

[2022]GRC082

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between:**

**THE STATES OF GUERNSEY** **Plaintiff**

**-and-**

**THE COMPLAINTS PANEL** **Defendant**

**-and-**

**ROBERT GEORGE HARNISH** **Interested Party**

**Date of hearing: 31<sup>st</sup> August 2022**

**Judgment handed down: 5<sup>th</sup> December 2022**

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

**Counsel for the Plaintiff:** Advocate J Hill  
**Counsel for the Defendant:** Advocate S Hodgett  
**Counsel for the Interested Party:** Advocate S B Duerden

**Cases and materials referred to:**

The Administrative Decisions (Review) (Guernsey) Law, 1986  
The Administrative Decisions (Review) (Jersey) Law 1982  
Practice Direction No. 3 of 2004  
The Royal Court Civil Rules, 2007  
The Administrative Decisions (Review) (Guernsey) (Amendment) Law, 2018  
*R v Hertfordshire County Council, ex parte Cheung* *The Times* 4 April 1986,  
*R v Newham LBC, ex parte Begum* (1996) 28 HLR 646  
*Porteous v West Dorset District Council* [2004] EWCA Civ 244

**Introduction**

1. By a Cause tabled on 20 May 2022, the States of Guernsey seeks to set aside decisions taken by the Complaints Panel established under the Administrative Decisions (Review) (Guernsey) Law, 1986, as amended, the earlier of which referred to a Review Board a complaint submitted by the Interested Party, Dr Robert Harnish, and the later of which declined to re-consider that decision. The proceedings were adjourned for three weeks, and I indicated that the Interested Party did not need to participate further at that stage. The action was again adjourned, this time by a Consent Order, for a further two weeks, by which time the Panel, as Defendant, was

indicating that it was neutral in respect of the Plaintiff's action. Accordingly, I left open to the Defendant that it could consent to the relief being sought by the Plaintiff, otherwise there would be a "rolled up" hearing to consider leave and the substantive aspects of the claim, and gave directions for the Defendant to file and serve evidence in the event of it not so consenting. In the event, the action proceeded.

2. In the meantime, the Interested Party sought an order that he could adduce evidence with a view to assisting the Court. That application was heard, under the terms of Consent Orders, at the start of the hearing that took place on 31 August 2022. The Plaintiff opposed the application of the Interested Party, although the Defendant raised no opposition, principally on the grounds of relevance. I chose to admit the evidence the Interested Party wished the Court to consider by also permitting the Plaintiff to serve further evidence dealing with it. Had the Interested Party's evidence been filed at the same time as that of the Defendant, that opportunity to reply would have arisen anyway. In the event, what was contained in the Interested Party's Affidavit sworn on 5 August 2022 has been of very little assistance to the determination of this action. It highlighted matters in the materials already before the Court, which could have been achieved by submissions, but I considered it preferable to permit the evidence to be adduced, in particular because otherwise the Interested Party may have felt that the issues about which he feels most aggrieved are still being ignored, and because what he might have been saying could have had a material effect on the way in which the discretion available to the Court might be exercised. It is clear that the Interested Party is the person most directly affected by any decision on this challenge and he should not be prevented from being heard where he demonstrates such a wish.
3. As a result, the evidence before the Court at the hearing comprised the Plaintiff's Cause, an Affidavit of Emma Le Tissier, who is the Committee Secretary for the Committee *for* Health & Social Care of the Plaintiff (to which I will refer as "HSC"), sworn on 17 May 2022, a First Affidavit of Esther Ingrouille, who is the Committee Secretary of the Committee *for* Education, Sport & Culture of the Plaintiff (to which I will refer as "ESC"), also sworn on 17 May 2022, an Affidavit sworn on 22 July 2022 by the Chair of the Defendant, Advocate Michael Adkins, a Second Affidavit of Esther Ingrouille, sworn on 25 August 2022, the Affidavit of the Interested Party to which I have just referred, and the Third Affidavit of Esther Ingrouille sworn on 30 August 2022.
4. In addition to the Plaintiff's Cause, I had the benefit of a Skeleton Argument prepared by Advocate Hill, who appears on behalf of the Plaintiff. He elaborated upon these matters in his oral submissions, following which Advocate Hodgett confirmed that the Defendant neither consented to nor opposed the relief sought by the Plaintiff to set aside its earlier decision (referred to as "the First Decision") and Advocate Duerden, on behalf of the Interested Party, made some submissions on his behalf, which assisted in understanding what it is that the Interested Party is really complaining about.
5. At the conclusion of the hearing, I reserved judgment. This judgment sets out my reasons for granting the Plaintiff permission to proceed with its claim for judicial review and quashing that First Decision (which has the effect that the later decision ("the Second Decision") falls away).

## Facts

6. There is a long history set out in the complaint submitted on behalf of the Interested Party by his Advocates, which is dated 11 August 2021 ("the Complaint"). The document itself is entitled "Restated and Revised Summary of Dr Harnish's Complaint" and the main text contains 137 paragraphs spread across 31 pages. There are then eight schedules, covering a further 34 pages. In addition, there is an 11-page chronology and there are 184 documents in support of the Complaint, which run to 638 pages. However one looks at the Complaint, it is a very substantial submission made on his behalf covering more than a decade of involvement, but from which it is not, in my view, easy to discern what it is that he is complaining about. Even the content of Schedule 7 to the Complaint, which is described in para. 25 as being "a

*summary sketch*” of the Interested Party’s complaints (apparently since a letter sent on his behalf dated 3 November 2020), ranges across a considerable number of matters set out in para. 6 thereof, some of which involve around a decade or longer of events and alleged failings. Indeed, para. 4 of that Schedule states:

*“It is Dr Harnish’s view that it is not appropriate that he should lay out his individual concerns before the ARB in detail. In his view, the “tip of the iceberg” presented in this document is sufficient to make the case for the States to undertake a full investigation, and that the full details can only be assessed within a comprehensive inquiry that is empowered to consider the systemic failings to which they point.”*

7. The first paragraph of the Complaint refers to an earlier complaint that the Interested Party had submitted on 12 June 2019. The Defendant reached its decision in respect of that complaint on 27 March 2020. A copy of that decision was helpfully exhibited to Advocate Adkins’ Affidavit. The decision reached was that that complaint should not be referred to a Review Board because the Interested Party, as complainant, had not exhausted the internal complaint procedures of the relevant Committees, which meant that section 3(1)(ea) of the 1986 Law was engaged and it was not open to the Defendant to refer that complaint to the Chairman of the Panel of Members. Although para. 27 of that previous decision indicated that the Interested Party could re-submit his complaint once the internal complaints processes had been exhausted or reformulate what he was complaining about to be confined to any issue where the internal complaints processes had already been exhausted, it is common ground that the new Complaint which became subject to the First Decision should be regarded as a fresh complaint under the 1986 Law.
8. In the second paragraph of the Complaint, having referred to the earlier complaint having been submitted in respect of decisions and actions taken by HSC and ESC, it is troubling to note that it states:

*“It is no longer clear that the complaint can be limited specifically to the actions of the Committees. Indeed, there is evidence that systemic failings in respect of Dr Harnish’s case extend to other committees and officers of the States.”*

This is also touched upon in para. 10, which indicates that *“the present complaint restates, revises and supplements the Original Complaint as regards the conduct and actions of the States (principally but not solely the Committees).”* Further, in para. 13, it is apparent that the Complaint is intended by the Interested Party to relate to multiple instances of decisions and actions taken by the States and covers a period of five years, but *“have their roots in the same issue”*:

*“All his complaints relate to the insensitive manner in which the States has handled and is continuing to handle his case, without full regard for the appropriate standards of good conduct and due diligence. That approach has necessarily tainted each decision the States has made in this matter, including their several decisions to dismiss his legitimate concerns.”*

When I turn to consider the statutory scheme under which the Complaint is made, it will be apparent that such a possible broadening of the terms of the Complaint is a further reason why the members of the Defendant seized of this Complaint do not appear to have addressed their minds to which Committee or person acting on behalf of a Committee would be responding before a Review Board. This is an example of where I have found it difficult to identify what the subject-matter of this Complaint properly is.

9. Switching to the other end of the Complaint, in para. 137 there is a submission that the Interested Party should now be treated as having exhausted the internal complaints procedures of both

HSC and ESC. The implication is that this was a step that needed to be achieved following on from the Defendant's decision on 27 March 2020 so as to avoid a similar outcome. The end of any internal complaint process came about on 9 July 2021. There were various exchanges prior to that time as to the subject-matter of the complaints that needed to be resolved. The process is covered in Section B of the Complaint, which also refers to Schedules 5 and 6, so I will do no more than summarise the key elements.

10. A letter dated 2 September 2020 was sent on behalf of the States of Guernsey to the Interested Party's Advocates. It relates to restrictions imposed on the Interested Party and is expressed to replace earlier restrictions that had been imposed on him by way of a letter dated 24 July 2017. As a result of this new decision, the Committee Secretaries of HSC and ESC wrote to the Interested Party's Advocates on 6 October 2020 indicating that this new decision meant that there was nothing further for either Committee to investigate. By letter dated 3 November 2020 from the Interested Party's Advocates addressed to the Advocate who had written the letter dated 2 September 2020, it was suggested that this approach was misguided. However, this letter also stated that a new complaint in respect of the decision contained in the letter of 2 September 2020 and "*the decision-making process followed by [the States] in the handling of [the Interested Party's] case*" was being lodged. (At para. 23 of the Complaint, the repetition of the earlier complaint and the Interested Party's opposition to the restrictions contained in the letter of 2 September 2020 are defined as "*the New Complaint*".) The then Committee Secretary of HSC indicated that this new complaint would be progressed and subsequently, on 26 November, the two Committee Secretaries wrote to the Advocates for the Interested Party informing them that a single investigator would be appointed "*who will look at all aspects of the complaint on behalf of both Committees*", which was acknowledged to be a departure from the Committees' policies.
11. The next significant development in dealing with this complaint was a letter dated 15 June 2021 sent to the Interested Party's Advocates by the Strategic Lead for Place Policy, Steve Wakelin ("the SLPP"). He explained that he had been directed to conduct an investigation into the complaint made by the Interested Party and intended to commission Martin Thornton to undertake that investigation. It would, so far as possible, follow HSC's policy numbered G107 on Dealing with Complaints. However, the policy refers to complaints arising from service users so it would need to be modified to address the Interested Party's complaints. Under a heading of "Terms of Reference", what was to be covered is explained:

*"To complete an investigation into five inter-related formal complaints made against the States of Guernsey by Dr Robert Harnish:*

- 1. That officers of the States of Guernsey were responsible for a delay in the commissioning of a new risk assessment between May 2017 and March 2020.*
- 2. That the decision of officers of the States of Guernsey to maintain the Interim Restrictions (2019) was made incorrectly i.e. without adequate evidence or information, or disproportionately, and that this may constitute a failure in procedure;*
- 3. That officers of the States of Guernsey failed to provide Dr Harnish with assurance that the matter regarding contact with third parties (Lets Go Mobility event), and that any incorrect information provided by officers, has been rectified.*
- 4. That there has been a potential breach of negotiated communications, between a States of Guernsey officer ... and [another], by excluding Dr Harnish and his advocate from written communication.*
- 5. That Dr Harnish's complaints have not been dealt with in a timely fashion."*

12. The SLPP's letter of 9 July 2021 referred to a letter sent on behalf of the Interested Party dated 2 July 2021 which *inter alia* had indicated that a draft complaint under the 1986 Law was to be

provided confidentially for the eyes of Mr Thornton and the SLPP only, questioned how policy G107 was being met and raised concerns about the independence of Mr Thornton. As a consequence, this letter concluded that the Interested Party had “*prejudged the outcome of the complaint process and that further engagement with him on this topic is therefore futile.*” Having regard to section 19 of policy G107 (“Habitual/Vexatious Complainants”), the SLPP was satisfied that two or more of the criteria listed therein were met and referred to:

- “1. *The substance of the complaint is changed, or new issues are raised or further questions are raised to prolong contact with staff;*
2. *He focuses on trivial issues, which are out of proportion to their significance;*
3. *He makes an excessive number of contacts, placing unreasonable demands on staff; and*
4. *He has unreasonable demands or expectations and fails to accept that these are unreasonable.*”

Accordingly, the SLPP indicated that he was cancelling any further investigation of the Interested Party’s complaints. This is why the Defendant could conclude that before receiving the Complaint the internal complaints processes of HSC (and ESC) had been exhausted.

13. Returning to the content of the letter dated 2 September 2020, having set out the background to its assessment of the Interested Party’s risk profile, it imposed a prohibition on him that:

*“Until further notice, the States of Guernsey revokes and/or refuses to extend or grant any licence and/or permission to [the Interested Party], or to any third party, which has the effect of allowing [the Interested Party] to access premises in its control for the purposes (whether primary or incidental) or participating in activities involving children (i.e. persons under the age of 18 years). Such activities will include but are not limited to:*

- a) any activities that involve attending to children’s personal care needs;*
- b) any activities that might involve physical contact with children;*
- c) supporting, teaching or coaching children.”*

If the Interested Party were not to abide by that decision, the States would consider seeking, for example, injunctive relief. In respect of premises or locations in Guernsey and Alderney not within the control of the Plaintiff, a set of expectations were set out relating to the Interested Party not having unsupervised involvement with children on a similar basis. In his Affidavit, the Interested Party sets out why he considers that these expectations are really requirements, even though the consequences of non-compliance in the letter dated 2 September 2020 do not extend to seeking anything akin to injunctive relief but rather to sharing with any person concerned further information relating to the Interested Party, including a risk assessment of him. That said, one aspect of these expectations is that the Interested Party “*is required to contact the Head of Children and Family Community Services (see contact details below) if he proposes to undertake any of the activities set out above [in the expectations] in order that a contract can be agreed*”. The letter also states that the States will evaluate progress made against work that it is proposed the Interested Party should undertake where the States would take into account his representations because the decisions in the letter “*will be subject to review and possible amendment*”.

14. It is apparent from the Complaint, and was confirmed by Advocate Duerden, that the Interested Party is seeking to challenge the imposition and maintenance of the restrictions imposed upon him by the letter of 2 September 2020. This is set out specifically in Section F of the Complaint (paragraphs 123 to 134). It is alleged that these restrictions “*go further than is necessary to achieve any legitimate child protection objectives*”, making them “*a highly disproportionate response*” (para. 125). This Section concludes (at para. 134) with the assertion that:

*“Until such time as they may be reviewed, the New Restrictions will continue to be in place, causing Dr Harnish further significant financial loss and reputational harm.”*

15. Prior to reaching the decisions found in the letter of 2 September 2020, consideration had been given to a report from Dr David Briggs dated 23 June 2020. At para. 19 of the Complaint, reference is made to a report that had not by then been finalised. That report from Phoenix Forensic Consultants Limited is dated 24 August 2021. A copy of it was provided to the Complaints Panel on 21 September 2021 and is referred to at paragraphs 11 and 18(e) of the First Decision.
16. Section C of the Complaint refers to unreasonable delays. Within that context, para. 44 refers to the duty to act in a timely manner being particularly strong where restrictions have been imposed that engage an individual’s Convention rights (and Article 8, ECHR is mentioned and repeated at para. 62). Paragraph 46 refers to the restrictions on the Interested Party affecting his income and isolating him from a community and friends.
17. Section D of the Complaint refers to conflicts of interest and/or appearances of bias. Whilst it focuses in particular on the role played over more than a decade by the Head of Children and Family Community Services, it is not confined to that individual. Some of the Interested Party’s allegations relate to disclosure to third parties of what he regards as inaccurate information and the absence of any investigation of his complaints in respect thereof.
18. There is a degree of overlap with Section E of the Complaint, which covers generally prejudicial conduct. One of the difficulties with this Section is that it appears mostly to be historic because it refers more particularly to the maintenance of the restrictions imposed in 2017 without concentrating on the new set of restrictions said to supersede these contained in the letter of 2 September 2020. Whilst it is possible to refer to the origins of how the latest decisions on these restrictions have been reached, the actual decision that must, in my view, be engaged under the 1986 Law will be the most recent decision on this issue. One issue covered in this Section, though, relates to ongoing inquiries by the Office of the Data Protection Authority in relation to issues raised with that Office by the Interested Party, not all of which had been resolved by the time of the Complaint.
19. The first paragraph of the Conclusion to the Complaint (numbered 135) appears to summarise the position of the Interested Party:

*“The history of the States’ handling of Dr Harnish’s case demonstrates a strong prevailing negative bias and a deliberate failure to consider the wider implications for Dr Harnish. ... Over the last six years, Dr Harnish has explored every avenue available to him to bring about a just resolution of his case. He has encountered systemic failures of open, honest, transparent and accountable governance that includes every level of management from the Head of Children and Family Community Services to the Chief Executive Officer of the States of Guernsey.”*

20. Following the submission of these materials on behalf of the Interested Party, on 3 February 2022 the Chair of the Defendant appointed the same members of the Complaints Panel as had determined the earlier complaint from the Interested Party in March 2020. This was on the basis that they were familiar with the background as a result of their previous determination. As recorded in the First Decision (at para. 14), the members used video conferencing when meeting on 11 February and 3 March 2022.
21. On 1 March 2022, the Chair of the Defendant informed the Interested Party’s Advocates and the Committee Secretaries at HSC and ESC that the Panel had been convened *“to consider a*

*complaint pursuant to the Law from Dr Robert Harnish in respect of decisions taken by or on behalf of* HSC and ESC and expected to issue a decision during the week commencing 7 March 2022. Later the same day, in an e-mail, the Committee Secretary of ESC asked the principal officer of the Panel if she could say anything further “*about the current review request*”, which generated an automated response. There was no further reply until the afternoon of 4 March 2022, when the principal officer sent to the Interested Party’s Advocates, the two Committee Secretaries and Mr Wakelin a copy of the Defendant’s First Decision. The First Decision was also provided to the Chairman of the Panel of Members.

22. Paragraph 1 of the First Decision opens with the explanation that:

*“This is a decision in respect of a complaint (**the Complaint**) made by Dr Robert Harnish (**the Complainant**) in relation to decisions taken by the Committee for Education, Sport and Culture (ESC) and the Committee for Health and Social Care (HSC) in relation to restrictions imposed upon his access to States of Guernsey property and facilities and the process leading to and connected with the imposition of those restrictions.”*

Because the Defendant had decided to refer the Complaint to the Chairman of the Panel of Members of the Administrative Decisions Review Board, only brief reasons for that decision were given (para. 2). It explained that the delay in reaching this decision resulted from disruption caused by the Covid-19 pandemic, “*including impacting on the availability of already stretched administrative resources*” (para. 3).

23. In para. 8 of the First Decision, it is stated that:

*“The Panel has not found it necessary to consider whether or not it would have exercised its discretion pursuant to section 3(2) of the ADR Law in respect of this Complaint as the final decision, being the Committees’ decision not to further investigate the Complainant’s complaints and thereby exhausting the internal complaints process, occurred within the previous 12 months.”*

Further, at para. 15(a), the Panel considered that “*the complete and professionally organised material constituting the Complaint*” meant that it “*did not require any further information to consider the Complaint*”.

24. In terms of the factual background, the First Decision noted that the previous decision in March 2020 had summarised the general terms and it chose to quote all six sub-paragraphs of that previous decision in para. 17 of this First Decision, where the preamble to those sub-paragraphs notes that “*The Complaint raises highly sensitive issues ... and having regard to the Panel’s reasons for its decision which in broad terms rely on procedural matters, rather than matters of substance*”. The following paragraphs of the First Decision supplement that background:

“18. *Subsequently, the following has occurred:*

- a. *The Complainant undertook a risk assessment with Dr David Briggs on 2 March 2020. Dr Briggs produced his report of this assessment on 6 May 2020;*
- b. *The Committees confirmed or re-imposed the Interim Restrictions with an expanded scope extending a form of restrictions to privately owned premises on 2 September 2020. These decisions are communicated in a letter to Maurant Ozannes from the Law Officers of that date. It is not stated in the Law Officers’ 2 September letter the legal basis of the*

*Committees' authority to extend restrictions on the Complainant to private premises;*

- c. *The Complainant lodged a new internal complaint with the Committees on 3 November 2020 (New Complaint);*
- d. *On 9 July 2021, the Committees appear to have effectively completed their internal review processes in respect of the Complainant's New Complaint. On that day, Mr Steve Wakelin 'Strategic Lead for Place Policy' (the SLPP) acting on behalf of the Committees and who had been appointed to investigate the New Complaint, informed Mourant Ozannes that he would close his investigation of the New Complaint on the basis that the Complainant was vexatious. The SLPP referred to States of Guernsey policy "G107 ("Habitual/Vexatious Complainants")" as the basis for making that determination.*
- e. *The Complainant completed the therapeutic intervention recommended by Dr Briggs. The 'Phoenix Report' is the report of that intervention.*

19. *The specific grounds of the Complaint are summarised in paragraph [12] of the Restated Complaint:*

*The crux of Dr Harnish's complaints is that the handling of his case by the States was heavy-handed and disproportionate, leading to significant personal, reputational and financial consequences for Dr Harnish. In particular, the States has continually:*

- a. *failed to engage and follow their internal complaint procedures (Section B);*
- b. *caused significant and unreasonable delays (Section C);*
- c. *failed to prevent conflicts of interest and/or appearance of bias (Section D);*
- d. *generally engaged in unfairly prejudicial conduct (Section E); and*
- e. *failed to exercise due diligence in deciding to impose restrictions on Dr Harnish and/or to disclose sensitive information to third parties (Section F)*

*such that the decisions and actions taken by the States cannot reasonably be regarded as impartially motivated, proportionate or soundly-based.*

20. *Sections B – F of the Restated Complaint set out the facts and contentions in respect of each ground of complaint in further detail."*

25. Following careful assessment of all the material provided by the Interested Party, the Defendant's determination is found in the body of para. 22:

- "a. *The Complaint is in respect of a number of decisions and acts by the Committees who are committees of the States of Guernsey. These are set out at length in detail in the Complaint. In considering the Complaint, the Panel has identified the following key decisions and acts in respect of which the Complainant complains, which in fact encompass various subsidiary, interim or associated decisions and acts. These are:*

- i. *The re-opening of the Complainant's 'case' in June 2015;*
  - ii. *Imposing and maintaining the Interim Restrictions;*
  - iii. *Imposing the New Restrictions;*
  - iv. *The disclosure of details in relation to these matters to various persons and bodies;*
  - v. *Failing to properly investigate the First Complaint;*
  - vi. *Failing to properly investigate the New Complaint.*
- b. *Accordingly, these are decision and acts and omissions which are within the jurisdiction of the Review Board.*
  - c. *None of the exclusionary factors set out in section 3(1) of the ADR Law are engaged."*

26. In paragraphs 23 and 24 of the First Decision the Panel sets out the consideration it has given to whether the Complaint is vexatious or unreasonable for the purposes of section 3(1)(d) of the 1986 Law and concludes that it is not, principally because *"the core matters of which he complains have not ever been addressed by the Committees"*.

27. In his Affidavit, Advocate Adkins refers to his understanding that the role of appointing members to a Review Board was not undertaken by the Chairman of the Panel of Members and so devolved to the senior available Acting Presiding Officer of the States of Deliberation and that this step must have been undertaken by no later than 8 April 2022 because of an e-mail of that date sent by the Director of Reviews & Tribunals (who is the same person as the Defendant's principal officer) referring to the Board that had been appointed meeting on 29 April 2022, from which it is apparent that a timetable to reach a hearing in June 2022 to hear the Complaint against HSC and ESC was contemplated. In this Affidavit, there is also reference to a change of personnel relating to who will constitute the Review Board, although there is no indication as to when such a change was made.

28. On 12 April 2022, the Committee Secretaries of HSC and ESC sent a lengthy letter to the Chair of the Defendant. Given the similarity of the content of this letter with the Plaintiff's Cause, I infer that it was drafted with assistance from a lawyer. It requested the Defendant to re-consider its decision to refer the Complaint to a Review Board and indicated that, if the Defendant did not re-consider the First Decision, proceedings by way of judicial review might follow or that the concerns expressed might be raised before the Review Board at its hearing. The topics covered in this letter were a suggestion that there had been a breach of Article 6, ECHR, that the Defendant had departed from its own procedures in not making enquiries of HSC and ESC, that there had been an unexplained and material delay in reaching a decision on the Complaint, that there were factual errors (all of which have subsequently been pleaded in the Cause), and that the Interested Party had already secured the best remedy he could because the restrictions imposed upon him were the subject of ongoing review. Reference was made to correspondence in October and December 2021 and most recently a letter dated 21 March 2022 from his Advocates.

29. The Chair of the Defendant replied to this letter on 29 April 2022. It stated that the panel and his role as Chairman *"ceased to exist and ceased to have any powers nor functions under the Law over this Complaint upon the determination of the panel to refer the Complaint to the*

*Chairman of the Review Board*". Although this letter does not state it explicitly, this must amount to declining to re-consider the First Decision.

30. Thereafter, these proceedings were commenced.
31. The Chair of the Defendant exhibits a copy of his letter dated 23 June 2022 sent to the two Committee Secretaries. Within that letter, he wrote that "*The Panel does not consider itself to be a body which is wholly independent of*" the States of Guernsey. He also explains that "*The Panel is careful not to encroach upon the role of a Board, and act outside its own statutory powers, by conducting an assessment of the underlying merits of the complaint beyond that which is required to satisfy itself of the matters in sections 1, 2 and 3.*" The letter also contains the following explanation:

*"The Panel will frequently be assisted by information provided by the relevant Committees and, in the majority of cases considered since the Panel's creation it has requested such information. However, in some circumstances the Panel will be able to make a decision to refer or not without obtaining information from the relevant Committee. For example, a complaint against a decision which falls outside section 1 could be (and in fact has been) declined without further reference to the relevant Committee. It is important to recognise that any such enquiries made by the Panel of any relevant Committee are made in furtherance of the Panel's duty to make enquiries into the facts of the matter, as required by section 2. For the avoidance of doubt, substantive procedural fairness is provided to the Committees by the oral hearing before a Board.*

*Under section 2, once a matter has been referred to the Chairman, the Chairman must refer it to a Board "forthwith" and the Board must then enquire into that complaint "with the least possible delay", in accordance with section 7. Accordingly, once the matter has been referred to the Chairman, the Panel's statutory functions have been completed and there is no express power to re-consider its decision to refer the matter. Whilst this may not necessarily preclude a Panel from reconsidering its decision in exceptional circumstances, it is unlikely that any such power exists once the Chairman has taken steps in the exercise of the Chairman's own powers, as in this case."*

### **The Plaintiff's contentions**

32. In para. 9 of its Cause, the Plaintiff sets out the various particulars on which it relies in seeking to have the First and/or Second Decision quashed. In effect, the Plaintiff advances all of the usual bases on which an application for judicial review can be instituted.
33. Illegality is raised in respect of the First Decision, referring to non-compliance with the Defendant's mandatory duty under section 2 of the 1986 Law to enquire into the facts.
34. There are various bases on which it is said that the First Decision is irrational or lacks proportionality. These relate principally to the findings recorded in the First Decision in para. 17 (which, as I have noted, quotes from the decision taken in March 2020) and para. 18(b), (d) and (e). The conclusion found in para. 22(c) as it relates to section 3(1)(f) of the 1986 Law is alleged to be wrong because the Interested Party had available to him alternative remedies and these have not been addressed as required. In any event, the point made in the letter of 12 April 2022 that the effect of section 7(3) of the 1986 Law means that the Interested Party has already achieved what could be requested by a Board after a hearing is repeated and then there is a further reference to the possibility that the exclusionary factor in section 3(1)(d) might be engaged.

35. Moving on to procedural fairness, this appears largely to be based on the Defendant not having provided a copy of the Complaint to HSC or ESC and not having invited any response from those Committees to the Complaint, which is alleged to be a departure from its own procedures and so to be a breach of the principles of natural justice. Reference is also made to the delay in reaching a decision on the Complaint.
36. There is some overlap with the Plaintiff's raising of its legitimate expectation that the Defendant would follow its own procedures in light of a document setting out a description of the role of members of the Defendant.
37. As regards the Second Decision, illegality is raised on the basis that the Defendant has unlawfully assumed that it did not have power to re-consider the First Decision.
38. The grounds of the Plaintiff's challenge to the First and/or Second Decision are developed in Advocate Hill's Skeleton Argument dated 23 June 2022, particularly in relation to the question as to whether permission to proceed should be granted and also whether or not the Defendant was *functus officio* by the time of the letter of 12 April 2022.

### **The statutory regime**

39. When the 1986 Law was enacted it was the product of a successful Requête to the States of Deliberation led by Deputy Roger Perrot, also an Advocate of this Court, and signed by eight other States' Members. The proposal was to use the model that had been established in Jersey by the Administrative Decisions (Review) (Jersey) Law 1982, duly modified because Guernsey did not have an office-holder of Greffier of the States to whom a complaint in Jersey would initially be made. Instead, it was suggested and subsequently approved that the complaint would be referred to the States Supervisor (who subsequently became known as the Chief Executive of the States) or, if it was a complaint about the Advisory and Finance Committee (and subsequently the Policy Council), it would be referred to Her Majesty's Greffier to perform that function. The requérants were "*of the opinion that the Jersey Review Board system is simple, easy to understand, informal and inexpensive and that a similar mechanism ought to be created in Guernsey*".
40. In the mid-1980s and for some years thereafter, the availability in Guernsey of judicial review was not recognised. That position changed in the late 1990s and the Court has issued Practice Direction No. 3 of 2004 setting out how to commence a claim, although there are still no rules in the Royal Court Civil Rules, 2007 setting out any other requirements.
41. The Defendant was created through amendments made to the 1986 Law by the Administrative Decisions (Review) (Guernsey) (Amendment) Law, 2018, which took effect from 3 June 2019. Section 1A was inserted and consequential changes were made to other provisions. Appointment to the Defendant (ie, the Complaints Panel) is made by the States (subsection (1)), which is also responsible for appointing a Panel Chair from amongst the members appointed (subsection (3)). Certain persons set out in subsection (5) are ineligible for appointment, otherwise subsection (2) provides that:

*"The members of the Complaints Panel shall be persons who, in the opinion of the States, have sufficient experience and knowledge to enable them to decide matters likely to fall for decision by the Complaints Panel."*

42. Sections 1 and 2 of the 1986 Law, as amended, provide:

*"1. Where any person (hereinafter referred to as "**the complainant**") is aggrieved by any decision made, or act done or omitted, relating to any matter of administration*

by any Committee of the States or by any person acting on behalf of any such Committee, that person may apply to the Complaints Panel to have the matter reviewed by a Review Board constituted in accordance with this Law (hereinafter referred to as a “**Board**”).

2. On receipt of an application made under section 1 of the Law the Complaints Panel shall enquire into the facts of the matter and, if satisfied as a result of its enquiries that the circumstances justify a review of the matter by a Board, it shall refer the matter to the Chairman of the Panel of Members who shall, as soon as may be, appoint a Board in accordance with this Law and thereafter forthwith refer the matter to the Board so constituted for the Board’s action in accordance with this Law.

Provided that –

- (i) if, due to the unavailability or indisposition of the Chairman, reference to the Chairman would in the opinion of the Complaints Panel involve undue delay, the reference shall be made to the Deputy Chairman, who shall act in accordance with this section, and
- (ii) if, due to the unavailability or indisposition of both the Chairman and the Deputy Chairman reference to either of them would in the opinion of the Complaints Panel involve undue delay, the reference shall be made to the senior available Acting Presiding Officer of the States, who shall act in accordance with this section.”

43. However, as part of its consideration of a complaint, section 3 makes provision that the Defendant cannot refer a complaint in certain circumstances. These are the exclusionary factors mentioned in para. 22(c) of the First Decision. Subsection (2) was added by the 2018 Amendment Law, as were paragraphs (ea) and (g) in subsection (1):

“(1) The Complaints Panel shall not refer any complaint under this Law to the Chairman if in its opinion –

- (a) the matter complained of is not within the jurisdiction of a Board,
- (b) unless subsection (2) applies the matter complained of relates to a decision, act or omission of which the complainant has had knowledge for more than twelve months,
- (c) the subject matter of the complaint is trivial,
- (d) the complaint is frivolous, vexatious, unreasonable or not made in good faith,
- (e) the complainant has not a sufficient personal interest in the subject matter of the complaint,
- (ea) the complainant has not exhausted the internal complaints procedures of the relevant Committee in respect of the matter complained of,
- (f) the complainant has in respect of the matter complained of a right of appeal, reference or review or a remedy by way of proceedings in any court of law unless, in any such case, the Complaints Panel is satisfied that in the particular circumstances it is not reasonable to expect the complainant to resort to or to have resorted to that right or remedy, or

- (g) *the complaint would require the Board to make a finding of medical negligence or malpractice in order to form an opinion for the purposes of section 7.*
- (2) *Where –*
  - (a) *the matter complained of relates to a decision, act or omission of which the complainant has had knowledge for more than twelve months, but*
  - (b) *the Complaints Panel is of the opinion that –*
    - (i) *there are exceptional circumstances which justify the making of a complaint after twelve months have elapsed since the complaint had knowledge of the decision, act or omission, or*
    - (ii) *it is otherwise in the interests of justice that the complaint should be referred to the Chairman,*

*the Complaints Panel may refer the complaint to the Chairman.”*

I believe that there is a slip in subsection (2)(b)(i) where the second reference to “*complaint*” strikes me as if it should refer instead to the “*complainant*”.

44. Section 6 of the 1986 Law confers upon the Defendant the ability to seek further information relating to a complaint. This is particularly relevant in the light of some aspects of the Plaintiff’s challenge to the First Decision and in light of the conclusion of the Defendant set out in para. 15 thereof. The section, as amended, reads:

*“For the purposes of this Law a Board and the Complaints Panel shall have power to call for documents from any Committee or officer or employee of any Committee and to hear any person in connection with any complaint:*

*Provided –*

- (a) *that the power conferred under this section regarding the calling for documents and hearing of evidence shall not extend to the calling for any document containing, or the hearing of any evidence upon, any information the disclosure of which is prohibited under or by virtue of any provisions of any enactment or is confidential or privileged from disclosure under or by virtue of any enactment, custom or rule of law,*
- (b) *that a witness before a Board or the Complaints Panel for the purpose of enquiring into any complaint under this Law shall be entitled to the same immunities and privileges as if that person was a witness before the Royal Court, in the same manner as set out in article 20E of the Reform (Guernsey) Law, 1948.”*

The particular matters to which reference is made in Article 20E of the 1948 Law, as amended, which relates to protection afforded to persons appearing before Committees, with specific reference to the Scrutiny Management Committee of the States of Guernsey and a panel established to deal with complaints under the Code of Conduct for Members of the States of Deliberation, include the privilege against self-incrimination and legal professional privilege.

45. The final provision from the 1986 Law that is engaged relates to what can be achieved at the conclusion of a hearing by a Review Board. Section 7(3) provides:

*“Where a Board after making enquiry as aforesaid is of opinion that the decision, act or omission which was the subject matter of the complaint –*

- (a) was contrary to law, or*
- (b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory, or*
- (c) was based wholly or partly on a mistake of law or fact, or*
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts, or*
- (e) was contrary to the generally accepted principles of natural justice.*

*the Board, in reporting its findings thereon to the Committee or person concerned, shall request that Committee or person to reconsider the matter.”*

The Board can set a deadline by which the Committee or person concerned must inform it of the result of that reconsideration (subsection (4)) and, if it forms the opinion that the Committee or person’s reconsideration is insufficiently considered or implemented, it must refer the matter to the States (subsection (5)).

### **Permission**

46. Although it was not mentioned during the course of the hearing, the first consideration is whether to grant the Plaintiff the permission to proceed it seeks by paragraph 1 of its prayer.
47. I am satisfied that the Plaintiff has standing to bring the claim. The States of Guernsey remains a single legal entity. Although the 1986 Law refers to complaints against Committees of the States, there is no suggestion that a Committee is endowed with sufficient personality to bring such an action in its own name. Accordingly, whether on behalf of a single Committee or more than one, it will be the States that has capacity to be a Plaintiff seeking judicial review of a decision of the Defendant.
48. Because the nature of the 1986 Law is such that it is arguable that it amounts to little more than an internal review within the States, I did give some consideration as to whether it is permissible to seek to challenge any decision of the Defendant. I think the way that Advocate Adkins describes the process in his Affidavit as a “*filter*” is appropriate. What matters is what a Review Board will do, not so much what the filtering process of complaints, now by the Defendant, sets out to do. Before the creation of the Defendant by the 2018 Amendment Law, most of the filtering of complaints was undertaken by the States Supervisor and then the Chief Executive of the States, who is an employee of the States. It might have been surprising if the States, as that individual’s employer, could bring proceedings by way of judicial review. However, the introduction of the Defendant performing this role in respect of all complaints from 2019 appears to me to have been designed to bring some independence to this stage of the process. Although the members of the Defendant are appointed by the States of Deliberation on the recommendation of the Policy & Resources Committee, once so appointed the Chair and members are required to perform their functions distinctly from if they were treated as a Committee of the States. Indeed, section 1A(5) of the 1986 Law expressly limits those who

can be members to persons separate from the States of Guernsey or those eligible to be on the Panel of Members. Further, the reference in section 1A(9) to service of a document on the Defendant being through the Panel Chair, care of the principal officer appointed by the Policy & Resources Committee, points towards proceedings against the Defendant being capable of being instituted. If a complainant were aggrieved at a decision of the Defendant, I consider that, in the absence of any statutory appeal, a judicial review claim could be instituted. Accordingly, I am satisfied that the States of Guernsey can seek similar relief when aggrieved by a decision of the Defendant, by which I mean I am satisfied that the First and Second Decisions are indeed justiciable, in the sense of being amenable to judicial review.

49. As regards these proceedings being commenced promptly (as set out in the Practice Direction), there has been no suggestion that permission should be refused on this basis. Although this was not raised on behalf of the Interested Party, as it could have been, I have still had regard to section 7(1) of the 1986 Law, which provides that “*A Board shall, with the least possible delay, enquire into any complaint referred to it under this Law*”. Where a complaint is made under the Law, the clear intention is that it should be progressed swiftly. As a matter of administration, the idea is obviously to seek to resolve the complainant’s concerns quickly and cheaply. The time taken by the Defendant in itself points away from any sense of urgency. I think that is unfortunate, but it lends support to the Plaintiff’s contention that the speed with which it acted should be viewed in that light.
50. Whilst I consider that the issue of delay is finely balanced in this case, I have decided that I should grant the permission sought by the Plaintiff. In saying that, I am conscious that the proceedings were only commenced some weeks after receipt of the Second Decision, but taking around five weeks to write the letter dated 12 April 2022 following receipt of the Defendant’s First Decision strikes me as perilously close to losing the opportunity to challenge that First Decision, particularly when the issues raised in that letter were then largely translated into the Cause and the supporting Affidavits could, in my view, have been prepared and sworn quicker. It is the Interested Party who is most affected by the delay in dealing with his Complaint. There has been no real explanation offered by the Defendant for the length of time it took. If it really is down to administrative resources, the Policy & Resources Committee might need to think about the role of the principal officer to the Defendant and how appropriate it is for one person apparently to be covering so many different functions. I have further noted that the proviso to section 7(1) of the 1986 Law refers to sittings of a Review Board being held in public, but the first meeting of the Board appointed to hear the Interested Party’s Complaint appears to have been scheduled to take place in private and proposing to deal with the matter by way of a directions hearing followed by a full hearing, no doubt to be held in public, spreading over a period of months does not appear to me to accord with the simplicity and ease of use envisaged by those who proposed the introduction of this Law.

### **The Second Decision**

51. Having decided to grant permission to proceed, I will briefly deal with the Plaintiff’s challenge to the Second Decision before turning back to the First Decision.
52. I am not persuaded that the Defendant had the ability to re-consider the First Decision as it was invited to do by the letter of 12 April 2022 from the Committee Secretaries. From the evidence adduced on behalf of the Defendant, I infer that the Board to consider the Interested Party’s Complaint had been appointed in accordance with section 5 of the 1986 Law by no later than 8 April 2022. Indeed, this might have taken place somewhat earlier because, under section 2, once the Defendant had referred the Complaint to the Chairman of the Panel of Members, the latter was required “*as soon as may be*” to appoint the Board to consider the Complaint. There were plenty of days in March during which this should have occurred.

53. I agree with the assessment set out in Advocate Adkins' Affidavit. Whilst this is slightly different from the response given in his letter dated 29 April 2022, I do not regard it, as Advocate Hill submitted I should, as contradicting the position. The initial response was that the functions of the Defendant ceased upon the referral, whereas in the later letter of 23 June 2022 there is an acknowledgement that there might be exceptional circumstances enabling the Defendant to re-consider its decision. In the factual situation of the Interested Party's Complaint, I am satisfied that the initial response was accurate. Because it was clear that a Board had been appointed and was already seized of the Complaint, there is nothing in the 1986 Law that indicated that the Defendant could re-take a decision in respect of its functions prior to referring the Complaint. The later letter explains the position more fully, accepting that there may be a power to re-take a referral decision provided that the matter is still capable of being recalled if that were the decision. If the Chairman of the Panel of Members had not yet appointed a Board, I think the Defendant could inform the Chairman that the referral should be regarded as being in abeyance whilst the members constituted to consider a given complaint re-considered that decision. However, as soon as a complaint is in the hands of a Board appointed by the Chairman, I consider that the matter has moved away from the Defendant and then sits with the Review Board. As such, there is a window of opportunity during which there is scope to re-consider a decision to refer, but a Committee affected would, in my opinion, need to act swiftly. If it does not, the capacity of the Defendant to suspend the effect of its referral will be lost.
54. Advocate Hill has referred to three English cases dealing with whether a decision-maker is *functus officio*. They are *R v Hertfordshire County Council, ex parte Cheung* *The Times* 4 April 1986, *R v Newham LBC, ex parte Begum* (1996) 28 HLR 646 and *Porteous v West Dorset District Council* [2004] EWCA Civ 244. I accept that there is a general principle that a decision-maker, such as the local authorities in these cases, can correct an earlier decision if it decides that it is wrong. However, it is not clear in any of these cases that the decision-maker was exercising a preliminary function before another decision taker was seized of a matter, which is the way the 1986 Law operates. That is why I have drawn a distinction between the short period of time before the referral by the Defendant to the Chairman becomes operative and later on, when the functions relating to a complaint have switched from the Defendant to a Review Board. As such, once that happens and in the absence of legislative intervention conferring such a power for the referral to be re-visited, I am clear that the Defendant is unable to take any contrary decision to its original decision to refer. Put simply, at that point, its functions under the 1986 Law have come to an end.
55. Accordingly, had it been necessary for me to do so, I would have refused to quash the Second Decision.

### **The First Decision**

56. I am, however, satisfied that the Defendant has fallen into error in the members not addressing their minds to whether this was a proper matter to refer to a Review Board, the most pressing of which is the absence of any consideration of section 3(1)(f) of the 1986 Law.
57. As a general point, the Interested Party's Complaint strikes me as one much better suited to a judicial process rather than to be considered by a Review Board. The extent of the issues raised in the Complaint cover so much ground over such a period of time that reviewing all of that background and assessing what relevance, if any, it has is more akin to judicial review proceedings such as these than for the consumption of a Review Board. As was raised during the hearing, in the absence of a clear statement within the Complaint as to what decision made, or act done or omitted to be done forms the basis of the component parts of the Complaint, I doubt very much that a Review Board would be well-placed to extract a coherent set of decisions, acts and omissions from the mass of material submitted.

58. That aspect raises another element where the Defendant might have wished to exercise its powers to seek further information under section 6 of the 1986 Law. There are clearly two decisions affecting the Interested Party that would not fall foul of section 3(1)(b) of the Law, which relate to the imposition of replacement restrictions imposed on him as set out in the letter dated 2 September 2020 and the decision taken to treat him as an habitual or vexatious complainant for the purposes of policy G107, which brought the internal complaints process to an end. However, to the extent that any aspect of the Complaint relates to something decided, done or not done before 11 August 2021, and on behalf of the Interested Party Advocate Duerden did not suggest that these matters were not regarded as still needing to be reviewed, the Defendant has not set out in the First Decision how it might exercise the discretion available to it under section 3(2). The earlier decision taken in March 2020 did address that timing issue and indicated that the Defendant would have been minded to exercise its discretion in favour of referring older complaints. However, that exercise has not been undertaken in respect of the Complaint with which the Defendant was seized this year. In my judgment, it has fallen into error in concluding as it has at para. 22(c) of the First Decision that none of the exclusionary factors arises without at least explaining why it will refer older matters to the Board. In particular, what has been extracted by it into para. 22(a) shows that it considered that the Complaint raised matters dating back beyond 12 months before its submission.
59. The decision taken by the SLPP and set out in his letter of 9 July 2021 is potentially a significant decision because, but for that decision, the internal complaints processes of HSC and ESC would have continued. If a Review Board were to be invited to consider solely that decision and were to conclude that the decision should not be upheld, the SLPP on behalf of both Committees would be invited to reconsider it and, as a consequence, the internal complaints procedures would not have been exhausted. In those circumstances, the Complaint could not be referred to the Chairman by virtue of section 3(1)(ea) of the 1986 Law. This would put the Interested Party and the Defendant back in the position they were in during the early part of 2020 and thereafter. Perhaps the oddity of the situation is that it suits the Interested Party to accept that finding, because it enables him to submit that he has now exhausted those internal complaints procedures so that the barrier to referral found in March 2020 has been overcome. However, looking at the situation objectively, it is that finding, which might be susceptible to review, which impacts on whether the part of the Complaint objecting to the imposition of the restrictions by the letter of 2 September 2020 can also be reviewed.
60. Although Advocate Hill was not prepared to concede that a review of the SLPP's decision pursuant to the terms of policy G107 was much more the type of matter suitable for a Review Board than the restrictions imposed by the letter of 2 September 2020, suggesting that the decision might still be amenable to judicial review proceedings, I take the view that this is exactly the type of administrative decision, through purported application of a States policy, where a Review Board would be well placed to decide whether any of the grounds listed in section 7(3) exist calling for that decision to be re-considered. Accordingly, even if it might theoretically be amenable to a judicial review, the Defendant could conclude that in the particular circumstances of this case, where the internal complaint procedures had not been exhausted previously, meant that those internal complaints procedures should be conducted scrupulously fairly so that it was reasonable to have that decision looked at again. That is why, had the Defendant's decision been confined to referring the SLPP's decision, effectively as a preliminary point, to a Board, I would have been unlikely to have granted the Plaintiff's challenge to such a decision.
61. The difficulty, though, lies with the referral of the decision to impose what are termed the New Restrictions on the Interested Party through the letter of 2 September 2020. These restrictions have real legal consequences for the Interested Party because he is effectively prohibited from accessing States-controlled premises for certain purposes. The background to this latest decision covers a considerable amount of material that has been appended to the Complaint, and it is possible that there would be more material than that for any body called upon to review

it. For example, there ought to be Committee minutes showing how such a decision was reached, whether directly by the Committee or Committees involved or through delegation. Moreover, and as was raised during the hearing, the language used in that letter indicates that it applies across the whole of the States' estate and is not confined to premises over which either HSC or ESC has control. As such, the Committees who might need to respond to the Complaint could be broader than just those two, although I appreciate that HSC and ESC will sit centrally in this regard. These are, in my view, all reasons why this is the type of challenge where a legally enforceable outcome for both sides would be preferable, whichever way it may go. Having regard to the nature of the decision taken, I am satisfied that this is an area where the Interested Party has the ability to bring the matters that are relevant, possibly extending to alleged breaches of his Convention rights, where action under the Human Rights Law could be added to seek additional remedies, before this Court and seek appropriate relief. As such, section 3(1)(f) is, in my judgment, clearly in issue and the First Decision omits to address this, confining itself to para. 22(c). Accordingly, I am persuaded that the ground pleaded at para. 9(8) of the Cause has been established by the Plaintiff, thereby enabling me to proceed to consider whether to quash the First Decision.

62. Before doing so, I can also mention, the primary case for the Plaintiff advanced by Advocate Hill, which is that there was a duty on the Defendant to enquire into the facts of the Complaint which it had failed to satisfy. Aspects of this issue have been presented as illegality, procedural unfairness and legitimate expectation.
63. I am not persuaded that it can be said that the Defendant acted unlawfully. All section 2 of the 1986 Law requires is that the Defendant "*shall enquire into the facts of the matter*". Although the Defendant might have enquired more deeply, particularly through inviting comments from HSC and ESC (or even more widely within the Plaintiff), it is apparent from the First Decision that it had reviewed the Interested Party's Complaint and so had considered the facts being advanced. As a filtering process, I do not consider that there is any absolute requirement for the Defendant to engage with any Committee of the States. It is empowered to do so by section 6, but it is not required by the Law to take any such step.
64. It is further alleged that the Defendant has failed to comply with its own procedures. The evidence of those procedures comes from a document entitled *Descriptions of New Roles for Complaints Panel of Members & Independent Members of a Review Board and Frequently Asked Questions*, which was exhibited to Mrs Ingrouille's First Affidavit. This document contains four sections. The first refers to the duties and responsibilities of members, including the Chair, of the Defendant. It cites section 2 of the 1986 Law, refers to the panel being of four members (which may well be contrary to section 1A(6) of the Law, especially in light of an entry relating to the Chair alone, implying he has a casting vote, which does not feature anywhere in the Law) and that they will be required to "*read and comprehend case documentation ('bundles') received from complainants and States' Committees, requesting additional information as required in order to explore fully all relevant and factual issues*". The section on independent members of Review Boards is of no relevance, but the final section lists useful or requisite skills for all members of the Defendant and Review Boards. It includes the expectation that members will demonstrate "*excellent verbal and written communication and interpersonal skills with an ability to dealing with people from a wide range of backgrounds*" and have "*excellent questioning and listening techniques*" and "*absorb, interpret and question complex information, including written material and verbal submissions, and identify the salient points*". Some of these references are clearly relevant to a Review Board hearing, which is expected to take place in public. There is no similar provision for anything done by the Defendant to take place in public and so the conflation of these skills for members of the Defendant with those who might be appointed by the Chairman of the Panel of Members as independent Members to constitute a Review Board into this single document is, in my view, unhelpful, depending on the purpose of this document.

65. The Plaintiff's evidence does not identify whose document this is. The way the case is put depends on it being a document produced by the Defendant itself because then there is a nexus to it setting out the procedure that the Defendant itself might follow. In the absence of any express indication that it is the Defendant's document, I am more inclined to view it as a document created for a different purpose. Indeed, the combination of what is being sought from a member of the Defendant with what might be relevant for the Chairman of the Panel of Members to appoint independent Members who might then be appointed to constitute a Review Board as and when necessary leads me to find that this is not a document setting out the Defendant's own procedures. Although I do not need to identify whose document this might be, I think it could well be a document produced by the Policy & Resources Committee before it proposed its recommendations to the States for those to be appointed to the Defendant under section 1A of the Law and also by the Chairman of the Panel of Members in respect of anyone seeking to be appointed as an independent Member. Whether or not that is the case, in the absence of evidence enabling me to find that this is a document generated by the Defendant and setting out its own procedures, there cannot, in my judgment, be any reliance placed upon it by the Plaintiff as giving rise to a legitimate expectation or for demonstrating that there has been any departure by the Defendant from its own published procedures.
66. A further reason for rejecting the Plaintiff's challenge to the First Decision on these bases is that it is unsatisfactory for the Plaintiff to attempt to paint a picture of an independent body having these duties to engage with one or more of its Committees based on a document that is not demonstrably the product of something created by the Defendant itself. Any attempt to raise a legitimate expectation based on what may well be its own document is, in my view, quite misguided. If the Defendant is to be regarded as independent of the Plaintiff (and the evidence of Advocate Adkins suggests he does not think it is), I consider that there should be a greater distinction made between those who serve the Defendant and those who serve the Chairman of the Panel of Members and any Review Board.
67. Despite that conclusion, there is one aspect of the Plaintiff's pleaded case where I do consider that the Defendant might have considered engaging with the Plaintiff through HSC and ESC. This relates to para. 9(11), (12) and (18), which concern not providing any copy of the Complaint, not inviting representations from either or both of the Committees and not observing the principles of natural justice. Given the nature of the Complaint, and also the passage of time between its submission and its determination, I regard it as extremely odd that the Defendant did not alert HSC and ESC to its receipt of the Complaint. The documents appended to it all show that there has been a lengthy and ongoing process of communication. The Defendant could not know without asking whether there had been any developments that might affect its First Decision. Indeed, and by way of example as referred to in para. 9(9) of the Cause, there had been further correspondence passing between the two sides, which in itself shows that there had not been acceptance by either of the Committees of the position being advanced on behalf of the Interested Party (and the letters are dated 4 October 2021, 21 December 2021 and 21 March 2022, although the last of these post-dates the First Decision). (However, I do not consider that the Interested Party's ongoing active involvement means that the Defendant should have considered whether this meant that section 3(1)(d) of the 1986 Law was engaged (as pleaded at para. 9(10) of the Cause), because this does not, in my view, bring into question his good faith or amount to the type of unreasonableness as regards the Complaint already submitted on which that assertion must be based.) Of further particular note is the fact that the letter of 2 September 2020 expressly refers to an ongoing process of review of the restrictions that were re-imposed at that time. If nothing else, I take the view that the Defendant should have informed the Committees that the Complaint had been received so as to check whether anything subsequent to its submission could affect its assessment of the content of the Complaint.

68. Although there is nothing on the face of the 1986 Law requiring the Defendant to inform any Committee or person acting on its behalf that an application has been made to it to consider referral to a Review Board, particularly in the circumstances of this case and the light of its earlier decision, I think it was remiss of the Defendant to take the First Decision without any reference to the Plaintiff. To this extent, I find that there has been procedural unfairness established by the Plaintiff, which is a further reason for proceeding to consider granting the relief it seeks.
69. I have left consideration of the factual errors pleaded by the Plaintiff at para. 9(2) to (8) until the end because, other than para. 9(8) to which I have already referred, I would not have regarded these allegations as they affect the First Decision as warranting quashing it. These are examples of where, with the benefit of input by HSC and/or ESC, the Defendant might not have made these findings. However, none of these findings would bind a Review Board, which is required by section 7 of the 1986 Law to undertake its own enquiries into the Complaint referred to it and is expressly empowered to regulate its own procedure.
70. By quoting from its earlier decision in the way it has in para. 17 of the First Decision, the Defendant can be criticised for not seeking to assess the relevance of any of these points to the Complaint with which it was by that time seized and where historic matters, as set out therein, were little more than background to the more recent decisions, acts and omission about which the Interested Party could complain. Whilst they might impact on the restrictions set out in the letter of 2 September 2020, any Review Board tasked with considering whether the decisions in that letter should be re-considered would have had the benefit of materials and representations made on behalf of the relevant Committees. The First Decision, in the sense that it decides that there is a matter of administration (or more than one) that merits being referred to a Review Board, is not dependent on the accuracy of such findings. Either a decision, act or omission is one that can be referred or it is not and none of these matters, in my view, affects that conclusion.
71. As regards the three matters drawn from para. 18 of the First Decision (as set out in para. 9(2), (3) and (7) of the Cause), each of the events that is listed happened, but the Plaintiff's complaint is that the Defendant has misinterpreted the materials in the Complaint (or provided by the Interested Party thereafter). The letter of 2 September 2020 speaks for itself and so it matters not what the Defendant has found. As I have already indicated, it is arguable as to whether the expectations set out for premises not under the control of the Plaintiff is coupled with a form of requirement to give notice to the officer identified and so can be elevated to some form of restriction, especially where the Interested Party has been provided with a different person as his single point of contact, possibly as a result of the complaints he has raised about his relationship with the Head of Children and Family Community Services. Because the Defendant's referral necessarily relates to the whole of the decision in this letter, it is immaterial whether there are wider legal consequences that the Interested Party wishes to have re-considered. I have already commented on the effect that would potentially follow if the SLPP's decision as set out in his letter of 9 July 2021 fell to be re-considered and so whether the Defendant in its First Decision accurately describes the reasons for it, the outcome remains the same, namely that the Interested Party's complaints being dealt with under a variant of policy G107 were brought to an end. Again, I have already commented on the fact that there was an ongoing process and a promise to review the restrictions imposed, all of which could have been clarified if HSC and ESC had been apprised of the Complaint and so able to comment on its content. I accept that there is a dispute as to whether para. 18(e) is accurate, but I am not persuaded that the Defendant's conclusion affects the rationality of its decision that there are matters that it considers should be looked at by a Review Board.
72. Accordingly, although it seems to me that the Defendant can be said to have extracted from the Complaint matters that would be disputed by HSC and/or ESC before a Review Board, I would

not have been persuaded that any of these, if viewed in isolation, would provide a foundation for setting aside the First Decision. Taken as a whole, had I not found a basis for considering quashing the First Decision on another ground, I would not have regarded these alleged factual errors as affecting the rationality of this Decision.

73. Whether or not to quash the First Decision (which would produce the effect that the Second Decision falls away in any event) is a discretionary remedy. I have given careful thought to whether or not the prejudice to the Interested Party in further delay before he gets the type of resolution to his position that he wants is sufficient to allow the process of the Review Board to continue on the basis of the Complaint he submitted more than a year ago, but I have decided that, the Plaintiff having established a basis for quashing the First Decision, that is the outcome that should follow.
74. In reaching that conclusion, I am particularly conscious that it means the Defendant has to take a fresh decision under the terms of the 1986 Law as to what, if anything, should be referred to a Review Board. Equally, in the light of the comments made during the hearing and in this judgment, the Interested Party might now prefer to test whether the restrictions should be continued and, if they are, consider bringing proceedings before this Court for appropriate relief. Because the restrictions (as currently set out in the letter of 2 September 2020) amount to a legal prohibition on him otherwise exercising the freedoms that he would enjoy, it may well be that the better outcome will be for them to be considered judicially rather than politically. Indeed, in the light of this judgment, the Plaintiff might even prefer to conduct an updated review and decide whether it remains appropriate to leave in place any restrictions on the Interested Party, following which the Interested Party could decide how best to proceed. One of the problems with the Complaint as it stands is that it is too far-ranging and needs to be focused more clearly if it is going to be usefully re-considered by a Review board. Further, as I have endeavoured to explain, the Defendant would have had to reach the same decision on this Complaint as it had in March 2020 but for the decision of the SLPP to bring his consideration of matters on behalf of HSC and ESC to an end in July 2021. Referring that decision as a preliminary point to re-consider prior to anything else being reviewed is an option that the Defendant might follow. However, there is no power in this action for me to dictate what is to happen, which is why it is best left to the parties to consider their options now that the First Decision is being quashed.

## **Conclusion**

75. For the reasons I have given, I am granting the Plaintiff permission to proceed with its claim for judicial review and I am also quashing the First Decision. As a consequence, whilst I cannot grant para. 3 of the prayer in the Cause, it follows that there is a live Complaint before the Defendant that it must now consider afresh. How it proceeds could be subject to any indications given by the Interested Party or the Plaintiff, acting through HSC and/or ESC, as to what any of them might now do. For the sake of the Interested Party, I encourage all concerned that any next steps should be taken in a timely fashion.
76. As regards the costs of these proceedings, I am minded to do little more than formally reserve them. In the circumstances where I expect the Plaintiff and Defendant are funded out of the same resources, it may well be that no order as to costs will be appropriate rather than the more usual order of costs following the event. However, if any party wishes to seek a positive order for costs, it will be open to that party to do so by making such an application that can then be dealt with on the papers or through a suitable appointment arranged through the Greffe.