this case and the chronology of the Appellant's applications for a licence, necessarily in considerable detail.

H The Authority's response to the Appellant's initial letter of inquiry of March, 2000, is contained in its response from the Housing Control Manager of the 11<sup>th</sup> April, 2000. The relevant passages are as follows:-

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A *"I confirm that the Authority's view is that a person who first occupies a Part A open market dwelling as an adult does so in the knowledge that they are not building up any rights to occupy a local market dwelling at any time in the future.*

B *Notwithstanding this, the Authority does consider applications from persons who are long-term open market residents who require to move into the local market for reasons of age and ill health. Each application is considered on its merits.*

C *From the information available it would appear that the Authority would be unlikely to grant you a housing licence to enable you to occupy a local market dwelling if formal application was made."*

The Housing Control Manager concluded by helpfully indicating what information would be required from the Appellant should she wish to make application for a licence.

D In response to that letter the Appellant replied on the 19<sup>th</sup> April, 2000, as follows:-

E *"In respect of your paragraph 1, I am completely amazed at your reply. I have never at any time been under the impression that I was not "building up rights" to occupy a local market dwelling; in fact, I was always under the impression that a licence to occupy a local market property would be forthcoming after having spent 20 years on the Island.*

F *In respect of your paragraph 2, I know several people in a similar situation to mine who have been granted a licence, and certainly not through age or ill health.*

G *I have never owned an open market property and this is the main reason that I have wished to be granted a licence; in order to have the chance to buy a property. On the open market I am afraid this is out of the question for me. Any other reasons for requesting a housing licence are for very obvious reasons; my life has been here in Guernsey for 20 years, my friends are here and, more importantly, my family is here."*

H Over the next few weeks there followed an exchange of correspondence between Mrs. Campbell and the Authority which essentially related to the Appellant providing further information with regard to her residence in the Island since April, 1980, the break in that residence for the eight months during 1987/1988, and evidence as to whether she had had or had a controlling interest in the ownership of any "open market" dwelling which she

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A had occupied (all relevant factors under the Law for the Authority to consider).  
Following the provision of that information, the Authority refused the Appellant's  
application for a licence in principle. The Appellant was informed of the fact and the  
reasons therefor by a letter dated the 20<sup>th</sup> June , 2000, from the Senior Manager (that  
B letter very properly setting out the full reasons for the refusal in accordance with section 5  
of the Law).

This first letter of rejection was in the following terms, excluding the introductory and  
concluding paragraphs:-

C *"The Authority has now considered your application for a housing licence to  
enable you to occupy a controlled local market dwelling in Guernsey.*

*The Authority resolved, with regret, not to grant the licence requested.*

D *In reaching this decision account was taken of the factors set out in Sections  
6(2)(b) and 6(5)(e) of the Law.*

E *Section 6(2)(b)(i) enables the Authority to take into account your familial and like  
connections with Guernsey.*

*It noted that you currently reside with your common law husband and your son  
who is a potential qualified resident and that you also have a grandson who will  
also be a potential qualified resident.*

F *Section 6(2)(b)(ii) enables the Authority to take into account the periods and  
circumstances in which you have been resident in Guernsey or elsewhere.*

G *In this connection the Authority noted that you have been resident in Guernsey  
from 4 April 1980 until 1 October 1987, ie. seven years and six months as a  
tenant of Part A open market accommodation and in the same circumstances from  
3 June 1988 to date, ie. for the last twelve years.*

H *The Authority noted that for the period from 1 October 1987 to 2 June 1988 you  
lived in the Isle of Man and that during that period you did not have a home in  
Guernsey.*

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A *The Authority also considered your application under Section 6(5)(e) of the Law which enables it to consider any other factors deemed relevant to the application.*

*It noted that it was your wish to be able to purchase a local market dwelling in view of the fact that you would not be able, financially, to purchase an open market dwelling.*

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*The Authority is of the opinion that the circumstances of your residence ie. occupation of an open market dwelling, outweighs your familial and like connections and your periods of residence and these other factors.*

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*In forming this opinion the Authority's view is that the Law creates a very clear distinction between the controlled occupation of "local Market" dwellings and the uncontrolled occupation of "open market" dwellings and that persons take up residence in the latter in the knowledge that they are not building up any rights to occupy a local market dwelling. Although the Authority notes that you have stated that you were unaware of the fact that you were not building up rights to occupy a local market dwelling, this is not considered, in itself, to be a reason which justifies the grant of a licence. Furthermore the fact that an open market resident cannot afford to purchase a dwelling in that market is not a factor which justifies the grant of a housing licence.*

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*In reaching the decision not to grant the licence the Authority also noted that your connections are based on your open market residence and to grant a licence could set a precedent for a substantial number of other open market residents, with similar connections to claim a licence, the effect being that the pool of local market dwellings available to local people could be significantly reduced.*

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*Such a reduction in the availability of local market dwellings would then be likely to lead to an inflation of house prices by increasing overall demand."*

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I have fully cited those reasons for rejecting the Appellant's application at that time, because, in substance, they do not change as the bases for the Authority's subsequent rejections of applications for re-consideration of their decision.

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I would note three things at this point. Firstly, the Authority was dealing with an applicant who wanted to move to the local market, to state the position in simplistic

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A terms. Secondly, the Authority, exercising its discretion under s.6(5)(e), had introduced the “precedent” factor, widely drawn to encompass *“a substantial number of open market residents with similar connections to claim a licence, the effect being that the pool of local market dwellings available to local people could be significantly reduced.”*

B Thirdly, the introduction of “precedent” arguments must lead directly to questions of “proportionality”, always a question to be borne in mind in the exercise of the Authority’s draconian powers (see Gillow).

C Nothing further happened between the parties until April, 2001, when Advocate Ferbrache took up the cudgels on the Appellant’s behalf. In his letter to the Authority of the 18<sup>th</sup> April, 2001, he reminded the Authority of the basic circumstances of the Appellant as had been provided by the earlier correspondence, and particularly relating to her periods of residence in Guernsey, which was a substantial majority of her adult life, in D rented open market accommodation, the rent for which was considerably lower than the norm for such accommodation and the lease for which was to run out in September, 2001. He reminded the Authority of the fact that her children had been brought up and E educated, largely, in Guernsey, and that the son was now a qualified resident. He particularly emphasised that Guernsey was the permanent home for both the Appellant and Mr. Kerr, and that they both held responsible positions in the community. They F lacked the financial means to purchase open market accommodation, but it was “just about” within their financial means, having regard to their ages, to raise a mortgage and purchase a very small local market property. Unless they were able to engage in such a purchase, virtually forthwith, then it would become impossible for them. Apart from the financial considerations, Mr. Ferbrache effectively summarised the Appellant’s position towards the end of his letter, when he stated:-

G *“The Authority has to ask itself whether it could honestly say that it was acting reasonably in connection with people who have lived lawfully in the community now for over 20 years; who have lived for the substantial majority of their adult life in Guernsey; whose son has put down his roots in Guernsey and people who would have little prospects of obtaining employment due to their age elsewhere. H They could not be expected, at their time of life, to go and reside elsewhere.”*

I The broad picture of the Appellant’s circumstances was effectively that which had already been put before the Authority, and related to an applicant, as I have previously simplistically stated, who wanted to move to the local market from the open market.

A However, Mr. Ferbrache also sketched into the picture a cloud which had now appeared on the horizon (relevant to the fact that the Appellant's lease on the present premises was to run out at the end of September, 2001). That cloud took the following form:-

B *"Our client believes that the owners of the premises that she rents may well be seeking to de-register these premises in due course because they are the owners, or are interested in a development along Gategny Esplanade. These are one of the developments that I believe the States are likely to give permission for open market units to be constructed as long as there is no net gain in relation to such open market units, i.e. that other open market premises "revert" to local market units of accommodation.*

C *If such is the case then our clients position is even more difficult."*

D Explanation of this cloud on the horizon, and Mr. Ferbrache's reference to a development along Gategny Esplanade, leads to the political arena.

E As I have already briefly indicated, the Register has (in fact since 1982) been closed for new inscriptions by the Housing Authority, though provision is made (now under section 52 of the 1994 Law) so that the States may, by Ordinance, permit the Authority to inscribe any dwelling in Part A or Part B of the Register. In July, 2000, the States debated a request by the Housing Authority that eight new units which were to be constructed might be inscribed in Part A of the Register. One of the prime re-

F development sites in St. Peter Port adjoined Gategny Esplanade (in planning terms it was zoned as a Mixed Use Re-development Area, which envisaged, as the description implies, a variety of new development, including for example, commercial office premises, tourist accommodation and residential accommodation). With regard to the Gategny Esplanade

G site, it was proposed that re-development should include 28 dwellings. The owners of the site, Umbrella Holdings Ltd., had requested the Authority to agree that a proportion of the dwellings be made eligible for inscription on Part A of the Register if, in return, the owner arranged for an equivalent number of dwellings, which were currently inscribed in

H Part A of the Register, to be deleted from and rendered ineligible for re-inscription in the Register. There was thus to be a direct swap between eight new dwellings being inscribed on the Register and eight existing dwellings being removed from it. In its policy letter dated the 25<sup>th</sup> May, 2000, the Authority indicated that it was minded to recommend the States to agree Umbrella Holdings Limited's request, and that for two

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A particular reasons: firstly, because it was important that the site re-development should proceed as soon as possible and that an element of open market accommodation might be the “pump-priming” that could achieve that objective; and secondly, that the development of flats on a prestigious site could well attract new wealth to the Island. (The Advisory and Finance Committee supported the stance taken by the Authority).  
B Moreover, the Authority stated that it continued to hold the view that there would be a general housing benefit (surely a legitimate consideration), in that dwellings which were more suited to the “local market” would cease to be inscribed in the Register, while eight new dwellings on a prestigious site which could well attract new wealth to the Island, would be inscribed  
C as their replacements. In other words, the dwellings which were likely to be deleted from the Register would be at the very bottom end of that market. In fairness to the Authority, it should be pointed out that it stressed that it was the specific nature of the Glategny Esplanade site which persuaded it to support the owner’s request, and that it would not  
D wish that to be regarded as an indication of any particular policy. Nevertheless, if the Authority received any future specific application which it considered had similar merit it would bring the matter to the States for decision.

E In the result the States approved the recommendations of the Authority, and resolved that an Ordinance be prepared to permit the Authority to inscribe in Part A of the Register eight new dwellings which would be constructed by Umbrella Holdings on the Glategny Esplanade site, but that the Ordinance would not be placed before the States for approval until (i) the construction of not less than twenty-eight dwellings on the site had been  
F completed and (ii) eight existing dwellings on Part A of the Register had been deleted from it.

G That, however, is not the end of this excursion into the political arena. On the 14<sup>th</sup> March, 2001, the States debated a further policy letter of the Authority (dated 29<sup>th</sup> December, 2000) which generally related to a “review of the open market”. The four matters covered in that policy letter were: the size of the open market; the inclusion of open market accommodation in prestigious or important developments; alterations to existing provisions concerning the Housing Register; and restrictions on qualified  
H residents. It is only the second of those matters which is relevant for present purposes; though in passing I should note that the Authority did not recommend any legislative measure directly to expand or contract the size of the “open market”. What is important, for present purposes, is the section of the Authority’s report relating to the inclusion of  
I “open market accommodation in prestigious or important developments.”

A I will limit my references to that report to the bare minimum. Naturally, the Authority reminded the States of their debate and resolutions in July, 2000, regarding the Glatigny Esplanade site, and that, notwithstanding the fears expressed by some States members with regard to “precedent”, the earlier decision was a “precedent” only in regard to  
B similarly exceptional proposals. The Authority, however, wanted to provide the States with the opportunity to approve a “policy statement” regarding similar site specific proposals which would lead to additions, and therefore deletions, to the open market, which would accordingly guide property owners, and assist the Authority, in bringing forward future proposals. The Authority recognised that it was likely that there would  
C only be a limited number of dwellings which might be acquired for the purpose of deleting them from the Register, which inevitably would be at the lower end of the open market price range.

D Importantly, the Authority noted that some States members, at the previous debate in July, 2000, had expressed concern that existing occupants of the dwellings to be deleted might “use that fact to gain the issue of a housing licence”. To offset that, the Authority proposed that it would only regard the “deleted” dwelling as satisfying the arrangement if, at the time of the application to delete, the particular accommodation was either vacant  
E or occupied by a qualified resident. Thus one potential result of the policy was that tenants at the lowest end of the open market might be evicted by landlords who were required to obtain vacant possession of the dwelling prior to deletion from the Register.

F The “policy statement” which the Authority asked the States to approve, which it was, subject to a technical modification, was in the following terms:-

G *“5. The dwelling to be deleted must be unoccupied, or occupied by a qualified resident, at the time of the application to delete the inscription. The fact that the dwelling is the subject of an application for the deletion of the inscription from the Housing Register under this policy would not be regarded as a reason which, of itself, would justify the grant of a housing licence to an occupier or former occupier.”.*

H What is unarguably clear is that by early 2001 at the very latest (and that is being kind to the Authority), the Authority recognized that the application of a policy to inscribe new dwellings “in prestigious developments” on the Register, and the consequential deletion of a similar number of open market dwellings at the bottom end of the price range, could  
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A have a direct impact on the small number of less wealthy "open market" residents. This might be a new factor, relative to the "precedent" argument, which the Authority could not ignore as far as this Appellant was concerned.

B I return to the Authority's reconsideration of the Appellant's position following Mr. Ferbrache's letter of the 18<sup>th</sup> April, 2001. That application was rejected by the Authority, and the reasons, again with commendable fullness, were set out in the Senior Manager's letter of the 31<sup>st</sup> May, 2001. The reasons in substance, and at times also in terms, repeat those which had been given in the first letter of refusal of the 20<sup>th</sup> June, 2000, though the C Senior Manager rightly addressed one new point which had been raised by Mr. Ferbrache in relation to Article 8 of the European Convention of Human Rights (which was not an issue on this appeal).

D This letter of rejection led to the issue of an appeal summons by the Appellant, which was received by the Authority on the 31<sup>st</sup> July, 2001. That summons included the following paragraph:-

E *"6. The Appellant resides in an open market flat owned by Island Development Limited which is situated at Mon Plaisir, St. Peter Port, and the current lease is due to expire at the end of September 2001. On the 26<sup>th</sup> July, 2000, the States of Guernsey agreed that eight of the open market flats there would be removed from the open market Register, thereby becoming local market; the Respondent being a party to this decision. As a result of this the Appellant is likely to have to vacate her current premises by or around the 12<sup>th</sup> June, 2002, at the latest (that should have read the 30<sup>th</sup> June, 2002)."*

F In addition, on the 29<sup>th</sup> October, 2001, Mr. Ferbrache wrote to the Authority to draw some further matters to its attention.

G With regard to paragraph 6, which I have just cited in full, Mr. Ferbrache enclosed copies of three documents, namely a letter from the landlord dated 12<sup>th</sup> June, 2001, a letter from the estate agents, acting for the owners, dated the 29<sup>th</sup> June, 2001, and a further letter from the estate agents dated the 25<sup>th</sup> October, 2001. Mr. Ferbrache summarised that H correspondence in this way:-

I *"What the owners are saying in the letter of the 12<sup>th</sup> June, 2001, is that certain units have already been deregistered and they are looking to occupants of the*

A *remaining units to indicate whether they want to go or not. They are also making it quite clear that there is only scope for a limited renewal.*

*Indeed the second document makes it clear that the lease expires on the 1<sup>st</sup> July, 2002... ”.*

B Mr. Ferbrache then addressed, into some detail:- the Appellant’s financial position, as well as that of her partner, not least with regard to the prohibitive cost of leasing or buying other open market property; the Appellant’s familial connections with Guernsey, (emphasising the existence of her grandson); and that, in Mr. Ferbrache’s words, her connections with the Island were overwhelming.

C The Senior Manager responded on behalf of the Authority, by letter dated the 10<sup>th</sup> December, 2001. It was acknowledged that the Authority did not contest that the lease of the Appellant’s flat was to be terminated, nor dispute anything else that Mr. Ferbrache had said in that regard. Nor was it disputed that the owners of the Appellant’s flat had entered into an agreement that it would seek to delete eight of the open market flats at the Mon Plaisir premises, though it was pointed out that there were eighteen such flats and there was no evidence that the Appellant’s flat (Flat 12) was one of those which was to be deleted from the Register; the Authority did, however, go on to acknowledge that if Flat 12 became vacant then the owners might seek to delete it. These, in my view, were perfectly appropriate questions to raise. Was the Appellant still merely wanting to move on to the local market (as I described earlier) or was she being obliged to move from her present accommodation?

F The Authority also acknowledged that it was likely that the Appellant and her partner would find it very difficult, if not impossible, to secure alternative open market accommodation. That, however, was not itself a factor which would justify the grant of a housing licence.

G What was disputed, in my view unsurprisingly, was the statement contained in paragraph 6 of the summons which I have already cited. The Authority were entirely correct in this regard, because the States Resolution of the 26<sup>th</sup> July, 2000, had not made, and could not have made, any specific reference to “open market” flats at Mon Plaisir. The incorrectness of paragraph 6 was fully acknowledged by Mr. Ferbrache in argument. The Senior Manager in his letter of the 10<sup>th</sup> December continued by saying:-

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A                    *“While therefore the Authority was a party to the States resolution it does not accept that Mrs. Campbell’s need for a housing licence is a direct result of that resolution.”.*

B                    The Senior Manager proceeded to repeat *verbatim* the salient comments of the Authority in its letter of the 31<sup>st</sup> May, 2001, namely that the circumstances of the Appellant’s open market residence outweighed her familial and like connections, and the other factors; that a clear distinction had to be drawn between occupation of “local market” as opposed to “open market” dwellings; and that to grant a licence to a person whose connections were based on open market residence could set a precedent for a substantial number of other “open market” residents, “with similar connections”, to claim a licence; and that such additional demand could reduce the pool of dwellings available to local market persons, and add to house price inflation, to the detriment of local persons of lesser means.

C                    Accordingly the Authority had concluded, whilst taking into account the further information which had been provided, that it did not consider it was justified in varying its previous decision of May, 2001.

D                    The Senior Manager proceeded, helpfully, to offer advice to the Appellant as to how, within the provisions of the Law, her son might be able to accommodate her lawfully, either as a member of his household or in a new dwelling to be created specifically for the purpose within the *enclos* of his property.

E                    Mr. Ferbrache replied by letter dated the 8<sup>th</sup> April, 2002, and sought early reconsideration of the Appellant’s position.

F                    He addressed a number of matters raised by the Authority:- firstly, the suggestion that the Appellant’s son might in some way be able to accommodate her, which he demonstrated was a practical impossibility, in the circumstances of the family; secondly, the Authority’s statement that *“It does not accept that Mrs. Campbell need for a housing licence is a direct result of that Resolution.”* (i.e. that of July, 2000), which need, in his view, was totally a result of that Resolution; and finally, the Authority’s view that to grant a licence to a person whose connections were based on “open market” residence, could set a precedent for a substantial number of other “open market” residents, with similar connections. Importantly, Mr. Ferbrache posed the question – *“how many other open market residents are being forced to leave their homes because of a Resolution by*

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A *the States which the Authority were a party to? We cannot see how thus any precedent would be created.”.*

B The Authority’s final letter of rejection was of the 30<sup>th</sup> May, 2002. The Authority noted the position of the Appellant, and her son, with regard to the impracticality of creating a new dwelling for her and her partner, but stated that their inability to exercise that option did not, in its opinion, justify the grant of a licence for an existing separate dwelling that the Appellant might occupy in her own right. The Authority then returned to the issue of the impact, or otherwise, of the States Resolution of the 26<sup>th</sup> July, 2000, upon the Appellant’s position, and not least because it was evident that the flat occupied by the Appellant and her partner was not necessarily one which had to be deleted in order to allow the creation of the eight new “open market” dwellings at the Gategny Esplanade site. In my view, it was, again, appropriate to raise that issue, although neither in the correspondence nor in argument has it been suggested that there might be a suspicious confluence of interest between the Appellant and her landlord.

D The Authority concluded, before again rejecting the application:-

E *“The Authority stands by its view therefore that there is not a direct link between a Resolution of the States and the application for a licence.*

F *As the Authority does not accept that there is such a link, it consequently does not accept your view that the precedent effect of granting a licence is limited to those who are ‘being forced to leave their homes because of a Resolution of the States which the Authority were party to’.*

G *The relevant precedent (my emphasis) that would be created by the grant of a licence would have a potentially wider impact as set out in the final paragraph of page 2 and the first of page 3 of my letter of the 10<sup>th</sup> December, 2001.”.*

#### 4. Conclusions

H Here, in my view, the Authority fell into serious error. It appears to me that the Authority paid too much attention to the inaccuracy of paragraph 6 of the first summons (repeated in the second), and to the arguments as to whether there was direct linkage between the States Resolution and the Appellant "being forced" to leave her house. I have some sympathy for the Authority becoming "side tracked" in this way, as I was also to start

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A with. The result, however, was that the Authority failed to recognise the importance of States policy with regard to the Appellant's precise current circumstances.

B From the beginning the Authority, in its discretion, sought to rely upon "precedent". That precedent was described as having a wide compass, namely it could extend to a  
C substantial number of persons whose connections with Guernsey were based on Open Market residence, with similar connections, who might thus seek a licence. The Authority is perfectly entitled, if it so wishes, to use a precedent argument. But it must apply the correct precedent. The cloud on the horizon which had first appeared in Mr.  
D Ferbrache's letter the 18<sup>th</sup> April, 2001, was by May, 2002, at the very latest, to be kind to the Authority, obviously and menacingly stationary overhead. By then, with regard to precedent, the question which the Authority had to ask itself was effectively that posed by Mr. Ferbrache in his letter of the 8<sup>th</sup> April, 2002 – "*how many other Open Market residents are being forced to leave their homes because of the Resolution by the States*  
E .....?". At no time do the Authority appear to have addressed that question, or how they would address the problems which might be faced by all those in such a situation. Their numbers, as is obvious from the Authority's own reasoning, must be very limited indeed – perhaps a handful at the most, as was acknowledged in argument, I believe, by the Comptroller. That is the precedent which the Authority had to consider, yet it continued to use the "wider precedent" argument relating to all Open Market persons with connections to Guernsey similar to those of this Appellant. And the new, correct precedent inevitably should have led to considerations of proportionality.

F It is not as if the Authority was taken unawares.

G I turn to consider the second States Resolution, of the 14<sup>th</sup> March, 2001. Before doing so, I must express concern that, being as relevant to this appeal as the first Resolution, it was not directly drawn to the Court's attention as part of the "agreed bundle" (the first Resolution and Billet d'Etat having been so included), but only emerged, almost accidentally, during the course of argument.

H It is clear from this Resolution, that the Authority had formulated a policy with regard to the inclusion of "open market" accommodation in prestigious or important developments, and had sought the States approval for that policy, the important aspect of it, for present purposes, being the potential for deletion from inscription on the Register of open market dwellings, almost certainly tenanted, and at the lower end of the price range. A probable,

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**A** if not inevitable, consequence of such a policy is that there may be persons who are affected by the implementation of such a policy, with developers taking the opportunity to construct new "open market" accommodation, and obtaining the deletion from the Register of an equal number of existing open market dwellings.

**B** All that we know, from the official records of the States, is that, to assuage political concerns that existing occupants of a dwelling to be deleted might use that fact to gain the issue of the housing licence, the Authority introduced the further policy that the fact that the dwelling was the subject of an application for deletion would not be regarded as a  
**C** reason which, of itself, would justify granting a housing licence to the occupier or former occupier. The Authority, however, as far as I am aware (and certainly not from its arguments in correspondence and before the Court) has not addressed in any way how it would approach licence applications in those circumstances, either generally or in any  
**D** specific case. The adoption of such a further policy without recognising the obligations to long term non-qualified residents who might inevitably become disposed, only goes to emphasise the impropriety of the Authority's stance.

Moreover, it is also clear from the policy approved in March, 2001, with regard to the  
**E** inclusion of "open market" accommodation in prestigious developments, that one of the bonuses which the Authority envisaged by such a policy would be a creation of more units of local market accommodation in that prestigious development. A further policy approved by the States was that the number of new dwellings, which could be inscribed  
**F** on the Register on a "one to one" exchange basis for existing dwellings, would be limited to one-third of the total number of new dwellings in the development, or a maximum of eight dwellings, whichever was the lesser. It follows, therefore, that the logic of the housing policy regarding "prestigious developments" envisaged an overall gain, and  
**G** maybe a considerable overall gain, in the number of new local market dwellings, even taking into account that there might be appropriate circumstances where a housing licence should be granted to the previous occupier of an open market dwelling to continue to occupy that dwelling, which had or was to become deleted.

**H** It is not good enough for the Authority, as a central player in the creation and implementation of policies which may affect the housing position of a very small number of people, then to ignore that potential result in any particular case. Any such criticism of the Authority must not detract from the consistently helpful advice given by its officers to  
**I** this Appellant, which was admirable.

A In summary, the Authority has wrongly sought to equate this Appellant with others who have similar periods and circumstances of residence, and familial or like connections, without taking into account the very unusual circumstances in which the Appellant now finds herself, arising from a housing policy of the Authority approved by the States.

B I conclude by making some general observations. In simple terms, the Authority has a general policy that those who have spent all their time in Guernsey as adults residing in "open market" accommodation will not be granted licences to occupy local market accommodation. That may well be a wholly justified policy, reflecting as it does the basic division between the open and local markets, as mirrored, both in terms and in spirit, in the legislation; provided that the policy is expressed to be a general presumption capable of rebuttal in appropriate circumstances, so that *"those who apply the policy are prepared to listen to reasons why it should not be applied in a particular case and in consequence, in appropriate circumstances, to make exceptions to it (as per Beloff JA)."*

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D Indeed, the Authority has recognised exceptions in the case of long term open market residents who require to move into the local market for reasons of age and ill-health. Those of a similar length of residency who lose accommodation resulting from the implementation of States policy to encourage prestigious new developments, may be another category of persons to whom special consideration should be given as potential exceptions to the general presumption. This is a matter for the Authority to address. What I can say, however, is that, when it is relevant to do so, it must be a factor to be taken into account, including issues of proportionality, in the overall balancing exercise in any particular case. To disregard that factor makes the exercise of the Authority's discretion in this case irrational and flawed.

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G In my opinion the Authority, generally, has taken proper and careful notice of what was said in Matheson with regard to licence applications by "open market" residents, so as not to *"unambiguously"* allow a general principle or rule to *"dictate"* its determination of an application, regardless of the particular facts. For the purposes of this appeal, I deliberately refrain from expressing any view as to whether, putting to one side the "States Resolutions factor", the Authority has conducted the balancing exercise satisfactorily. It must be premature to do so, as there is now a further ingredient which the Authority has to put into the equation.

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