THE STATES OF JERSEY

TRANSCRIPTS OF DEBATES

1. **Fief de la Fosse: proposed agreement with Les Pas Holdings Limited – P.117/2003, Committee of the Whole House, held *in camera* on 16th and 17th September 2003; and**

2. **Fief de la Fosse: proposed agreement with Les Pas Holdings Limited – P.117/2003, Addendum and comments, held *in camera* on 23rd and 24th September 2003.**

The attached transcripts have been prepared and checked by the States Greffe. They have not been prepared by 'Hansard' trained staff, but it is hoped that they will provide as accurate a report as possible of the proceedings.

16th September 2003 - morning

Greffier

I know on occasions in-Committee discussions have been chaired from the Greffier's desk, I think perhaps for the interest of convenience members won't mind, I get a slightly better view from the chair. Perhaps we allow one or two minutes to ensure that the doors to the Chamber had been correctly closed and people have left the precincts.

Deputy Troy

Sir, can I ask one question regarding the recording. Will the usual conditions apply to obtaining access to the recordings? I understand that the information is sensitive but if members can have copies of the recording under an undertaking that they keep the contents confidential that is acceptable presumably.

Greffier

We will need to seek advice from the Law Officers. I would imagine, unfortunately, Deputy it may not be possible for copies to be made but possibly the Solicitor General may be able to advise us whether it would be appropriate for the recordings to be available for members to listen to, perhaps we can come to that later unless you wish to address that point now Madam Solicitor General.

Solicitor General

My advice on the point would be against circulating multiple copies to individual members. There is always the risk of accidental loss or something of that nature, there would be nothing against a copy being available in the States Greffe to be read.

Senator Routier

Sir, just a minor point, were the speakers on in the tea room?

Greffier

They should be off Senator.

Senator Le Maistre

Just for the sake of clarity as it's been some while since we've had an in-committee debate in this House, it was put over by the media that effectively this was a P & R meeting in-committee. I think it's important for members to be aware that an in-committee debate is held according to Standing Orders and that it is a normal States meeting. It happens to be in-camera which is an unusual thing in itself perhaps, but it is a normal States meeting and normal Standing Orders apply.

Greffier

Thank you Senator that was very useful.

Very well, I think, do you wish to make any introductory remarks Mr. President of the Policy and Resources Committee?

Deputy Bridge

Sir, I was just going to say that in my time in the States I've only been involved in one in-committee debate. I don't know how new members felt about whether there was anything you felt you could add to explain exactly how it progresses.

Greffier

Yes, very well, if it does assist members. As the Deputy says there has only been one in recent times which was the Tourism Strategy which was a slightly different occasion. Basically as Senator Le Maistre has correctly pointed out to us the normal rules in Standing Orders will apply so effectively it's not a free for all in terms of interruptions, etc. members will be called to speak by the chair, but the important difference of course is that members are not restricted to speak only once they can seek to speak as many times as they are called. As I pointed out to members in my letter last week it is certainly not my intention to in any way try to stifle or bring the discussion to a premature end and of course at the end of the discussion there is no vote and I would possibly urge members to view this as an opportunity to share information which I'm sure members will receive from the Solicitor General from the Committee but also some members will wish to share information they themselves have found. Perhaps this isn't the occasion to have long debates on the merits or otherwise of the proposition because that will be the occasion for proper debate which will be held in due course. I don't think we want to have a dress rehearsal for whenever the main debate is held.

Did you wish to make any introductory remarks Mr. President?

Senator Walker

Yes Sir, thank you I will be very brief because I concur fully with the remarks you just made. I also agree with the Deputy of Grouville and Senator Le Maistre that this is an extremely unusual occurrence for this House. It may well, under all the circumstances and probably is a unique occasion for this House. It will certainly, I believe, be whichever way the final debate decision goes, an historic meeting of this House, whether that's the right or wrong reason, it's not for me to say. But Sir, this is one of the most important issues this House has had to address in recent times certainly since I've been a member, and it does as you've said provide a very considerable opportunity for members to gather as much information as they feel they require and I'm grateful, I have to say to Senator Syvret for proposing this way forward, I believe it is a very acceptable and proper way of proceeding given the constrictions placed upon us in public debate in terms of legal advice.

It is as I've said an opportunity for members to gain as much information as possible and is also of course an opportunity as you have said Sir, for members to make as many points as they wish as well and to speak as often as they are called. But particularly this is an opportunity which has so far not been available in debate to members to get the full legal background and the full current legal advice from the Solicitor General and it is of course that legal background and current advice to which my Committee has been acting and reacting since we first became involved in this situation. And Sir, as you said in your letter and you've repeated this is not really the day for debating the main issues that will come in due course but I know that you feel and certainly I feel that members should be free to raise any issues that they wish during the course of this debate. So I will not talk to the issue at this point I may well of course, wish to speak and almost certainly wish to speak later, perhaps more than once and obviously I'm available as are members of my Committee to answer any questions that members may wish to put to us throughout the day, as I now I think the most appropriate thing for me to do would be to hand over to the Solicitor General and ask her if she can provide the legal background, the history of the legal current background and the current legal advice against which basically forms the most important part of the background certainly to this entire matter.

Senator Le Claire

Sir, sorry to interrupt Madam Solicitor, I do beg your pardon. Would it be possible please, Sir, through you, for Madam Solicitor to make it quite clear where the new advice comes into the advice she's just about to give.

Solicitor General

Yes. In fact I have some preliminary remarks to make before I begin the substantive address. Firstly I'm going to take the House through the entire chronology of advice which has been given and I'm afraid that may take a little time but I think it is necessary, I think members should know and I expect that members will want to know what advice has been given at each stage and if it has to be done in detail, it has to be done in detail. I'm sorry about that but I don't think there is any option.

Secondly, between the presentation by the Policy and Resources Committee at the beginning of June and today there has been quite significant amount of information, disinformation and distorted information put into the public domain. Now some of it in fact, I would have regarded as quite irrelevant to the legal advice but because some of it is so misleading and I'm sorry to say in some cases so untruthful, I think that I have to incorporate it into my chronology because if I do not I fear that members may be left with some very misleading and wrong information and so that I'm sorry to say will add to the length of my address. There have been some approaches from individual members with queries I will try where possible to incorporate the answers to those into this address and again some of them don't go I don't think directly to the legal advice which I'm giving but nevertheless because they have been raised I'm going to attempt to cover them.

The next point is that members will have questions and some of those questions I may not be able to answer immediately that is partly because I do not have the conduct of the litigation, that is in the hands of Advocate Binnington and although I have called for his files and I have his files in the Law Officers' Department, there are simply too many of them to have on this bench with me. I've brought the files which I think are most likely to be relevant but the files occupy a small room and I have not been able to bring them all with me. Therefore there may be either documents to which members would like me to refer or indeed questions which members would like me to answer which I cannot do immediately and in respect of that I think the best suggestion I can make is that I will simply note the question that has been asked or the document that has been requested and supply it after the lunch time adjournment or possibly in time for the next debate, depending on how difficult it is to locate.

So those are the opening remarks and now I will begin the substantive address which is the chronology of the claim and the advices and I will start in November 1989 when Advocate Falle wrote to the Receiver General asserting a claim to ownership of the foreshore and those members who went and read the advices will have seen the words quite repeatedly sometimes a reference to *fonds* which will have come up in italics *fonds* the *fonds,* sometimes it's a reference to the soil sometimes it's a reference to the solum and what's it's actually talking about when it talks about ownership of the *fonds* it means actually owning the ground, not exercising a right over it just owning it. And so this letter of Advocate Falle's asserted that the foreshore, the soil of the foreshore was owned not by the Crown but by the Seigneur of the adjacent fief.

This letter was brought to the attention of the Policy and Resources Committee. There was a preliminary attendance on 29th November by the then Solicitor General, my predecessor Mr. Sowden and a meeting was fixed for 5th December because of the implications of a claim to ownership of the soil of the foreshore were serious. This was a meeting which was chaired by the then Bailiff, Sir Peter Crill, the Committee was present and so were the Presidents of the Harbours and Airport, the Finance and Economics, the Public Services and the Housing Committees. Both Law Officers attended. The present Bailiff, who was then Mr. Bailhache, was Attorney General and Receiver General and I should explain that for some decades it had been customary for whoever held the office of Attorney General to hold the

office of Receiver General and Mr. Bailhache attended as Receiver General and Mr. Sowden attended as Solicitor General and the Receiver General informed the meeting that he had had this notification and that an "action" was going to be tabled soon.

The title of the "action" is an action *pour exhiber titre* and that means it's an action calling upon someone who is in apparent possession of land to show his title to the ownership of the land and the form of the action is that the person who is the defendant is called on either to show a good title or to vacate the land. Essentially it is an action claiming, the Plaintiff is actually claiming ownership of whatever land is referred to. The reason why the summons was likely to be served by the end of 1989 is that peaceful possession, peaceful and open possession of land for 40 years gives a prescriptive title to land and in 1950 the Crown had leased the entire foreshore of the Island with some minor exception which is of no relevance to the public. Now that lease, which was a contract lease and registered in the Public Registry was an open public act demonstrating claim to title and from the passing of that lease the prescriptive period began to run. The Crown had done something which clearly showed the Crown regarded itself as the owner of the foreshore and was dealing with the foreshore as owner. And 40 years from then would have completed the prescriptive period. Therefore the summons was served in order to break the prescriptive period because the prescriptive period is only effective if it runs without any challenge from any other person.

However, the Les Pas, originally it was a consortium and later it became a company, there was no wish at that stage on their part to litigate because at that stage the consortium, later the company, wished to develop an area at Havre des Pas and while I, it's not right for me to speak for Les Pas because obviously I don't act for Les Pas, it is apparent from the papers that Les Pas was seeking an acceptance of the scheme and that what Les Pas were hoping for was an agreement that they could develop Havre des Pas and had that happened I think it is very probable that there would have been no pursuit of the claim to the remainder or any other part of the foreshore. And at this stage it is right to say that the papers do show that there was a measure of political support and a measure of public support. There was also opposition but there was support which makes it reasonable for Les Pas to have been pursuing that course. Therefore they didn't want to litigate but they did want to break the prescriptive period therefore they served the summons. Initially the agreement was that either side could give one month's notice of a wish to bring the action to court. Later that was extended by agreement to three months.

On 12th March 1990 Mr. Sowden, Solicitor General, who had the day to day conduct of, it wasn't an action then, because it wasn't being litigated but it was a notified claim. He instructed counsel, and one member has asked who selected the counsel and on what basis. There were senior counsel, Raymond Kidwell, Q.C. and junior counsel Mr. George Gadney and that is quite usual, a silk and a junior from the same Chambers. The way in which they had been selected was that Mr. Gadney had assisted Mr. Sowden in a case of which some members may have heard, it is the case of Attorney General against Foster, and that was a case in which a defendant was charged with fraud as a generic offence, not the specific offence of false pretences or anything like that and the defendant raised the defence that there was no such generic defence, sorry offence. The proving of the existence of the offence required very considerable research into the Customary Law of Jersey, the records of the Royal Court, the *Causes Remises*, the Privy Council and Mr. Gadney, it was a very important case and a trail blazing case, it went to the Court of Appeal and there was a subsequent application to Privy Council. Mr. Gadney had worked very closely with Mr. Sowden on that and in fact had spent periods in Jersey researching and Mr. Sowden was therefore, I'm sorry I wonder whether I could have the water, Mr. Sowden was therefore, knew from experience, that Mr. Gadney, had a competence and already an experience in researching Jersey Customary Law. Mr. Kidwell's name was put forward by Mr. Gadney and was, his C.V. was checked by Mr. Sowden, in Who's Who, he was a Deputy Judge and a leading and distinguished silk and that it was how they were selected. Mr. Sowden also assembled a team of other persons and in case members are interested in the way in which the team was assembled, the first person whom Mr. Sowden consulted was Mr. Paul Matthews, that is not Advocate Paul Matthews, the Deputy Judicial Greffier. Mr. Matthews is a London solicitor, he is a distinguished, he was at that stage primarily a litigation solicitor, but he was also a distinguished academic, he's a visiting professor at London University and he was the

co-author with Mr. Sowden of the Jersey Law of Trusts which is the leading work on Trusts in Jersey and he too therefore had the advantages of being a litigation solicitor in a leading English firm but also having a familiarity with the way in which Jersey works, the Law of Jersey and the background and Mr. Matthews suggested as consultants or members of the team, Dr. David Yates of Cardiff University who specialised in Norman history, Dr. Geoffrey Marsdon who specialised in the Law of the Sea and there was of course himself, Mr. Matthews, and Mr. Sowden did research to the extent that he was able bearing in mind that he was discharging the functions of Solicitor General as well.

The first Kidwell and Gadney report was, it was signed off on 29th August 1990. There was subsequent research carried on but 29th August 1990 was day of the signing off. Members have been able to read that report and because it is quite lengthy I won't take my address to the lengths of reading it in full but the conclusion was the claims of Mr. Falle must surely fail. The Kidwell Gadney report or opinion I should say, opinion No. 1, was supplied to Les Pas and Les Pas in their turn commissioned an opinion from a Q.C., a Mr. Michael Fysh and Mr. Fysh prepared an opinion which was supplied to the defendants and the date of the Fysh opinion was 5th July 1993 and again members have been able to see that one and so I shan't go through it in full. His conclusion was "in my view were the present claim to the foreshore of La Fosse to be tested in Court the feudal claim would prevail over that of the Crown". Now this opinion as I have said was made available in July 1993. 1993 was the year in which the then Bailiff had announced his intention of retiring and there was going to be two changes in the Law Officers[1]. The Attorney General was going to become Deputy Bailiff and the Solicitor General, Mr. Sowden was leaving the post of Solicitor General to become Magistrate so at the end of 1993 there was going to be a break in the Law Officers and the Law Officers were anxious to give their advice before they departed office. So the Fysh opinion, July 1993 was supplied to Mr. Kidwell and Mr. Gadney.

There was a conference in Chambers, that is the representatives of the Committee and the Receiver General attended in London at the Chambers of Mr. Kidwell and Mr. Gadney and there were present the Receiver General, Mr. Bailhache, the Solicitor General, Mr. Sowden, I attended with them and the then President of Policy and Resources attended and Mr. Kidwell gave then an oral response to the Fysh opinion and stated that it had not changed his views and he remained of the view that the claim of Les Pas should fail.

On 16th November, I should say that at that conference, Mr. Kidwell and Mr. Gadney were asked if they could give a written opinion before the end of the year for the reasons I have explained, both Law Officers were leaving office. The timescale for a full written opinion was insufficient but on 16th November 1993 they sent a joint letter which confirmed in writing the conference and said that there was nothing in the Fysh opinion which had changed their minds but they said that they would give a later detailed opinion answering the Fysh points. Following the receipt of the Fysh opinion the conference in chambers and the letter from Mr. Kidwell and Mr. Gadney, both Mr. Bailhache and Mr. Sowden gave written advice before the end of 1993. Mr. Sowden on 21st November and Mr. Bailhache on 2nd December That is advice which members haven't seen and it is advice of some significance and therefore I propose, unless members wish otherwise, to read it, both advices to the House because this is the advice which immediately preceded, and in fact which was considered at, the meeting of the Policy and Resources Committee when the Committee, as then constituted, decided to reject the claim.

The first opinion was the opinion of Mr. Sowden, it is dated Sunday, 21st November 1993 and it states –

> "1. My conclusions, for the reasons set out below, (and many other reasons which cannot be expressed in a short Opinion), are that these claims are entirely without merit. The fact that they have been made is no more than a nuisance albeit an expensive and time consuming nuisance.

[1] *The Solicitor General has pointed out that this reference to the retirement of the Bailiff was an error. What should have been said was that 1993 was the year in which the Attorney General had been appointed to the vacant post of Deputy Bailiff.*

2. My unreserved advice to the Crown and to the States is that the claims be rejected and if persisted, then resisted to the uttermost, in the same way as earlier spurious claims to ownership of the whole of and to part of Jersey's foreshore have over the centuries, been rejected and successfully resisted by our distinguished predecessor Law Officers learned in the Law of Jersey and the Receivers General, a number of whom were also most learned in the law of Jersey."

There then follows a chronological summary which I will not take members through because it is really what I have been telling members already. But the further advice which comes at the end says -

"15. As to any private right in the foreshore in issue, the Royal Grants put forward by the Plaintiff have, of course, been examined minutely. These are wholly favourable to the Crown, because (deliberately in my opinion), they omit to confer expressly the "*litus maris"* or sea shore pertaining to the Fief de la Fosse. All the Grants do confer are rights over the foreshore expressed in latin which rights statute has since abolished. What is more, there is no evidence that such a grant of ownership of foreshore was ever prayed for when it could so very easily have been. Contrast to the grant of the Fief of Sark which expressly confirmed foreshore in great detail, as was prayed for by the grantee word for word.

16. There is, moreover, not a shred of evidence that the many Seigneurs of the Fief de la Fosse ever took or exercised acts of proprietary possession (as known to Jersey Law) of any part of the riparian foreshore. The reverse is quite true. Successive Seigneurs of the Fief de la Fosse have stood by quite idly whilst the Crown openly exercised proprietary possession of the foreshore in issue, granting by concession and otherwise to third parties all manner of licence over parts of it and receiving the resultant revenue.

There is nothing which I have read or to which my attention has been drawn which could remotely allow me to differ from the learned Opinions to which I have referred in this Opinion.[that is Mr. Kidwell and Mr. Gadney.] However, I advise that any future conveyances of the foreshore by the Crown within the curtilage of these claims can and should contain the customary guarantee of title to the land conveyed."

Senator Walker

I'm very sorry to interrupt the Solicitor General but I don't know if I'm alone but I'm having trouble in picking up some of what she's saying.

Solicitor General

I'm sorry. Do I need to go back and retrack or shall I simply …….

Senator Le Claire

Sir actually, Madam Solicitor General, through you, I was going to actually ask at a later stage without interrupting, but as we've really interrupted. As Madam Solicitor General has been interrupted at this stage I wasn't going to interrupt you Madam Solicitor General, would it be possible for members to receive this advice which has not been available as it contains, in the Madam Solicitor General's words, some very important advice given by Mr. Sowden and indeed Mr. Bailhache in the latter part of 1993 and for Madam Solicitor General to read it through right now is very helpful but I do believe that we do need to study and digest that information.

Solicitor General

Yes. Firstly on the subject of being audible, can everybody hear me? and please if at any stage I do become inaudible and somebody actually does want to hear me, could those who would like to hear me let me know.

Senator Ozouf

The nearer the microphone you are Madam, the better.

Solicitor General

Right. Is this……..

Senator Le Maistre

May I just say that it may be helpful for the Solicitor General to use the table which some members have on their desks which raises the microphone at the same time.

Solicitor General

Right. Shall I leave it as it is for the minute and then if there is a further problem do a bit of re-arranging, at the moment I have got my books balanced.

Senator E. Vibert

I wonder if it would help to make the suggestion that the Solicitor General only read the salient parts of the advice rather than the whole of the letter.

Solicitor General

I have to say the difficulty with my only reading the salient parts of the advice is that it will be my view on what's salient, but members may, something which I think is not salient, a member might think is salient indeed and I apologised at the start, I realise I am going to be lengthy and I fear I may be tedious but I do think members, I have assumed that members, want to hear it.

Greffier

They do absolutely.

Deputy Troy

Sir, can I just say that the point where we lost the full sound effect was at the second opinion. The Bailhache opinion.

Solicitor General

We haven't got to the Bailhache opinion yet. This is ……. I really must have been …..

Deputy Hill

Could I just raise something completely, I've got on these new machines and I'm told there should be a loop system and I'm told the loop is not working. I've got these deaf aid on you see but I'm not hearing

too properly. Do you know Sir, whether the loop system is on. I was going to send a message to the usher but there's no usher.

Deputy Crespel

If I may suggest to the Solicitor General that where I started to lose her was after she'd finished explaining that there was a sort of schedule of events which she'd already spoken about.

Solicitor General

Right, I move to the conclusion to Mr. Sowden's conclusion.

Senator Le Claire

I'm sorry Madam Solicitor General, I wondered and I did actually rise to ask because so many people have lost you in respect of the beginning of the written advice from Mr. Sowden I would particularly like to have copies of the hitherto unavailable letters from Mr. Sowden and the Bailiff that you're reading from. Mr. Sowden's from 21st November 1993 and the Bailiff's on 2nd December and I think that whilst it's important for us to hear what has been written it is more important for us to digest that, and I think that a very …..

Solicitor General

On the subject of making copies of the advices, certainly there is no problem once the advice has been disclosed to the members as an Assembly, there is no problem with the loss of privilege which has been a great concern in members reading and seeing the advice. I am very nervous about putting copies, multiple copies into circulation and that it because it is very easy for documents to get lost and the one point which I think must be kept in view at all times is that if the litigation is not settled it will continue and if it continues it will end one way or the other to state the obvious. One way of course would be that the defendants are successful. The other is that Les Pas may be successful. Now if suppose the settlement is not approved by the States and the litigation continues it is crucial that Les Pas should not see any opinions at all and I really am extremely nervous about the possibility of any papers getting into wrong hands. It's partly law, it's partly tactics if the States do not approve the settlement Advocate Binnington is going to have to argue it and it would be disastrous if he had to argue a case when written advice was in the hands of the other side and it may sound neurotic but I've argued cases myself and it just shouldn't happen and so again probably the best thing for a compendium of the written advices to be available in the States Greffe for consultation but I would be very unhappy about making copies and making copies. It's only got to get stuck in a photocopier.

Senator E. Vibert

I think that would be perfectly acceptable. It's been working so far as long as we do have an opportunity to go and read …..

Senator Le Claire

My concern was that it wasn't available at all until now so if it's available in the room across the road then that's fine Madam.

Solicitor General

Right, I'll go back to where I became inaudible and as I say if anybody cannot hear me please do let me know. I said that I would omit from Mr. Sowden's advice the chronological history as I've given it but his concluding advice was –

"15. As to any private right on the foreshore in issue the Royal Grants put forward by the Plaintiff have of course, been examined minutely. These are wholly favourable to the Crown, because (deliberately in my opinion) they omit to confer expressly the "*litus maris"* or seashore pertaining to the Fief de la Fosse. All the Grants do confer are rights over the foreshore expressed in Latin which rights statute has since abolished. What is more there is no evidence that such a grant of ownership of foreshore was ever prayed for when it could so very easily have been. Contrast the grant of the Fief of Sark, which expressly conferred ownership of the foreshore in great detail, as was prayed for by the grantee word for word.

"16. There is, moreover, not a shred of evidence that the many Seigneurs of the Fief de la Fosse ever took or exercised acts of proprietary possession (as known to Jersey) Law of any part of the riparian foreshore. The reverse is true. Successive Seigneurs of the Fief de la Fosse have stood by quite idly whilst the Crown openly exercised proprietary possession of the foreshore in issue granting by concession and otherwise to third parties all manner of licence over parts of it and receiving the resultant revenue."

17. There is nothing which I have read or to which my attention has been drawn which could remotely allow me to differ from the learned Opinions to which I have referred in this Opinion. However I advised that any future conveyances of foreshore by the Crown within the curtilage of these claims can and should contain the customary guarantee of title to the land conveyed."

It is then signed by Mr. Sowden.

Before I pass to the advice which was given by Mr. Bailhache I should explain that last reference to conveyances containing the customary guarantee of title. When land is sold in Jersey it is either sold with what is referred to as *fourniture et garantie* or it is sold *sans fourniture et garantie*. If it is sold with a guarantee of title and the title is defective the purchaser has a remedy against the vendor. If it is sold *sans fourniture et garantie* that is without a guarantee of title and the title turns out to be defective then the purchaser has no recourse against the vendor because the vendor is entitled to say "well I didn't guarantee the title". Now historically the Crown has always sold *sans fourniture et garantie* that is without guarantee of title. That is nothing to do with this case it has always been the way in which the Crown has transacted. Historically for as long as one can remember, it is simply standard in a transaction with the Crown and the advice which Mr. Sowden had given was that although he advised that the claim was without merit and should be contested nevertheless if there were any future purchases they should be with a guarantee of title.

The other piece of written advice was that of Mr. Bailhache, as he then was and that was advice of 2nd December 1993 and again I propose to read it. It is addressed to the President of the Policy and Resources Committee and it says –

"Sir,

I refer to the outstanding claim to ownership of part of the foreshore made by Les Pas Holdings Limited. The Committee will receive separately herewith an Opinion from Her Majesty's Solicitor General who was entrusted by me in my capacity as Her Majesty's Receiver General with primary responsibility for the preparation of a defence to the claim. The Solicitor General expresses in unequivocal terms his Opinion that the claim of Les Pas Holdings Limited is without merit.

As explained in the Solicitor General's Opinion, the Crown and the States commissioned a joint Opinion from Mr. Raymond Kidwell, Q.C., and Mr. George Gadney. This opinion is dated 29th August, 1990, and was copied to you. It is of course available to the Committee. The authors of the joint opinion conclude by asserting –

> "The claims of Mr. Falle should surely fail."

It was thought desirable to make that joint Opinion available to Les Pas Holdings Limited and their legal advisers. In August 1993 the Opinion of Mr. Michael Fysh, Q.C. was given to the Solicitor General and myself, and copies were forwarded to the Chief Adviser and to the Greffier of the States. Mr. Fysh concludes –

> "In my view were the present claim to the foreshore of La Fosse to be tested in Court the feudal claim would prevail to that of the Crown."

Both Mr. Kidwell and Mr. Fysh are distinguished leading Counsel. Mr. Kidwell has been a Deputy High Court judge for a decade. Mr. Fysh is the editor of legal journals and the author of text books. Mr. Fysh's Opinion has been studied by Messrs. Kidwell and Gadney. At a conference in London on 25th October, 1993, attended inter alia by you and the Chief Adviser. Mr. Kidwell opined that he saw no reason to change the views expressed in the joint Opinion. The Crown and the States were substantially more likely to win than to lose although the possibility of losing could not of course be entirely discounted. It appears to me that that is a realistic appraisal and that the options available to the Committee and the States should be viewed against the background. There are in my opinion three available options -

(i) to wait and see;

(ii) to litigate;

(iii) to seek to compromise.

I shall examine each of these options in turn.

1. this option is essentially the one which has been followed since the summonses were served in December 1989. In my opinion it will not be a viable option for much longer. It is unlikely that the claim will go away. A considerable investment has been made in the proposed scheme by Les Pas Holdings Limited and I doubt that that investment would be quietly abandoned. As soon as the company senses that there is no will to compromise, it is likely that notice would be given under the procedural agreement to activate the litigation. If there is to be litigation, there is in my opinion some tactical advantage for the Crown and the States in being the activator of it. The other material factor is that the States have begun committing substantial funds to land reclamation schemes to the west of the Albert Pier and to the south of La Collette. It would not in my opinion be prudent or sensible to continue with those schemes without taking a decision on one or other of the following options.

2. The Committee has been advised that it has been more substantially more likely to win than to lose if the case proceeds to Court. A victory in Court would of course be the most satisfactory conclusion. The possibility of losing cannot however be entirely discounted. The Committee will wish to be advised of the cost of litigation. Substantial funds have already been committed. When the time of the Solicitor General and Crown Advocate Nicolle is added to the fees and disbursements of experts engaged thus far, the cost probably already exceeds a quarter of a million pounds. If the case proceeds to trial and were ultimately to go to the Judicial Committee of the Privy Council, the cost on the Crown/States side would be likely to exceed one million pounds. Even if successful, part of that cost (perhaps a large part) would not be recoverable. This inhibition naturally applies in equal measure to the other side. On the 2nd October, 1933 Jurat G.F.B. de Gruchy wrote to the Receiver General abandoning his claim to own the foreshore adjacent to his Fief at Noirmont stating:

> "But, whatever my rights may be, the threat of litigation by the Crown leaves me defenceless, because the financial crisis has left me so embarrassed financially that I am in no position to fight an action at law, especially one which would no doubt be carried to the Privy Council, where, with the money and the influence of the Treasury against me, I should be ruined whether I won or lost."

How genuine were those sentiments may of course be open to conjecture.

The cost of complex litigation of this kind is a factor to be weighed in the balance. Another factor is the risk of failure. The risk, as advised above, is small. But the consequences of failure would be potentially catastrophic. Not only would the Crown lose that foreshore adjacent to the Fief de la Fosse remaining in its ownership, but also the States would lose those reclaimed areas upon which inter alia the Elizabeth Harbour and sundry buildings and engineering works at La Collette have been constructed over the past ten years. I repeat that the risk of failure is small. On the other hand the Crown and the States have a great deal more to lose than the other side.

3. It is curious that, notwithstanding many challenges to the title of the Crown to the foreshore, there is no decision of the Royal Court settling the matter once and for all. Two possible conclusions may be drawn. The first is that the challengers have all recognised the superior claim of the Crown. Once Crown title has been firmly asserted, the challengers have faded away. The second is that neither the Crown nor the challenger have wished to risk failure and have therefore compromised. History would suggest that there are arguments for either conclusion. There is evidence in the 19th century of claims fading away. On the other hand in 1993 Jurat de Gruchy's claim was withdrawn upon terms. On 30th September 1933 the Receiver General wrote to Jurat de Gruchy –

   > "I am now further instructed by the Treasury to inform you that in the event of your being willing to waive any claim to the foreshore I am empowered, on behalf of the Crown, to offer you on terms to be agreed the necessary concession to enable you to exploit the quarry."

   A memorandum from the Solicitor to the Board of Trade to the Treasury Solicitor of 11th October 1933, giving general advice in relation to claims to the foreshore is also instructive. [and he then quotes from it] –

   > "I find that a discussion without prejudice with a claimant's solicitor is always useful, as they often fail to understand the Crown's position in these matters. If a claim is pressed I ask for a statement of the claim, a reference to any Crown Grant, and evidence of acts of ownership particularly from the Court Rolls. If this is supplied a claim is often either admitted or compromised on agreed terms and expensive litigation is thus avoided."

   There is therefore precedent for compromise."

In relation to this claim however it appears to me that there can and should be no question of conceding title. As rightly emphasised by the Solicitor General, claims to the ownership of the foreshore have over the centuries been consistently resisted. Neither the Crown nor the States could be advised to concede title to Les Pas Holdings Limited.

The only possibly compromise would be one whereby the claim of the company was abandoned in consideration of the Crown agreeing to lease to it the relevant area of the foreshore. The Crown would not however be advised to entertain such a compromise unless the States were content to settle on such terms. Such a compromise would obviously involve an agreement to the construction by either Les Pas Holdings Limited or by joint venture by that company of a marina and housing

development subject naturally to planning and all other requisite statutory consents and permissions.

In conclusion I suggest that the Committee might find it helpful to approach this difficult decision by answering three questions expressed schematically below –

1. Does the Island Development Committee envisage in planning terms the development of a marina and housing at La Collette. If the answer is no I.D.C. should refuse the planning application. If the answer is yes, the next question is –

2. Do the States wish to see such a development achieved by private enterprise or by the States. If the answer is by the States they should litigate. If the answer is by private enterprise the third question is –

3. Do the States consider that the risks and expense of litigation are outweighed by the desirability of choosing a private developer to undertake the task. If the answer is yes the States should litigate. If the answer is no, the States should compromise."

And that was the advice of the Attorney General setting out the options.

Senator E. Vibert

What was the date of ……

Solicitor General

That was 2nd December 1993 and on 6th December

Senator Le Claire

I'm sorry, I thought you were reading Madam Solicitor from the Receiver General's letter of 2nd December.

Solicitor General

The Receiver General and the Attorney General are the same person. The office was held by Mr. Bailhache. Those written advices were before the Committee on 6th December 1993 and the Law Officers attended and the Act of the Committee notes that the advices were for it and the decision of the Committee is that the Committee that it would resist the claim. That takes the chronology up….

Deputy of St. Martin

I missed that lot, sorry

Solicitor General

The Committee decided to reject the claim.
6th December 1993.

Senator Le Maistre

Sorry to interrupt but I think it's important as we go that we try to understand and was there any indication at that point and advice to Policy and Resources as to what the implications were of

continuing with the development that was being planned whilst at the same time being faced with such a claim.

Solicitor General

Yes. Mr. Sowden's advice had been that there should be guarantee of title of all acquisitions and Mr. Bailhache's advice, he said that "the other material factor is that the States have begun committing substantial funds to land reclamation schemes to the west of the Albert Pier and to the south of La Collette. It would not in my opinion be prudent or sensible to continue with those schemes without taking a decision on one or other of the following options –

Senator Le Claire

I2 think the point is made there Madam Solicitor, through you Sir, that Madam Solicitor General did actually read that out a few minutes ago and having access to these documents later on will be enormously helpful.

Senator Ozouf

May I just for confirmation. Was that advice from the Receiver General was tabled and considered by the Policy and Resources Committee of the day and that they received both of those advices, considered them and made the decisions to continue with the investigations.

Solicitor General

They received the advices …….

Senator Ozouf

I ask that question because I'm being whispered to by my colleague next door that it's not in the minutes so that's why I'm just seeking clarification on this.

Solicitor General

I'm surprised that it was not in the minutes because I had thought that that one was.

Greffier

It's difficult for Senator Ozouf to interpret……. Senator Vibert…...

Senator E. Vibert

Well I like the Senator doing my job but in fact I might have missed it or in fact the Greffe office may have missed it in the minutes that were put out but I have no recollection, and I've been through them in a long trawling exercise and I can't find that letter anywhere or a discussion on that matter and it's such an important and vital letter I was in fact quite stunned when I read that there had been that letter because it clearly would have had to have gone to the Committee for consideration. I noticed that on 21st December there's a note there that you confirmed the position that Les Pas claim was without merit to that Committee and that was after that letter was actually tabled.

Solicitor General

This was the Act of 6th December.

Senator Le Claire

May we have the minutes brought from the other building so that we can from time to time individually or collectively confirm or otherwise the contents of the minutes because I think the process is quite important as to whether it's been stated whether or not these decisions to continue to develop were made by the Committee whether it was a full Committee and whether or not they had, I know it's going to possibly be the subject of a Committee of Inquiry but we're trying to get to the point where we understand and I can't help but feel that now is not a good time to start criticising members as they rise for clarification.

Solicitor General

Can I, or shall I read the minutes. Right. This is the minute of 6th December 1993 and the minute reads as follows –

> "The Committee, with reference to its Act No. 3 of 18th August 1992, recalled that it had discussed a joint opinion prepared by Raymond Kidwell, Q.C. and Mr. George Gadney concerning the ownership of the foreshore at Havre des Pas and had stated that in the light of the joint opinion the claim of Les Pas Holdings Limited to be legal owners of the land concerned should be strenuously resisted.
>
> The Committee received H.M. Attorney and H.M. Solicitor General and noted a letter dated 2nd December 1993 from the Attorney General and an opinion of the Solicitor General dated 21st November 1993 together with documents relating to previous claims to Jersey's foreshore."

Now those two are the two that I've just been reading from.

> "Mr. Sowden stated that his opinion had been prepared for the benefit of the States in the event of there being litigation and he was satisfied that the claim of Les Pas Holdings Limited was entirely without merit and should be strenuously resisted. Mr. Sowden was concerned to ensure that in the event of litigation the States should secure continuity of legal representation from the Solicitor General designate, Crown Advocate Stephanie C. Nicolle who had given a great deal of assistance in the work done by the Solicitor General. Mr. Sowden indicated that when he moved to the post of Magistrate he would be honoured to assist the Solicitor General designate in her representation of the States. It was noted that the opinion of Mr. Michael Fysh, Q.C. acting for Les Pas Holdings Limited was available and Mr. Fysh had concluded that in his view were the present claim to the foreshore of La Fosse to be tested in Court the feudal claim would prevail to that of the Crown. Notwithstanding this conclusion Messrs. Kidwell and Gadney had seen no reason to change their view. The Committee thanked the Solicitor General for the extent and depth his research of this matter and decided to accept the legal advice that the claim of Les Pas Holdings Limited was without merit."

Senator Le Claire

I think this an important question at this point if you could bear with me. Just first of all are you reading the minutes from 6th December.

Solicitor General

I'm reading a minute of Policy and Resources Committee 6th December 1993.

Senator Le Claire

Because putting together the pieces from what we've heard this morning, Mr. Sowden's advice was that it should be resisted because it's entirely without merit and you did say earlier when you were reading out the part that was inaudible at some points, and I got the gist of it which was basically it should be resisted and continuously vigorously be resisted.

Solicitor General

Mr. Sowden advised that it should be resisted and that any further transfers of the foreshore should have a guarantee of title.

Senator Le Claire

Did he not actually when he gave his advice which you read out from earlier which is the two letters I have asked to be available onwards. Did you not actually say, as you read, that they should be resisted and once resisted continuously and vigorously resisted.

Solicitor General

Yes. Do you want me to go back to that matter.

Senator Le Claire

Yes I think it would help. What the Committee is actively putting forward next is a watered down version of Mr. Sowden actually said. Mr. Sowden said that it should be resisted and …..

Solicitor General

Mr. Sowden, the opening bit, I'll read the bits that I think that you're focussing on. "My own reserved advice to the Crown and to the States is that the claims be rejected and if resisted then resisted to the uttermost" and then at the end he said, no actually that probably was the bit, that

Senator Le Claire

That was the key part was it?

Solicitor General

That was I think was the bit and then at the end he advised that conveyances should contain the customary guarantee of title.

Deputy Hill

Could I ask the Solicitor General, having read the Fysh report opinion there was another opinion by Mr. Birt who said it was a compelling case. He was I would have thought the A.G. designate, were those papers ever made available to Policy and Resources. Because they're available now I have seen them in the Greffe.

Solicitor General

That's a practical question which I'm afraid I can't answer because I didn't have conduct. Do you have the date of the letter from Mr. Birt?

Deputy Hill

No. But I know it's in the papers because I would not have known if I hadn't seen it. It follows the Fysh report or the Fysh opinion.

Solicitor General

Then I'm afraid that's one of the historical questions which I can't answer off the top of my head.

Right that takes the chronology to the end of 1993 and at the end of 1993 Mr. Bailhache ceased to be Attorney General though he remained as Receiver General for some little while longer and Mr. Sowden ceased to be Solicitor General. He became the Magistrate, Police Court Magistrate as it then was, Mr. Bailhache was succeeded by Mr. Birt, the present Deputy Bailiff and Mr. Sowden was succeeded by myself. And the next matter is the question of representation. This is in fact one of the matters I would not have regarded as crucial to the question which the House has to consider and that is whether it is or is not in the public interest to settle the litigation but it is one upon which attention has been very considerably focussed by third parties and in such a way I think that it is important that I should go over the sequence.

Some letters have been circulated I think some by an association called SOS, some by others. Letters from Mr. Sowden and possibly also letters from me, concerning resources for the arguing of the case and I think it is right to say at this point that Mr. Sowden was, and this is something which I do recall of my own knowledge, Mr. Sowden was very concerned that there should not be a sparing of resources and he also was concerned that the further research following the 1993 opinions that the impetus should be maintained and that there should be a continued completion of the research and generally of prosecuting the matter.

The letters written about the resources were written in December 1993 when it was envisaged that the conduct of the litigation would remain within the Law Officers Department and therefore that it would be conducted by me and that Mr. Sowden would assist to the extent that his other duties made it possible. When the new Attorney General took office one of things which he did was review the work demands and the resource demands within the department and on my elevation to Solicitor General had left vacant a post of legal adviser we were unable to recruit an advocate to replace me because as members would probably know it is not easy to recruit lawyers to the public service. This meant that whereas in Mr. Sowden's time there had been a legal adviser namely myself who was a qualified advocate and able to do litigation, the ordinary litigation. I was not replaced by a qualified advocate. This threw much of the litigation burden onto the Solicitor General which it hadn't been before and there was also the further problem that the former Autorisé de la Partie Publique had in 1991 been asked to resign and had done so. And despite attempts to recruit a local lawyer for that post those were unsuccessful as well. So the responsibilities

Senator Le Claire

Madam Solicitor what is that post please, sorry.

Solicitor General

It's the, Autorisé de la Partie Publique was a post occupied by a Jersey qualified lawyer usually a solicitor not an advocate, to deal with the property matters, the conveyancing, generally the land law matters. The former holder had been asked to resign and had done so. We had had successive unsuccessful attempts to recruit which we had never recruited anybody

Senator Le Claire

Why was he asked to resign and by whom?

Solicitor General

He was asked to resign because the work of his department was not being discharged, and the Legal Services Committee under Sir Godfray Le Quesne had actually received many representations it's just not working. Any way we were never able to get anybody. The work of Autorisé had devolved upon me while I was a Crown Advocate and as there was no other person able to do it, it's quite specialised I took it with me when I became Solicitor General which meant that when I moved into Mr. Sowden's position I took with the Autorisé's work, a certain amount of my former legal adviser work with civil litigation because we hadn't been able to replace me in that and from a resources point of view it was impossible for me to have the conduct of serious litigation such as Les Pas was going to be. And therefore the new Attorney General having reviewed the resources of his new department and the demands made of it came to the conclusion it would not be possible to retain Les Pas in house and I can actually recall the words in which he said it. He said "I would not have a Solicitor General" which is fair comment. Therefore there was a meeting with the then President of Policy and Resources and the then Chief Adviser to the States concerning the representation and this took place in, I think it was in March or thereabouts of 1994 and the subject matter of the meeting, was, if members will bear with me, I'm afraid I have a number of files here, yes, the meeting took place on 31st March 1994.

The then President said that Policy and Resources were committed to fighting the case but he was concerned about costs and he expressed some doubt as to whether Les Pas actually would proceed to litigation and the proposal put forward was that if the litigation trigger was pulled and the litigation went forward a private sector lawyer would be instructed. In the interim Mr. Sowden would continue with resources to the extent he was able and my note is, on a modest basis, because of course he had another office to discharge, I would deal with routine correspondence and then if it became litigation it would go into the private sector and the private sector lawyer who was identified was the present Attorney General, Mr. William Bailhache and Mr. Bailhache was at that stage a litigation lawyer and was generally regarded as one of the most competent litigation lawyers available. He was one of the two or three leading litigation lawyers.

And again this is a matter which I would not have regarded as crucial to the essential decision but with regret I think I'm going to have to dwell upon it because there have been some extraordinary misrepresentations put into the public domain on the subject of Mr. Bailhache to the extent that, if even a part of these fabrications were believed members might think his advice was tainted and so I'm sorry that I'm going to detain members but is very important that I clarify this one to the fullest possible extent and the position at that stage was that Mr. Bailhache was a litigation lawyer with the firm of Bailhache Labesse and I'm now going to have to give members a little bit of history about the merging of firms.

The firm of which Advocate Falle had been a member when he first began thinking about land reclamation was a firm which was then known as Bois and Bois, Perrier Labesse and it had been formed by the merge of two firms, Bois and Bois had merged with Perrier and Labesse and they had called themselves Bois and Bois, Perrier Labesse. Bailhache and Bailhache was a firm which was simply called Bailhache and Bailhache and had been for, since it had been first formed. These firms were unrelated to one another. During the course of the, at some time after the first thoughts which Advocate Falle had had on the subject of land reclamation the firm of Perrier and Labesse and Bois and Bois split and went back to their original components so that there were now two firms, Perrier and Labesse and Bois and Bois.

In the fullness of time there was then a merger between two firms, one was Bailhache and Bailhache the other was Perrier and Labesse and this took place well after the split of Bois and Bois from Perrier and Labesse. Bois and Bois having split the merge with Bailhache and Bailhache and they took the new

name of Bailhache Labesse. That is one relevant thing. The other relevant thing is that at an earlier stage in his domestic life Advocate Falle had divorced from his first wife or possibly vice versa and in his matrimonial affairs he had been represented by Advocate Michael Gould, who at that stage had been a senior partner in Bailhache and Bailhache as it then was and he had been advising Advocate Falle on was Advocate Falle's matrimonial affairs. When the question of Mr. Bailhache acting for the defendant came up objection was raised by Advocate Falle and he said there was a conflict. Now the question of conflict was looked at by a number of lawyers. Mr. Bailhache himself. It was considered by the Attorney General, by me and by English counsel and we thought that the suggestion of conflict was so far fetched that it simply was not sustainable. The alleged conflict was that because some people who had been colleagues of Advocate Falle's in the day when Perrier and Labesse had been Bois and Bois Perrier Labesse were now colleagues of Advocate Bailhache in the merged firm of Bailhache Labesse. Advocate Bailhache might perhaps meet them at the coffee machine and they might suddenly say I remember ten years ago Advocate Falle telling me something about this action. Now it has been said and wrongly said that there was an application by Les Pas to have Advocate Bailhache disbarred from acting. That is not correct, I don't know where that came from, it is not correct. What actually happened was Les Pas kept saying they thought that he was disbarred but refusing to do anything about it and in the end because this delay was in nobody's interest. I said right, I'm going to take a representation to Court asking the Court of declaration that Mr. Bailhache is not debarred and I took the application to the Court and for declaration and the arguments as I say of Les Pas were firstly that because many years previously Advocate Falle had been a colleague of people who were now colleagues of Advocate Bailhache and might in passing, have said something to them which they might in passing inadvertently say to Advocate Bailhache, assuming they all spent the day chatting round the coffee machine, that was a conflict.

Now I didn't see it as a conflict then. I don't think it as a conflict now. Members will know that my application was unsuccessful and the Court thought that there was a conflict. I didn't agree with it then, I don't agree with it now. I thought it was absolutely preposterous and the other one was that because Advocate Gould had acted for Advocate Falle in his matrimonial proceedings Advocate Gould might know something about Advocate Falle's financial affairs which for some unknown reason he might decide he might like to pass on to Advocate Bailhache. I thought it was absolutely ridiculous but the Court thought otherwise. And that is the basis upon which it was held that Mr. Bailhache could not act. Now some of the things which have been said in the public domain are not only pure fabrication, absolute fiction, but they are, I'm sorry to say that they appear to me to be, positively malicious and quite extraordinary. I heard some of them being said and I was actually saddened to hear them being said and this is in camera, members will know that I'm referring to the address by Mr. Shenton. I was saddened to hear a man like Mr. Shenton voicing what I can only describe as malicious fiction that Advocate Bailhache had acted for Les Pas that he had been concerned in Les Pas' business matters. It saddened me, it saddened me

Deputy Hill

May I just raise this. I was present at that meeting and I certainly didn't hear that being said. Maybe I misunderstood.

Solicitor General

This was the meeting outside the Town Hall.

Deputy Hill

Yes the one I was at and I certainly in actual fact.

Senator Le Claire

And I was there too and I didn't here that either.

Solicitor General

Well I noted it and it was controverted publicly in the JEP by the Vice-President of Policy and Resources and if it was not said I would have expected Mr. Shenton to say that he had not said it.

Senator Le Claire

Madam Solicitor may I at this point just make something quite clear, through the chair. I was at the meeting and I'm getting told to sit down. I was at meeting, I was at the meeting at St. Martin and I was also at the meeting outside the Town Hall. It was very difficult for people to hear what Mr. Shenton was saying at the Town Hall and I've just been listening to Madam Solicitor General telling us, and quite rightly she is horrified by any allegation that somebody would make that accusation but I did not hear that said what I did hear quite clearly said and this is the only thing that I can say, I was within quite good hearing range of Mr. Shenton at all times was that he had said that the Attorney General was not able to act on behalf of the States because he had been invited to a lunch which was then put as the reason why because they discussed the issue very briefly, have you heard about this and Mr. Shenton spoke up for the character and the conduct and the ability of the Attorney General and his only derogatory remark was that perhaps Mr. Bailhache could have had a better friend than Mr. Falle. I did not at any time hear him make the claims that you're now saying.

Solicitor General

Right I was

Senator E. Vibert

I'm sorry can I just interrupt because I was holding the loudspeaker so I did hear everything quite loudly and the Solicitor General is absolutely right. He did say that he worked for Les Pas Holdings I heard the Solicitor General say "that's not true" because he was almost standing next to me and I looked at her and I said "you're right, that's not true" because in fact at all inquiries that I've been looking at it was obvious that he had never done work for Les Pas and I rang Dick Shenton the next day and I said "Dick don't ever say that again on the public platform because that's not what the record says". So, whilst I don't like going against my colleagues who are good friends of mine I think it should be a truthful House, they may have missed it or they didn't hear it but I was standing right next to the gentleman holding the microphone and I was only two feet away from the Solicitor General.

Deputy Hill

Could I just add as well, because I think it's rather important that this matter was questioned at my meeting in St. Martin and in actual fact Mr. Bailhache was defended by Mr. Crill and there was a confrontation and in fairness to Mr. Shenton he did say there may well have been a misunderstanding but he stood by Mr. Bailhache and in fact at the end of the day, at the end of that meeting Mr. Crill at the end of the discussion, Mr. Crill said that "yes he now understood what Mr. Shenton was trying to say" and also he thought that Mr. Falle had acted disgracefully and anyone who was at the meeting at St. Martin will bear that out, because I don't think in any way anyone has tried to impugn Mr. Bailhache. I think Mr. Bailhache has been treated or been seen to be treated unfairly. I would like to support Mr. Bailhache on that.

Senator Le Maistre

I would like to raise one more point through the chair. It's an attempt to be helpful. There is a conclusion to that Court case in 1995 which some members may not have seen which I would have thought could be helpful if the Solicitor General were to read it because I think it then makes it clear what the issue is about.

Solicitor General

Sorry, that is the Court judgement.

Greffier

The end of the 1995 judgement.

Solicitor General

Yes, well certainly the judgement was that Mr. Bailhache could not act and as I said I didn't agree with it at the time and I don't agree with it now.

Greffier

Is there any particular part, Senator you wanted…

Senator Le Maistre

There is a conclusion, the representation was dismissed but there is the conclusion to that judgement.

Solicitor General

Yes, I did say that that my representation was unsuccessful and that the Court held that Mr. Bailhache could not act but it was not on any grounds such as he had acted for Les Pas or had interests in Les Pas or anything of that sort.

Deputy Hill

Can I just say for a matter of clarification also the action was by Les Pas Holdings versus the Receiver General in which case you appeared for the Receiver General.

Solicitor General

Yes but the action title is Les Pas Holdings versus the Receiver General but the representation was brought by me for the reasons I've given. They simply wouldn't bring the matter to an issue. Therefore that having happened it was necessary to select a further representative and again one member has asked who selected Advocate Binnington and on what basis. The answer is that the litigation was obviously going to be heavyweight litigation and there are some firms which can do heavy litigation and some which can't. Any firm which doesn't have a dedicated department is actually not competent to handle serious litigation. And there were a number of firms which now were already conflicted out one way or another. The firm of Bailhache Labesse was conflicted out because if Mr. Bailhache couldn't act on those grounds neither could anybody else in that firm. The firm of Ogier and Le Masurier was conflicted out because when in private practice at Ogier and Le Masurier Mr. Birt had acted for Les Pas. The firm of Crills was conflicted out because Advocate Michel of Crills had acted for Les Pas in the matter of the representation and this therefore narrowed the field. I don't wish to suggest by that Advocate Binnington was selected because nobody else was available. That is not so, he was already at that stage a Crown

Advocate, he had been made a Crown Advocate under the previous Attorney General he was a dedicated litigation lawyer and also Mourants was one of the firms with one of the biggest litigation departments able to give the proper attention to the case. Therefore Mr. Birt first thought of Advocate Binnington. Before he approached Advocate Binnington he asked me for my views and I thought it was a good choice but I also spoke with my predecessor, because he was familiar with the action, to find his views on Advocate Binnington, and his views on Advocate Binnington were that he was a good choice if Mr. Bailhache was not available. And so for the member who asked on the subject of that, that is the way in which Advocate Binnington was selected.

So chronologically we have come up to, that was 1994, it was not possible as I have said to have Mr. Bailhache and Mr. Binnington is going to act.

Deputy Hill

Could I, maybe it's the right time to ask this because some members were present at the meeting last week at Cyril Le Marquand House and I can honestly say I was rather disturbed to hear the Attorney General possibly questioning whether Advocate Binnington was the right person to continue with this, maybe I misunderstood what Mr. Bailhache was trying to say but I got a little bit of feeling actually of a certain air of lack of confidence in it. Would there be any …….

Solicitor General

Well I wasn't at the meeting because I was away and I haven't seen Mr. Bailhache since then but he certainly hasn't expressed it to me.

Senator Walker

No, through you Sir, there is no question that the Attorney General did not suggest that Advocate Binnington should not continue with the case, exactly the reverse. He made, I think, very strong points that he should continue with the case. I think what you're confusing the issue with, I think the Attorney General did express some concern, if that's not too strong a word about the length of time it had taken to bring the security of costs motion to the States. But that's all he said. But he very definitely in no way question Advocate Binnington's ability to continue with the case. As I say exactly the reverse.

Senator Le Claire

Could I just be helpful to say that it was my question through the chair that I prompted that when I raised the question as to why it had taken 12 months for Advocate Binnington to make the application for costs and that delay had actually been part of the reason why we were not awarded them and at that time, being very diplomatic the Attorney General said that it may be an issue that the Solicitor General wishes to cover today which I would like Madam Solicitor General to do so but he did make the case in confirming what Senator Walker said that it would be impossible for anybody to pick up a case of this magnitude in a month if we need to go to Court and be able to run with it.

Greffier

I'm sure Madam Solicitor General you're coming to this in due course to the cost of the application.

Solicitor General

Yes. I'll think I'll stay chronologically. And I'm in 1994 I'm afraid. There are a few years I'm afraid to work through. At this stage I'm going to refer to something and this is another of the things which I don't think, I would not have myself regarded as crucial, but it has been raised and it has had some ventilating and that is the correspondence in 1994 over La Collette Phase II and this has been put into

some documentation which Save Our Shoreline circulated to members. And the position in respect of that is that in 1994 consideration was being given to the purchase of areas of foreshore at La Collette from the Crown. The Receiver General was at that stage still the present Bailiff but he was no longer Attorney General and was not advising the States, he was simply dealing with the disposal of the foreshore on behalf of the Crown and the advice of the Law Officers was not specifically, it was not directly, taken by the Committees, it was drawn to my attention by the Director of Property Services who informed me that he was concerned that there was a proposal to buy an area of foreshore in respect of which there was a challenge as to title on the basis of a valuation which had been obtained by the vendor and without a guarantee of title and the matter was taken place in February 1994 and I wrote on the subject to the President of the Public Services Committee, again members will bear with me. I think I need another file now.

I wrote to the President of the Public Services Committee and copied the letter, no I wrote to Mr. Tucker and copied the letter to the Presidents of I.D.C., Public Services, Policy and Resources. Finance and Economics and the Chief Adviser and set out the risks of buying land in respect there was a challenge without a guarantee of title and I referred to an earlier letter from Mr. Sowden in which he had made the same points. I was subsequently contacted by the then President of Public Services and my note of the conversation was that because of waste disposal problems Public Services had to have the site at any price and that even if thereafter title was awarded to Advocate Falle and they had to pay him millions for it they still had to have it.

Following that I felt that I should write again to the President so I wrote to Senator Carter as he then was on 14th February, set out the risks and concluded by saying that whether the States wished to acquire the site at a price in excess of what their valuer had advised or to do so without guarantee of title or before the dispute was resolved were political decisions. But I did advise I thought it was not prudent. As I say that is not in my view crucial to the essential question which is what is in the public's interest now but I have referred to it because it has been raised by Save Our Shoreline.

That's 1994.

The litigation then began and therefore the effective conduct passed to Advocate Binnington and Advocate Binnington attended with me on the Policy and Resources Committee so that the Committee would meet formally with their, the Advocate who was going to be acting for them and the meeting was general. At the conclusion of the meeting the then President said that he would wish to ask Advocate Binnington if Advocate Binnington shared the, or if he could confirm the advice previously given that the case was without merit and Advocate Binnington replied that he did share that view. And although it's not in the Committee Act my recollection of his comment was that the points were superficial, the points of the Plaintiff were superficially attractive, but when analysed they fell away.

That was in 1995. There then began the task of discovery and discovery is a procedure in litigation where each party is required to furnish the others with a complete list verified by affidavit of all the material which that party either has or has at any future stage had, which may be relevant to any issue in the litigation. And the discovery I have to say was on a scale far vaster in the event than had ever been contemplated and the discovery exercise ranged over all the States Greffe records, the Royal Court records, Government House records and it took a very considerable period, particularly at the stage when advice was given by the new archives service that the documents could no longer be photocopied, they should be photographed and that created further problems. Eventually discovery was substantially completed. In 1997 there were some discussions between the Policy and Resources Committee as then constituted and some representatives of Les Pas.

I cannot go into detail over the negotiations and the discussions because they were being carried on on a political front but the stage came when Advocate Binnington and I were asked to attend upon the Policy and Resources Committee and the purpose there was for Advocate Binnington to advise in the light of the negotiation discussions whether the position was as previously or whether something had happened

in discovery which would make it advisable to concede on the requests of Les Pas. And I should say at that stage that although I wasn't party to the discussions I do know that the demands of Les Pas were very considerable in contrast, certainly in contrast to what is now demanded and following, certainly I'm trespassing into the political area here and I hope I'll be corrected if I'm wrong, but it has certainly appeared to me from the papers that following the meeting at which there was some quite extraordinarily high demands and negotiations fell away the next response from Les Pas was that they would be happy to start discussions again but their price would only go up. So that the Committee of that day was faced by apparently intractable negotiators. There was a meeting of the Committee on 29th July 1997 and I attended in the company of Advocate Binnington and I believe that Advocate Binnington had also written and Advocate Binnington's advice was that the discovery exercise, the researchers had not shown any evidence of Seigneurs claiming ownership. He did say that no litigation is certain but his overall advice was that the research had disclosed what he described on a more informal occasion as no smoking pistols, the research had not turned up any thing which would make it desirable to concede Les Pas' claims, even though they were at that stage almost unworkably high.

The negotiations then terminated because as I've said the demands were exorbitant, the negotiators were intractable and the advice from Advocate Binnington was that research had not shown anything which made a big hole below the water line in the States position.

Matters then moved on. There was compulsory purchase of an area of the foreshore and such interest as the company had and such interests as the Seigneur had, were both acquired. I don't think I need to say much about this save that one member has raised the query whether by purchasing by compulsory purchase the foreshore there was a tacit acceptance that the company owned it. That is in fact not the case. What was purchased was expressed to be such interest as the company may have and that was accompanied by a specific statement that the States denied that there was any such interest. So it was simply purchasing an interest if there was one, but the assertion was repeated that there was no such interest. Compensation was not at that stage assessed, it has been left over, and if the litigation continues and Les Pas is successful they will be entitled to compensation for the area which was acquired by compulsory purchase.

That brings matters up to almost to the millennium. There was then a judge was appointed to have conduct of the action and it was essential to appoint a non-local judge because any locally available judge would be conflicted out. They had all been Law Officers in their time and had advised one way or the other. Mr. Howard Page, Q.C., was appointed the Commissioner and he began what is called case management. Case management means the judge setting timetables and he began the exercise of setting timetables. There was also as members will be aware an application by the defendants, that is the Receiver General and the States, for security for costs and that was heard in 2002. The application was unsuccessful and it was following the unsuccessful application for costs that a further consideration was given to whether there was any merit from the public point of view in seeking to re-examine the possibility of a settlement.

Advocate Binnington was asked for a risk analysis, and he provided a risk analysis which I believe members have had copies of, and the risk analysis was far more unfavourable than as I think members will see the earlier advice had been and the risk analysis was without going over every word because members have seen it, that there was a real risk of losing, that he believed the case for the defendants to be the better case, but a real risk of losing. The written risk analysis is dated in November of last year. There had been an earlier briefer response from Advocate Binnington which is this real risk and it was at that stage that there had been discussion between the Attorney General and myself as to whether it was the duty in the light of this of the Law Officers

Senator Le Claire

I'm sorry Madam Solicitor, through the chair Sir, I'm totally lost here because I didn't get a chance to see yesterday to see the advice that was made available, I was going to try to look at it today.

Solicitor General

Oh right.

Senator Le Claire

You've skipped right over the most important part of the day I feel in thinking that, without being rude Sir, Madam Solicitor through you Sir, is that I'm here to specifically very very interested in hearing what the new advice is. We've just gone from the case without its merits to

Solicitor General

I'm sorry I thought that members had had copies.

Greffier

Available for viewing not to be circulated.

Senator M. Vibert

Could I ask Sir, I know the Solicitor General's coping very well, could it be read out so everyone can hear it please.

Greffier

It's quite lengthy isn't it, but it's possibly useful.

Solicitor General

Yes. I will, if members can bear with me I'll have to locate it because I hadn't been going to read it out because I thought members had read it. I wonder if the Greffier has a further copy because I have a mass of paper work and I'll take a few minutes to locate.

Senator M. Vibert

Sir, would it help if we had a 5/10 minute break?

Greffier

There is a copy in my office shall we simply adjourn for five minutes while it's located.

Reconvene

Greffier

Please don't stand it's an informal meeting. Very well break time is finished and we're all duly refreshed. Madam Solicitor over to you.

Solicitor General

Right, what I have here is the written risk analysis from Advocate Binnington and I'm going to read it in full. It's headed "Fief de la Fosse Risk Analysis" first sub-heading –

"**Agreed points**

1. The foreshore is limited in Jersey by the "*Plein de Mars*", i.e. the very high and very low tides occurring at the Spring equinox.

2. The burden of proof is on the Plaintiff to demonstrate its title to the land claimed.

3. The Plaintiff could show an entitlement to ownership of the foreshore if it can be shown that, as a matter of law in Jersey, all Seigneurs of maritime fiefs own the foreshore contiguous to their fief.

4. Alternatively, the law in Jersey on the question of grant is identical to that in England: the Plaintiff could in this case show title as against the Crown or the Public to any part of the foreshore –

   (1) by producing an express grant of it from the Crown;

   (2) by evidence from which such a grant may be inferred;

   (3) by construction of a grant in ambiguous or general terms.

5. It is not open to the Plaintiff to plead prescription against the Crown, and in any event such an argument could not be made out on the facts.

The Plaintiff's claim as to the geographical limits of the Fief de la Fosse

6. Insofar as the Eastern and Western boundaries of the foreshore of the fief are concerned the Plaintiff claims the Eastern boundary to be the boundary between St. Helier and St. Saviour (effectively Le Dicq) and the Western boundary to be the Douet de Hauteville (effectively Payn Street). The Western boundary, from Payn Street, is claimed to run in a straight line which passes from Payn Street and appears to continue through the entrance of the Elizabeth Marina to the low water mark.

Do Seigneurs of maritime fiefs own the foreshore as a matter of general law?

7. In our view, this is the area of dispute which is most likely to form the true battleground in this case. As set out in the subsequent sections, we do not consider that the Plaintiff has any good prospect of showing an express grant in favour of the Seigneur de la Fosse of ownership over the foreshore, we also do not consider that it has any good prospect of showing that it became entitled to such ownership by prescription over a number of years. Accordingly, it is this question upon which the Plaintiff's case is likely to be decided.

8. There is real difficulty in assessing the likelihood of success in this matter. The Court is being asked to determine a question which has never previously been answered. The Court will have to look both to the historical context of the Customary law, as well as, potentially, to modern policy questions.

9. In an historical context, we would identify different periods during which the law developed to deal with particular issues.

Droit de varech – [do members want me to translate the French as I go along? – *droit de varech* that's right of wreck]

10. In the earliest times (pre-1650, say) the questions for the Court were as to who owned wreck landing on the foreshore.

11. There is no doubt that under the customary law of Normandy seigneurs of fiefs bordering the sea had the right to wreck that landed upon the foreshore. Thus *Terrien* states that –

> "*En quelque terre que le varech soit trouve ou arrive, quand le Seigneur du fief le saura, il le droit faire garder sauvement au port, ou pres d'illec, le plus profitablement qu'il pourra: et ne le droit appeticier, renuuserser, mouvoir, ne muer devant qu'il ait este veu par le Baily, ou par son commandement …… Car tout ce que l'eau aura jette ou boute a terre, est varech Toutes les autres choses remaindront au seigneur, auquel fief le varech aura este trouve.*

[And that translates as –

> On whatever land the wreck is found or arrives when the Seigneur of the fief knows about it he must cause it to be kept safely in the harbour or near thereto as profitably as he can, and he cannot divide it, deal with it, move it or otherwise handle it before it has been seen by (and then there is a reference to le Bailly, that's not a Bailiff as in Jersey, the Bailiff was simply an officer of the Court) or by his commandment. For everything which water has thrown or cast up on land is wreck. All other matters remain to the Seigneur upon whose fief the wreck has been found.]

12. *Berault* states "*La garde du varech appartient au seigneur du fief sur lequel il est trouve, sans qu'il le puisse enlever ou dimineur aucunement jusque a ce qu'il ait este veu par la justice du Roy".*

And that translates as –

> The keeping of wreck appertains to the Seigneur of the fief upon which it is found without him being able to remove it or diminish it in any way until it has been examined by the King's Justice (or the King's Court).]

13. Le Geyt refers to Article 194 of the *Coutume de Normandie* which states that "*Tout Seigneur Feodal, a droit de varech a cause de son Fief tant qu'il s'etend sur la rive de la mer".* [That translates as "every feudal Seigneur has a right to wreck on account of his fief for the extent, sorry, so far as it extends along the bank of the sea".] He points out that *D'Argentre* was of the opinion that it was necessary to have a title to claim varech, and that it was regarded as a Royal Prerogative, yet English jurists believed that it could be acquired by prescription. As far as the position in Jersey he said that "*je ne sache point qu'a Jersey les Seigneurs ayent jamais allegue pour le varech autre chose que leur possession immemoriale, quand il fallut repondre a des Quo Warrantos". [*That translates as "I do not know that in Jersey the Seigneurs have ever alleged in respect of wreck anything other than their immemorial possession when it was necessary to reply to the *Quo Warrantos*. To interpose here, this is me now not Advocate Binnington, the *quo warrantos* were some assizes. Literally it means "by what warrant" and they were assizes held in the 14th century and some were later but the most significant were the 14th century when the Crown sent commissioners over to enquire of various people by what right they claimed to enjoy this or that right which they were exercising and it gets its name from *quo warrantos,* you know by what warrant or by what title, are you exercising this right? So what Le Geyt is actually saying there is that when the Seigneurs in the past were asked by what right did they claim wreck they simply said immemorial possession. They didn't point to direct grants.

The next sub-heading, I'm now back to Advocate Binnington's text –

Poingdestre and Le Geyt

14. Le Geyt's view on the *droit de varech* – [that's right of wreck] which appears to envisage Seigneural rights extending over the adjacent foreshore – is to be contrasted with his views in

relation to another matter: the right to gather vraic. In considering vraic, he writes that the Seigneurs cannot claim entitlement to vraic because "*c'est la resource du laboureur et les Fiefs ne s'étendent point au delà du Plein de Mars".* [This translates as "it is the resource of the labourer and fiefs do not extend beyond the Plein de Mars" and that as I've said is the equinoctial spring tide high point.]

15. We say that this distinction reflects the legal thinking of time: although not explicity stated, it was implicity recognised that a Seigneur could have rights over land (such as a right of wreck), without owning such land (for he did not own the vraic – (that's the seaweed). However, this distinction is at best implicit: we have not found any express explanation that this is the correct position, and this may well lead to difficulties before the Court.

16. The Plaintiff places great store by reference to varech landing "*sur le fief*", [that translates as on the fief,] and reasons that as wreck cannot land above the high-water mark then the foreshore comprises part of the fief. The Plaintiff claims support for its case in an Extente of 1274 relating to Samares which, at the time, appears to have been a Crown fief, the Extente recording that "….*le Sire le roi a le Varech de mer sur ses propres terre, et la visite des Varechs qui arrivent sur les terres d'autrui ".* [That translates as "the Lord the King has wreck from the sea on his own lands and the examination of wrecks which arrive on the lands of others".] We may argue that, as is the case in relation to the grant of Sark, "*les terres d'autrui*", the lands of others, refers to foreshore which has been the subject of an express grant.

17. It is difficult at this stage to predict whether the Court will accept the distinction between rights over and property in the foreshore, in circumstances in which the jurists of the time failed to make such distinctions explicit. We would rely upon the fact that no person was, at that time, claiming ownership of the soil, whether by seeking to quarry it or to convey it to some other party, and accordingly the question had simply not fallen to be considered.

18. We are not greatly assisted by Poingdestre: he writes "*Pour les banques et rivages de la mer, elles appartiennent à des particuliers presque partout: ou bien aux Seigneurs des Fiefs sur lesquels elles sont: Et le Roy peut disposer de celles qui sont vacantes sur les siens"* [which translates as "for the banks and shores of the sea they belong to individuals almost everywhere alternatively to the Seigneurs of the Fiefs upon which they are and the King can dispose of those which are unowned on his own Fiefs.]

Modern times

19. The evidence which post-dates Poingdestre and Le Geyt (18th century onwards), in our view favours the defendants' case. Particular examples can be considered. During the process of discovery much material has been unearthed. There are a number of instances where the Crown's claim to ownership of the foreshore has been asserted and challenged but, interestingly, not by a Seigneur but by private individuals or companies (see, for example, the Croft Brick and Granite case). [Then there's a sub-sub heading.]

(1) Benest v Pipon

20. In a Privy Council case on appeal from Jersey in 1829 (Benest v Pipon) the Seigneur of Noirmont claimed that in his capacity as Seigneur he and his predecessors in title had enjoyed, since time immemorial, the exclusive right to cut vraic that grew on rocks called *L'Isle Percee* situated within his fief. Giving judgment, Lord Wynford stated that –

> "The rocks where the seaweed grows, which was the subject of the action in the Court of Jersey, are covered with the ordinary tides. The sea is the property of the King, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has

> exclusively used for so long a time as to confer a title by prescription …….. This is the law of England and the cases referred to prove that is the law of Jersey."

21. This case is of some assistance to us in suggesting that there was no general right of Seigneurs to ownership of the foreshore within their fief. To the extent that it suggests that title could be acquired by prescription it leaves open the question as to whether the exercise of rights of varech and gravage would amount to the necessary "use" for these purposes. Given that these rights are either the subject of express grants or are incidents of jurisdiction under customary law rather than incidents of ownership we are of the view that the Plaintiff has only a limited chance of success in arguing that ownership has been acquired by prescription.

(2) Evidence of 18th and 19th centuries

22. There is substantial evidence on the 18th and 19th centuries of the Crown acting on the assumption that it owned the foreshore around the Island without interference from the Seigneurs. This included the construction of railways, the construction of sea walls, and the regulation of quarrying activity. If the Seigneurs did indeed own it one would have expected during the discovery process to find instances of their attempting to sell parts of it or blocking access to it, which we have not. The one exception is in relation to Guy de Gruchy, the Seigneur of Noirmont Manor from 1909 until 1940, who, in his book "Medieval Land Tenures in Jersey", published posthumously in 1957, stated that –

> "There can be no doubt that in Normandy the foreshore belonged to the holder of the adjoining fief… The *Ancienne Coutume* is equally clear that the beach on which wreck of the sea was found or thrown up was considered to be part of the fief of the lord whose right and duty it was to guard that wreck. In Jersey the same rule obtained in the middle ages…."

23. However, in private correspondence with the Receiver General located on discovery he indicated that this right of ownership related only to Noirmont: "it is a special right of the Seigneur de Noirmont, not a general right of Jersey Seigneurs".

24. It is however worth noting that in an opinion given by the UK Treasury Solicitor in October 1933 in relation to a dispute with the Seigneur of Noirmont concerning the quarry at La Cotte, the Treasury Solicitor wrote that –

> "the fact that 'wreck of the sea, flotsam and jetsam and legan within the fees and manors' are granted is one that should be taken into consideration. We have frequently been advised by counsel that the taking of wreck within a manor is good (though not by itself conclusive) evidence of a title to the foreshore where wreck is washed up".

(3) Receiver General's views
[and this is not referring to any current Receiver General]

25. Some support for the proposition that foreshore could be within a fief but owned by the Crown is to be found in an opinion of the Attorney General, William Venables Vernon, given to the Receiver General on 27th March 1888. The Attorney General had been asked to review draft deeds of conveyance of certain strips of land at Gorey which were formerly foreshore but which had been reclaimed as a result of the building of the Coast Road. The Attorney General objected to the use of the phrase "strip of foreshore" in the draft, saying "that this ground is not in any sense, 'a strip of the foreshore' ". If it formed part of the actual foreshore, I consider it could not properly be alienated in this manner. A concession of the foreshore could only be granted subject to certain formalities and under an Order in Council. But the ground ceded to Mr. Le Brocq has "*de facto*" ceased to form part of the beach. It can only be described with any decree of accuracy as forming part of certain waste lands recently reclaimed from the sea and as bordering on the new roadway

built, or on the course of building, by the States, and not as bordering on the beach. It has, therefore, by right of accretion, accrued to the riparian "fief", the "fee" however remaining in the Crown".

(4) Croft Brick and Granite case

26. One of the few occasions where the Royal Court had the opportunity to consider the nature and extent of the Crown's claim to ownership of the foreshore was the case brought in 1913 by the lessee of the quarries at Ronez Point, the Croft Granite Brick and Concrete Company Limited. The company entered into possession of the quarry and foreshore with the consent of the Crown pending the grant of a formal lease by the Crown. When negotiations over the rental broke down the Crown sought to evict the company from the area in question. In defence of the claim the company argued that the Crown did not own the foreshore and employed arguments that are, perhaps not surprisingly remarkably similar to those presently advanced by the Plaintiff: namely that ownership of the foreshore is vested in the Seigneur whose fief extended to the sea shore. The company argued in the alternative that even if the Crown owned the foreshore its ownership was subject to the *ius publicum* and that the jetty which was at the centre of the dispute was being used for the benefit of the public.

27. The company lost, not because the Court determined that the Crown did indeed own the foreshore but because the company, having entered into occupation by virtue of an agreed concession by the Crown was not to be permitted to challenge the Crown's title. The company appealed to the Superior Number and lost, for the same reason. The company's appeal to the Privy Council was subsequently abandoned.

28. Although the arguments for and against the Crown's ownership of the foreshore were rehearsed at length before the Court and reported in the Evening Post no decision was ever reached on the validity of the claim.

29. It is however interesting to note that around the same time as the Law Officers were arguing the Crown's claim to ownership of the foreshore the then Solicitor General advised the Lieutenant Governor that in relation to certain articles which had been washed ashore at Crabbé and then he quotes –

> "by the custom of the Island the Seigneur of the Fief on which the articles come ashore is the proper custodian of all jestson ….. the salvors in the present case should therefore notify the Seigneur of the Fief or Fiefs on which the goods came ashore" (and that was a letter dated 8th January 1917).

30. It would therefore seem clear that the Law Officers were perfectly comfortable with the proposition that a Fief could be described as including the foreshore for certain purposes whilst ownership remained vested in the Crown.

Conclusion on customary law

31. By its nature, it is difficult to predict how the customary law will be developed or held to be by a Court in circumstances which history provides at best, only a confused guide. We consider that we have good arguments to support conclusions that –

    (i) customary law only ever granted Seigneurs jurisdiction over, not ownership of, the foreshore, alternatively

    (ii) customary law never truly considered the position, but should now be declared in accordance with modern policy to be that the Crown owns the foreshore.

32. However, one cannot underestimate the uncertainty which flows from –

    (i) the possibility of further historical evidence coming to light to undermine our case; and

    (ii) the way in which Commissioner Page will view the case – including questions of policy, if they arise.

    On this basis, we consider that we have a better than evens chance of success, but must emphasise that there is a real risk of losing.

An express grant

33. If the Plaintiff is not entitled to ownership of the foreshore as a matter of customary law, then if must fall back on an express grant.

34. In 1696 Deborah Dumaresq who then held the fiefs of Samares, Homett, Crapdoett, La Fosse and Faisants, petitioned William III to unite and entail the fiefs with her other lands. The King confirmed her rights in respect of the fiefs and in particular her right to *"wrecks of the sea in the Parishes of Saint Clements and Saint Hilary,* [Saint Hilary being St. Helier*] from the brook next towards the East of Le Hac,* [probably Le Hoc]*, in St. Clement's Parish and the brook of hautevill in Saint Hilary's Parish and all flotsam and jetsam and lagan …".* This wording was repeated in further letters patent of 1734 granted by George II and in the sale of the fiefs by Deborah Dumaresq to John Seale in the same year.

35. In subsequent sales of the Fief the contracts were written in French and the wording referred to in the Letters Patent relating to wrecks, etc. became "*y compris le droit de gravage et de varech, c'est a dire l'etendue que se trouve entre le douet autrefois appele Le Douet de Hauteville et la Paroisse de St. Sauveur."* That is included therein the rights of wrecks, that is to say the extent which, is not referring to the extent of the land lease, extent which was found between the brook formerly called Le Douet de Hauteville and the Parish of St. Saviour.

36. At various times the Plaintiff has appeared to suggest that the word "gravage" means "beach" and that a conveyance of the *gravage* was conveyance of the foreshore (see, for example reference to a conveyance of the fief in 1846 in the Plaintiff's Appendix A). From the letters patent it would seem that "gravage" simply refers to rights similar to rights of wreck over things that are washed up on the foreshore and which are still today known as flotsam, jetsam and lagan. However, it is certainly the case that some dictionaries, and some texts in other contexts, give "gravage" the meaning of beach: we will need to distinguish these examples.

37. Looking at the Letters Patent it is difficult to discern an express right of the foreshore unless the rights of wreck and gravage were rights which could only arise by virtue of ownership of the fonds of the foreshore (as to which see below in relation to the bornement of 1854). [A bornement is action to fix a boundary.]

38. One can contrast the wording used in the Dumaresq Letters Patent with the wording of the grant to Helier de Carteret in 1562 by Elizabeth I of the Island of Sark where the grant included "…. All manner of quarries, ports, shores, rocks, wrecks of the sea …. Goods and chattels waived all situate within the seas or sea coasts contiguous or appertaining to the Island or within its shores…". This appears to comprise an express grant of the foreshore which is not contained in the grant of La Fosse. Accordingly we see no reason why, had it been intended that the Fief de la Fosse include ownership of the foreshore, it could not have been expressly granted.

39. Finally it is to be noted that where there is any doubt as to whether a grant includes foreshore or not, it is settled by reference to the use. The only evidence of user of the foreshore of the Fief de la

Fosse (other than rights within the *ius publicum* , [ius publicum means public right] – vraic, navigation, fishery) is of an occasional holding of the Seigneural court on the foreshore. While this supports our case based on jurisdiction, the user is equivocal: it is difficult to think what other rights could have been exercised over the foreshore. Further, royal grants are construed against the grantee – at least when they are made on solicitation of the grantee.

40. Our conclusion on this point is that we have a good chance of demonstrating that there was no express grant of the foreshore of La Fosse to the Seigneur. Further, we do not consider that the grant of Letters Patent can be construed so as to incorporate such a grant, nor that there is any evidence of subsequent acts of possession from which to infer such grant.

Evidence from Fief de la Fosse: the 1854 bornement

41. One particular case which relates specifically to the Fief de la Fosse and which demonstrates that there may be a difference the boundary of the fief and the limits of the rights of varech and gravage is one of the documents upon which the Plaintiff relies, namely a bornement of 1854.

42. The then Seigneur of La Fosse, one Francois Godfray, actioned the Attorney General to witness the registration in the Rolls of the Royal Court of a record of the bornement of the Fief de la Fosse and the Fief du Prieur de l'Islet.

43. On 17th May 1849 the Deputy Viscount had attended on site with the Seigneur, the Attorney General and the experts (experts doesn't just mean experts, [experts are holders of a particular office, they are sworn in before the Royal Court, one of their functions is to determine things like boundaries]. The Seigneur pointed out to the experts the Douet de Hauteville which he claimed was the limit of his "droit de gravage". The Attorney General objected on the basis that he had been summoned to fix the boundary between the two fiefs not to fix the limit of the right of gravage claiming that the extent of the right of gravage did not fix the boundary of a fief. The Seigneur claimed that the right of gravage formed an important part of the rights of a Fief and that it was the sole basis upon which the limits of the fief could be established, going on to assert that the right of varech gave the Seigneur seigneural rights over all lands gained by alluvion. The Attorney General requested that the matter be referred to the Royal Court but eventually the experts decided to proceed. The bornement continued on 20th May and 10th July 1849. On an unknown date in April 1850 the experts gave their opinion as follows –

    (i) that a straight line from the centre of Conway Street to the sea determined the boundary between La Fief de la Fosse and the Fief du Prieur de l'Islet;

    (ii) that the right of gravage or varech of La Fief de la Fosse extended to the former course of the Douet de Haureville;

    (iii) that the former course of the Douet was 13 feet 2 inches from the South West corner of Payn Street going West and from there in a straight line to the North Western extremity of a rock known as Rocher Esteur;

    (iv) that the alluvial land from the centre of Conway Street to the limit of the former course of the Douet belonged to the owners of the contiguous properties subject to them making their *aveu* to the Fief de Prieur de l'Islet. [Interjecting here again an *aveu* is a form of declaration or acknowledgement or was a form of declaration or acknowledgement anyone who owned property on a fief was required periodically to acknowledge that it was on the fief and that is because certain seigneural rights could arise in respect of a property. The property didn't belong to the Seigneur but he had certain rights in respect of it and making an *aveu* is simply recognition or acknowledgement that your property is situation on somebody's fief.]

Senator Ozouf

That doesn't mean ownership though obviously

Solicitor General

No it doesn't mean ownership, to illustrate it by example, if somebody died owning a property, died without direct heirs, that's children, grandchildren, great grandchildren, etc. the Seigneur was entitled to devolve enjoyment of the property for a year and a day before the property could then onto the collateral heirs, the brothers and sisters, the cousins, the uncles and aunts, whatever. So the Seigneur had certain rights over properties, but the property did belong to somebody else, or there was a *decret* which was an insolvency proceeding and a debtor renounced his property it was held by the Seigneur who was entitled to enjoy it until completion of the insolvency when it went to one of the creditors. It didn't belong to the Seigneur, he had rights over it and because the Seigneurs had the potential latent rights over all properties on their fiefs they like to keep tabs on what was on their fiefs so periodically people had to make the *aveu* saying "I acknowledge my property is on the fief of such and such.

So that's all that a bit about the bornement said when it says that they had to make an *aveu* to the Fief of the Prieur de l'Islet. They had to say yes, my property is this bit of accreted land, it's situated on the Fief de Prieur de l'Islet.

Senator Ozouf

We can't do that with our foreshore, then we can't make an *aveu* to the Seigneur that we've got property on his Fief then.

Solicitor General

No, in the first place the rights have all been abolished anyway and in the second place I don't think we want to make any acknowledgements of anything.

Deputy Troy

Excuse me. I've got the bornement in front of me and I've also got a map from the Archive Centre of the boundaries of the Fief and in this map it's clearly shown as coming down Conway Street and then you've got the other line extending out to Payn Street out to the west and within the Payn Street and Conway Street boundary was a Prieur de l'Islet which is the Crown and I believe that under this bornement the Crown actually gave away sections within its area. Because you mentioned before the neighbouring properties. The Crown had the right to give away. If it had the right to give it then surely it had exercised the right of ownership to be able to give it.

Solicitor General

Yes, that depends of course whether you take the claimants to the extent of Fief de la Fosse. If the argument is right that the boundary for Fief de la Fosse is the Conway Street line and that the rights of varech are the further line

Deputy Troy

Well that's what this bornement

Solicitor General

Then the Crown would have been both Seigneurs of the Fief as well as the Crown. So it would be ambiguous. It depends whose argument is right as to whether ownership

Deputy Troy

Because in the document it says that the boundaries of the Fief are not necessarily the boundaries of the gravage.

Solicitor General

Yes.

Deputy Troy

So where falls

Solicitor General

Yes. The Plaintiffs are arguing that the right of varech shows the extent of the Fief. The defendants argue that is not so. But it should be remembered that this bornement is not a Court judgment. It's the experts determining something, so it's indicative of what the experts found but it

Deputy Troy

Yes, but the experts confirm that the boundary of the Fief is at Conway Street and that the rights of gravage extend from Conway Street up to Payn Street but they don't actually say that the boundaries are at Payn Street. So you've got a totally different, you've got two different points haven't you. One that the Fief ends at Conway Street and the rights of gravage extend up to Payn Street which I felt was quite important.

Solicitor General

Yes. Did you feel that was in conflict with I've just read out from Advocate Binnington.

Deputy Troy

No. You've been explaining that the two are separate. In the context of today Mr. Godfray at the time who at the time I believe was a lawyer, making a claim to the foreshore in that time because you had the shifting sands obviously at that point and you had the, Sir, the alluvion, you had the shifting sands which is deposited sands and they had to organise their rights of gravage because the boundaries were sometimes shifting, as far as I understand it. And Sand Street of course is Sand Street because there was sand in it. But I think it's quite important that this case seems to centre round the Fief de la Fosse owning the foreshore but if it's defined as the Fief de la Fosse ending at Conway Street that's quite a bit further to the east than to the west.

Solicitor General

I wonder if it would easier for members to follow Advocate Binnington's advice if I carried through it. I'm quite happy to diverge at a later stage.

Greffier

You're nearly there aren't you?

Solicitor General

I think it would be easier for members to follow the actual advice if they got it all in one chunk, I can make a lot of comments about my own views on jurisdiction, fiefs, *aveu's*, rights, etc. I have views and I can express them but I think it would be easier for members to take it in if I just follow Advocate Binnington through.

Deputy Troy

Sorry to have interrupted you but there have been several other interruptions and so, but

Solicitor General

I'd read out the analysis of the finding in the bornement and Advocate Binnington then continues

44. Although the Plaintiff suggests that this case supports its claim it can be interpreted as being favourable to the defendants. Firstly, it suggests that, certainly by the 1850's, the boundary of a fief and the limit of the rights of varech and garage were not necessarily regarded as one and the same. Secondly, the fact that the experts decided hat land formed by alluvion between Conway Street and the Douet de Hauteville would accrue to the owners of contiguous properties but be within the Fief du Prieur de l'Islet seems to be inconsistent with the proposition that the Seigneur owned the foreshore in that area. Surely, if he did, the alluvial land would remain within the Fief de la Fosse?

Other matters

45. Quite apart from the merits of the action, in any risk analysis we suggest that the following be considered –

    (1) Even in succeeding in this action, there is little likelihood that the defendants will recover their costs from the Plaintiff. A Pyrrhic victory may thus follow.

    (2) In order to guard against such a Pyrrhic victory, we would recommend a warning shot against the funders of the Plaintiff, drawing to their attention that they risk becoming liable for the Plaintiff's legal costs should the Plaintiff be unsuccessful. This necessary warning would open the way to such an application being subsequently made, as well as promoting prospects of settlement.

    (3) A settlement on favourable terms for the defendant would leave the way open for a Law removing (for the avoidance of doubt) any ownership by the Seigneurs of the foreshore. While such Law might be challenged, it would require very deep pockets to do so: we would have the arguments in favour of the Crown's ownership of the foreshore ready prepared. And any challenger would thus be at a significant disadvantage. Such a further challenge is unlikely as, in addition to the arguments presently being raised by the Defendants, a new claimant would be met by the argument that their claim has been commenced more than 40 years after the Crown leased the entire foreshore of the Island to the States.

Now, that was quite a long document, it was, I think may be still, available for members to read. The Greffier is nodding.

Senator Le Claire

Madam Solicitor, have you finished the advice Madam?

Solicitor General

I've come to the end of that and what I was going to say in my comments on it, I accept it may be difficult to take in a document of that length by hearing someone else read it. The crucial part, which repeated what Advocate Binnington had said earlier that year when first asked for a risk analysis, the matter which, along with the costs of course, was very compelling both for the Attorney General and for me, was the paragraph, paragraph 32 where Advocate Binnington is giving his conclusion on customary law and it is the bit where he says "we consider that we have a better than evens chance of success but must emphasise that there is a real risk of losing". Now I think the chronology I've taken members through will show that that is a far less sanguine assessment than the early assessments which starter was - my predecessor's advice it is without merit and though coupled with a warning that there should be guarantees of title and the present Bailiff's advice that while the case for the States was the stronger there is always uncertainty in litigation, and he nevertheless was far more positive about the strength of the States case, it is a very serious move from that to a real risk of losing. And in risk there are two things to be considered, one is the likelihood of the risk happening and the other is the consequences of the risk if it happens. They're quite separate things and they both need consideration.

If you've got a risk of something happening which actually isn't going to matter very much even if it does happen, then you can be very bullish even if you think the risk of it happening is actually fairly quite high quite iffy and to put this in the context I have many a time advised a Committee whether to litigate something or not. If the litigation is minor the costs won't be high. The Committee is quite keen to litigate on a point of principle. No ill consequences such as the establishment of a bad precedent will follow. I would say to them, well, you know you've got quite a weak case but there's no bad consequences if you lose. So your risk of it happening is high but the consequences of the risk are not that bad, that's a case in which you might think well, you know the consequences aren't too bad. The more serious the consequences the lower the risk level before you have to start to worry and when you have very serious consequences an appreciable risk is a very serious matter. Now it was always recognised here that the consequences of a successful claim by Les Pas, the consequences were very serious because there was the extent of the foreshore before even the first whisper of Les Pas the States had already begun reclamation at La Collette and there has been further reclamation so the consequences have already been recognised as being high. But when the likelihood of the risk was low it was possible to be very bullish about the litigation and the advice was it should be stroneously resisted. Once you get to the point that the lawyer in control of the litigation is saying "with a better than evens chance of success but a real risk of losing" that is the moment at which the client must be asked to give a serious consideration to a settlement which is damage limitation.

Senator Le Claire

Could I ask Madam Solicitor at this point because I think this is the whole crux of the matter. We have been told time and time again that new evidence has come to light that is giving us the reason to make this deal and the new evidence that you're telling us now that has come to light is the fact that we've had a risk assessment that shows different wording. Any risk you said is ultimately a case of confidence and also the other side if the risk is involved.

But is it not the case that after having unsuccessfully applied for the costs which I still would like an explanation as to why we took 12 months to get there, that Advocate Binnington has been indicated by the Attorney General as, not incompetent, not a bad attorney but somebody's made a mistake. Now having made a mistake if it's true that he has and we are unable to recover those costs which I'm asking, I'm not saying that he has, I'm asking. Then is that perhaps why he perhaps he hasn't got the confidence to continue along the same basis that he has.

Solicitor General

I'm sorry, there's two things that I think I'm going to need to clarify. The first is the reference to we have been continually told that there is new evidence. Can I have an identification, I don't I've ever said there is new evidence.

Senator Le Claire

Unless I'm very mistaken Senator Walker keeps telling people in the media or giving advice in light of new advice received, or in light of new advice

Solicitor General

New advice is not new evidence.

Senator Walker

Just to emphasise the point

Senator Le Claire

I withdraw the evidence then and ask for the semantics to be dropped if you can just bear with and just get to, it makes a big difference, I'm sure it does. But the turn of the words are still that we have been told of new advice. Well the new advice in my understanding has been tainted by the fact that we have not received the costs from the Court because we delayed for 12 months and I would like an explanation for that because that in my mind has undermined his confidence and our confidence.

Solicitor General

Right. Can I say firstly the reference to semantics. I hope it doesn't sound like nit picking but it is a very important matter and I think everything has got to be categorised with absolute accuracy. Evidence are things like the documents you turn up. If they turned up a grant from The Queen to the Seigneur of La Fief de la Fosse saying "I give you the foreshore", I mean that's evidence. Advice is the assessment by a lawyer saying "I've looked at this, I've looked at that, I've taken into account the other thing, this is my advice".

Senator Le Claire

No, just for clarity Madam Solicitor, I feel under pressure every time I rise to clear this all up and I made a mistake by saying evidence when I wanted to say advice and it's the first time I've ever done it, but under pressure, every time I stand up to get this issue brought out and fleshed out in the open. I meant advice but I said evidence.

Solicitor General

Fine, and then the reference to a mistake was the fact that the costs were not awarded.

Greffier

Regarding the costs application.

Senator Le Claire

What I mean Madam Solicitor, is that the new advice we are receiving in my view seems to be broadly weaker for a number of factors and I'm questioning where the confidence of Advocate Binnington and the confidence of the States has been affected because ….. have not been awarded the costs, because of the delay of 12 months and if that's been the *raison d'être* for us receiving the new advice then I think we need to know that, and why was it delayed?

Solicitor General

The significance of the costs is one which was at the end of the document which I have just read that the defendants may be left with a very large bill and I'm sure it will be a very large bill and then being left having to pay it and not being able to recover it from others. That is the significance of not getting the order for security. That judgement of the Court is what initiated the request from the Law Officers to Advocate Binnington for a risk assessment because once it was clear there were going to be quite high costs come what may, and almost inevitably not recoverable it was time to look at it and think, ought we now to go back and re-examine the question of settlement which was on the table once before but failed because of the intractable attitude then of Les Pas.

Senator Lc Claire

So, Madam Solicitor, it was nothing to do and this has been my point all along. It was nothing to do with some piece of paper that has come up in the course of discovery that has made us reflect upon our view. Our view has in my understanding been changed because a risk assessment was drawn up after the judgement had been made not awarding us the security of costs.

Solicitor General

Certainly the risk assessment came after the judgement of costs I'm not sure if there's any further question that

Senator Le Claire

The question, Madam Solicitor was we are not in the position of receiving new advice because of some new piece of paper or some new understanding that has come about through the course of discovery. The legal term which you put for the sharing of information from the States, the Attorney General, the Governor's house, etc. so we've not turned up some new piece of paper

Solicitor General

Can I say that I haven't got to the end of my chronological traverse of all this and I will be coming before the debate so to Advocate Binnington members would probably wish to know why the change in his advice and I have got his written response. Sir, I haven't come to that yet and possibly it might be of assistance if I continue till I've

Senator E. Vibert

I wonder if I could just raise a point on this business of the costs and the action relative to the costs. It would appear and certainly this is what Senator Walker has put in the public domain, and also the Attorney General put it at our meeting three or four days ago and it's in fact in his report here that there were warning bells sounded as a result of the judge hearing that cost application saying that there was a serious issue to be tried and that was when warning bells in the Attorney General's head I would just like to ask you Solicitor General did it ring warning bells in your head at all because you haven't mentioned it?

Solicitor General

No..I don't… Did the Attorney General actually use the words "warning bells"? Yes, I think it's important, it's important. The reference to a serious issue is not the same as saying that he believes they have an overwhelming case. It is saying there is an issue to be tried which is one of the matters which has yes, I think it's quite obvious that is a significant point.

Senator E. Vibert

Why would it sound warning bells when it is something that is simply a statement made by a judge summing up the case because it is a big case that he is going to be hearing, he has 20,000 documents to look at that there's some real issues to be tried.

Solicitor General

I don't think he was summing up the case, I mean a judge does not sum up until the case is over.

Senator E. Vibert

I wasn't saying summing up the case I was saying it was in his, he used that in his judgement.

Solicitor General

Yes, I'm not quite sure what the question is.

Senator E. Vibert

The judgement was, in his judgement he simply said that there were serious issues to be tried, he said some other things and what I'm saying and asking you is that the Attorney General, and in fact Senator Walker in public, said that this was the trigger, this were the warning bells that gave them doubt that our case was as strong as we kept saying it was.

Solicitor General

Yes, well certainly there is a difference between a serious issue to be tried and without merit that's certainly the case, yes.

Senator E. Vibert

It's never been properly made.

Solicitor General

Oh right.

Senator M. Vibert

Could I ask Sir, we're getting near lunch, could I ask that the Solicitor General be allowed to finish her chronological order with as few interruptions as possible.

Greffier

Just looking at the clock, do you think it's something you'll be able to finish off your chronology in the next 10 minutes or so or would you rather come back after lunch.

Solicitor General

I think it would probably be better if I finished it after lunch.

Senator Le Maistre

Propose the adjournment

Greffier

Propose the adjournment.

Deputy de Faye

Before we adjourn Sir, may I make a suggestion and that is I understand the Solicitor General felt that if she was asked certain questions she may have to retire to consult files and it strikes me that there may be an opportunity now over the next five minutes or so for those types of questions to be identified so that the lunch time break, could serve as an opportunity for the Solicitor General to consult those rather than break late this afternoon.

Greffier

Are they matters which are readily to hand or is it something members could take up privately with the Solicitor General?

Deputy de Faye

I've certainly got three or four questions that I would like to put

Deputy Farnham

Perhaps the Solicitor General would like lunch to have the strength to carry on this afternoon.

Deputy Troy

Sir, I think even the process suggested by the Deputy could take a substantial amount of time.

Greffier

If we need to adjourn we'll adjourn again this afternoon. I think it's probably almost impossibly unfortunately. The House stands adjourned until 2.30 p.m.

16th September 2003 – afternoon

Greffier

Can I mention one practical matter, the matter of the induction hearing loop was mentioned this morning. We've made some enquiries. It would appear that when the sound system of the Chamber was designed it was felt that during an 'in camera' discussion when the speakers are switched off it would not be proper for the hearing loop to work because apparently I'm told that people even in the Royal Square with the appropriate equipment could pick up the sound so unfortunately it does mean at present that when the sound is switched off for the speakers unfortunately the loop doesn't work. I do apologise to those members who are finding it difficult.

We pick up and Madam Solicitor to continue your chronology.

Solicitor General

Yes. And this morning I had brought it up to the risk analysis and read out the risk analysis and just before the luncheon adjournment I was asked about the meeting of 10th September and the reference in the Commission's judgement to the fact that there was a serious issue to be tried and I have in fact in the lunch time adjournment located the speaking notes of the Attorney General so that I can view what he said and he records that following the decision I e-mailed him about the judgement and said that I would like to discuss it and one of the things we were discussing was whether it should be appealed and so on. His speaking note says that "my review of the Royal Court's judgement on security for costs gave me however, extreme cause for concern. In the course of his judgement the Commissioners said if it would be quite wrong in a case of the complexity and sensitivity of the present one for me as designated trial judge to express any view whatever about the merits or demerits of the case at this stage of the proceedings other than to say that there appears to me that there is a serious issue to be tried. Both parties agreed that this was the correct approach. This seemed to me to be quite some distance to what I had always understood to be the States and Crown position namely that there was no merit in the plaintiff's case. First of all the trial judge indicated that there was to him a serious issue to be tried. Secondly the Advocate for the Crown and the States agreed that this was so." That is the speaking note and certainly I agree absolutely that that part of the remark represented quite some distance to use his words from the previous advice and was a cause for concern but it's not the Commissioner making a finding, it's the Commissioner saying there is a serious issue to be tried, but I do agree that that is a cause of concern.

Deputy Hill

Sorry to ask. Could I ask you to elaborate as to why it's a cause for concern please.

Solicitor General

Well because in the words that I've just used. It is a distance, it has moved a distance from the previous advice and there is a very big difference from entirely without merit to a serious issue to be tried.

Deputy Hill

I'm sorry, with respect the judge didn't say about no merits, etc. I thought he was commenting on the 2002 judgement, not the merits of the case.

Solicitor General

No he was talking about the substantive issue namely the claim to ownership of the foreshore and it was that that he meant was a serious issue.

Senator E. Vibert

Can I just ask for a clarification on a couple of those points Madam.

Firstly there was a meeting in August 2002 and the minutes state "the Committee noted the Commissioner had refused to order security for costs and noted that the Commissioner recommended in his judgement that no satisfactory explanation was given as to why the application could not have been made at least 12 months ago". Now having said that, could I ask if there was cause for concern and alarm bells were ringing why you didn't express that view at that meeting that you concerned about those remarks?

Solicitor General

I'm sorry, could I have a copy of the Act. This is

Senator E. Vibert

I don't have a copy of it. We are unable to have copies so I've had to make my notes from that Act.

Greffier

What was the date of that meeting?

Senator E. Vibert

The date was in August 2002.

Solicitor General

Well, the purpose of that meeting was to explain specifically the, sorry, does the Senator want to say anything more? He's standing.

Senator E. Vibert

Well, what I wanted to say was surely that judgement about that there were serious issues to be tried simply means that the case was complex, that it was sensitive and there were serious issues to be tried. Not that the other side had a good case.

Solicitor General

Right. I will now answer the query which was why this Act does not refer to issues of concern. The purpose of my attendance on 22nd August 2002 was specifically to advise the Committee of the result of the security for costs decision and the ancillary matters such as the likelihood of appeal, the matter of the delay. It was an attendance for the specific point. At that date the Law Officers had not received from Advocate Binnington the risk assessment and therefore I was addressing the Committee on that and didn't raise it with the Committee.

As to the further point made by the Senator that the Commissioner was saying that it was a complex and sensitive case, he is saying a bit more than that. A case can be complex and sensitive but still merit the designation that it is without merit. The point that the Attorney General has made as recorded in his speaking note and with which I so agree, that I agree is that this was a move away quite some distance from, without merit.

Senator E. Vibert

You didn't feel that you had a duty to tell the Committee that when you reported that

Solicitor General

I felt that I had a duty to do what I had gone to do which was advise the Committee about the security for costs and that there was a further duty once the risk analysis had been obtained to raise the matter with the Committee which was then done.

Senator Syvret

This is quite an important point. I don't think the judge saying that there is a serious issue to be tried can be taken as an indication of some kind of prejudice on his part as to the merits of the case and this is an important point around which the States debate is going to hinge because the fact that the judge asserted in that particular decision that there was a serious matter to be tried has been portrayed to members of this Assembly as indicating that the judge had formed some type of opinion as to the merits of the plaintiff's case and somehow that that opinion had shifted and I don't believe that that is the case and it's simply a matter of interpretation and cases can have very serious matters at issue and matters to be tried. But nevertheless can still be ultimately quite clearly decided by the Court, I mean a case I read some time ago was the defamation action in David Irving and Lipstadt concerning the holocaust and there were indeed very serious matters of the utmost gravity, I think were the words used in that particular case but nevertheless Irving was crushingly defeated fortunately. I don't the fact that serious issues to be tried can be taken as an indication surely of the merits or otherwise of the case. I mean if the judge were to have said in fact in that hearing that the case was of no merit he would effectively be inviting, would he not, some kind of striking out application?

Solicitor General

I think I should expand on or clarify the use of the phrase "serious issue to be tried". Serious issue to be tried is an expression which is quite frequently used in litigation either in striking out or similar things and a serious issue to be tried does not in that context mean – the matter which states it's serious, it means there is serious in the sense there is an appreciable ground for what is being done. And I think I must make that very clear and if any member has any further queries over this please raise them because this is important. It is important "Serious issue" doesn't mean it's going to be very serious if you lose the foreshore. A serious issue to be tried means that there is, that the plaintiff is able to show a solid jumping point and that is important and I think it may have given the use of serious issue may have given rise to some kind of merge of thinking but it is important that is very clear. Have I

Senator Syvret

For my part, that indeed always was my understanding. Serious issues to be tried meant that the legal points at issue were serious, rather than the actual consequences of the case, because that it the Court after all is concerned with the legal issues. But it seems to me that given the vast volumes of pleadings and evidence assembled concerning this case by both parties, all three parties, over the years, there seems to me to be, have always been the case that there has been serious issues to be tried. I mean that if that weren't the case then presumably one would need to strike out or something of that nature many years ago. I just don't see that the Commissioner asserting in this particular instance that there were serious issues to be tried has actually changed the complexity of the case for one moment. There has always been a serious issue to be tried in terms of this particular legal argument.

Solicitor General

Yes. There is a further point there, I want to make sure that I'm expressing myself clearly here as well. I am not trying to suggest that the Commissioner has made any sort of ruling or finding or decision and the significance of this passage is that it did raise the need for getting a risk assessment. Now if the risk assessment had come back saying well the Commissioner may think there's a serious issue to be tried but I still think it's entirely without merit, then that would be fine but when the risk assessment came back saying "there is a real risk of losing" then it would be quite improper for the Law Officers to just put that in the drawer and not have told the Committee about it.

Senator Le Claire

Madam Solicitor, is it not true that as you said earlier a risk assessment does take into the fact the consequences as part of its overall brief and the risk is influenced upon not only the case at hand but the consequences thereafter and just to echo what other members are saying, if it was never seen as something serious before then why was the team assembled that constituted a distinguished academic, a visiting professor of Manchester, Dr. David Yates Masterson, a specialist of the sea. All these people were put together as a specialist team by the previous S.G. in 1990 as you told us. If it had never been a serious issue where was the need to spend £1.5 million and have such a specialist team put in place. Because at that time it seems to me that they were putting together a team to fight it and fight it vigorously. The only sign that there seems to have been a change is when you draw into the argument the consequence of the risk which is from the risk assessment and the only reason the risk assessment was put forwards was we had subsequently lost the fight for the costs. No?

Solicitor General

No. To begin at the beginning of that. What I said about risk is that there are two factors to consider. One is the likelihood of the risk happening the other is the seriousness of the consequences if the risk does happen. So to go back historically to the stage to which the Senator was referring, that is when Mr. Sowden had assembled his team it was perfectly obvious to everyone that the consequences half of it was serious, in that everyone would see that there would be serious consequences if the foreshore were lost. That team, the question was asked of me why was such a team put together? Well a team was put together because having been notified that there was a claim which could have serious consequences obviously it became very important to find out how serious the risk was of that claim being made good, if I may put it in those terms. That was the team, the team did work and the first Kidwell and Gadney opinion was the one which members have seen and said that the claim was not well founded. There was the Fysh opinion and a second Kidwell and Gadney opinion and the advice of the two Law Officers in December 1993. The Attorney General's being that the case for the States was substantially stronger though litigation was not certain and the advice of the Solicitor General being that the claim was without merit and should be resisted but I would add that it is clear from the correspondence files that Mr. Sowden also thought that there should be further research and further work carried out and there is infact on file a letter from him to Advocate Binnington suggesting further works which should be researched.

There was then a period of, I think it was years, certainly it would have been at least two years probably more, of someone doing, if not full time research, certainly research on a very regular basis and the litigation team at Mourants had a dedicated research Assistant researching for the material so that the risk assessment carried out by Advocate Binnington in 2002 had further material and the discovered documents, the skeleton arguments which were prepared for Court and also the analysis of the out of the discovered documents. The parties were required to pick the documents which they thought were relevant and to explain their relevance so that those were all that was in place in 2002 as it was not in place in 1993.

And again I would repeat what I said about my predecessor – when giving his opinion he did say and advise subsequently that it was important to continue research and I have no doubt that if had continued conduct of the action he would have reviewed results of the research.

Senator E. Vibert

May I just ask another question on this issue. But rather than jump from place to place if we could keep obviously on the same point. In the judgement the trial judge virtually ended by that saying as well as saying there's a serious issue to be tried he then added both parties agreed that this was the correct approach. Now could the Solicitor General tell us whether her instructions to Advocate Binnington were to agree that this was the correct approach because I got the distinct impression from the Attorney General at our meeting that he thought, at our meeting, that he thought this was adding to the weakness of our case that we did not say "we don't agree with that situation, we don't think there is any serious matters at issue here, we believe our case is overwhelming". Now it was simply an impression, the Attorney General didn't say that but he did question whether he had done the right thing over that. I wonder if the Solicitor General

Solicitor General

I wonder if I might read the Attorney General's speak notes to find the passage.

Senator E. Vibert

I can help the Solicitor General. In the Attorney General's information given to us, the memorandum on page 4 item 4.6 – he says "on the application for security the Crown and the States did not advance the contention that security for costs ought to be given because the Les Pas case was plainly and obviously bad and the company was bound to lose".

Solicitor General

But I haven't found a passage which suggests that the agreement that there was a serious issue to be tried was ill advised I have found a passage which refers to the fact that there had been no striking out which possibly may be – I'll read that one – it says "I also then took into account that no use had been made of a standard procedure available under the Royal Court Rules namely the procedure of applying to strike out your opponents case on the grounds that it disposes no reasonable cause of action or that it scandalous, frivolous or vexatious or may prejudice embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court". The purpose of a strike out application is to enable a party to go to the Court and prevent time being wasted for a full trial. The party says in effect of the Court that even on the face of the pleadings which have been filed there is no conceivable basis upon which the Court could find in favour of the claimant. That course of action was not followed from that it must be inferred that the view taken by the defendants was that there was a case to be met. It goes without saying that if there is a case to be met there is a possibility of losing it.

Now if I can go back to the question which was what was my instruction to Advocate Binnington? I think I should actually clarify the way in which the management of the litigation works. You have a client and you have the lawyer. The client gives instructions in the sense that the lawyer cannot decide things he's going to compromise the action or he's going to admit something or not. But it is the lawyer who advises the client, I think you should do this, I think you should do that, and you will sometimes say I invite you to instruct me to do such and such. Now the litigation in this case is in the conduct of Advocate Binnington and it was placed in the hands of Advocate Binnington for the reasons which I explained this morning because the Law Officers do not have a litigation department and also because it was going to be a very time consuming action and the resources of our department were such that as the then Attorney General said that if it was done in-house he would not have a Solicitor General. And this means that I have been the liaison point between Advocate Binnington and the Policy and Resources

Committee. I have not been duplicating every step taken by Advocate Binnington in the litigation. It would be a complete impossibility and, if I could have done it, I could have done the litigation myself.

The question of a striking out, the way in which a striking out generally comes about is that the lawyer looks at the action and thinks, I think this one should be struck out. Writes to the client and says "I think you should consider striking this out" and if he's really confident he'll say "I invite you to instruct me to apply". The client makes the decision and gives instructions but is on the basis of the advice of the lawyer. Now because I'm a lawyer I think that the confusion may have arisen, people may be thinking that I am in some way directing the litigation, I am not and could not be, because I cannot have the hands on knowledge and familiarity with it of Advocate Binnington and I would add the only thing I can add to that is that at the stage when discovery was drawing to a close I thought that it would probably be beneficial if I and possibly my predecessor were to review the discovered documents and indeed I went so far as getting the agreement of my predecessor to assist and getting a pass for the discovery room at Mourants, which is a complete room half filled with every discovered document. The attempt was aborted I think shortly after as Mr. Sowden had a coronary by-pass and I simply never had any moment at which I could go and review the discovery documents. Now if members of the States think that is negligent so be it but I'm afraid the job of Solicitor General is not a sinecure. My predecessor did a seven day week and an 11 hour day. I don't do that much but I work during the day, I work in the evenings I some work to the small hours, I work on Saturdays and I occasionally work on Sundays and I am not able to duplicate what Advocate Binnington is doing.

Senator E. Vibert

Could I just put to the Solicitor General that I attempted to arrange for Advocate Binnington to attend this meeting, unfortunately because of the Rules and because of the Law that was not possible, but I did ask him if it was possible to have him attend the meeting on Wednesday with the members of the States and we told quite convincingly by the President that you were the person who carried the case that Advocate Binnington took his instructions from you and you could answer all these questions. It would appear to me that Advocate Binnington is the only person we can ask the question of why did he not take action when that matter was struck out to fight it in a different way as outlined in paragraph 4.6 by the Attorney General. Advocate Binnington being able to do that we can't get an answer to that situation.

Solicitor General

No, I've tried to explain what is meant by "giving instructions". The lawyer, the Attorney General certainly I have been the liaison point between the Committee and Advocate Binnington the lawyer as I've said gives advice and the instructions are on the advice. So as for instructing to take a striking out application that would be triggered by advice from the lawyer and Advocate Binnington has not at any stage advised that he thought there should be an attempt to strike out the Les Pas action therefore no instructions have been given to strike it out.

Senator Le Claire

May I ask, Madam Solicitor General please Sir, the meeting we had was quite helpful with the Attorney General and I'm a little bit confused because there is obviously a role for everybody to play and you're giving us those roles in some description at the moment. Could you tell us at what stage and who was the case manager, if there is such a thing, is there somebody who is in charge of the case, like a brief, or would that always have been Advocate Binnington because the Attorney General deduced the word "case manager" and I don't know if that's a role that is, and if there is one who, at what point of the chronology did people take over and were in charge of the whole case?

Solicitor General

Case management is an expression which came into being following some reforms in the U.K. which subsequently followed here and it refers to a change in litigation process whereby the judge who has, who is going to hear the case exercises a much more active part in ensuring that the parties move it forward. There was a time when it was entirely up to the parties how speedily or otherwise they moved a case forward and if the parties did nothing, nothing might happen. I can remember some years ago getting a case struck out which had been brought against the Public Health Committee because the plaintiff had, or the plaintiff's lawyers it would be more correct to say, had done nothing for 14 years and we had reached the stage when nobody could remember what the case was about. That was generally felt not to be in the interest of the citizen who suffered from delays and was generally, you know the matter was in the hands of the lawyers and suffered from delays so the system of case management came in and this allows the judge to impose a control and say "no you don't leave it drift you must meet the deadlines, you must come to Court, I do expect to see you there you can't just agree with one another that we'll meet again in ten years time" this kind of thing. So that is what case management is.

Senator Le Claire

And is it true to also say then Madam Solicitor General that there is in the minutes somewhere stated, I can't remember the exact date that the judge who's looking at this won't allow us to continue to negotiate with Les Pas for ever and a day and that sooner or later this must come to Court, and we must either settle or we must bring it to Court, in which case how long do we have?

Solicitor General

It is certainly the case

Senator Le Claire

Just, when we're going to decide to debate some thing Madam Solicitor General in the next two weeks or not and some people have the impression that we can call for an unending delay but I know that from those minutes that we have to go to Court at some time.

Solicitor General

Currently the date for the return to Court is 13th October 2003. The hearing was previously from May of this year and the judge agreed a delay but on the grounds only that the parties, it would be made public that the parties wished the delay because there was a possibility of a settlement. The judge agreed the delay. It was adjourned until October and 13th October is the date when the Commissioner is expecting to see the parties back in Court. Now I was asked this morning whether it was possible to make an application to the Commissioner for a further date and the answer is that it is possible to make an application but is impossible to give any guarantee that it will be successful.

Greffier

I wonder Madam Solicitor to help members, I think we're straying, you were keen to press on with chronology, I know members quite rightly wish to raise points of clarification. I wonder perhaps if it would help members if we simply did let you finish your chronology and we raise these points after.

Senator E. Vibert

Sir, there is one other point on this issue on clarification that I would like to put, if I may.

Greffier

Well, very briefly.

Senator E. Vibert

Very briefly. In the note that we received from the Attorney General, paragraph 4.5, item (1) the, I think it's from the Attorney General and yourself, I think it's the Attorney General/Solicitor General. It stated that about the fact that it was noteworthy that no application has been made to strike it out. Now in our meeting that was put in such a way as to give an indication that actually was a weakness in our case. Now could I put to you or ask you whether Advocate Binnington had ever suggested to the Policy and Resources Committee that this matter should be struck out (number point (1)) and point (2) the same applies to this question on the application of security that because, was it ever put to you or to the Committee that Advocate Binnington should raise in Court the fact that there was no case and not agree with the fact that there were serious issues to be tried which again has been put to us as States members but that is a weakness in our case if we didn't do that.

Solicitor General

Yes. Obviously I can't comment on how it was put but having read the Attorney General's speaking note and also being a co-signatory and indeed having had a hand in drafting the joint advice of January 2003. I want to make it perfectly clear we're not, certainly I would not intend to be saying that it is a weakness in the case that we have not applied, i.e. the judge is going to take it into account. The significance of not having applied is that the fact that the application has not been made is an indication that the litigation lawyer has not advised that there is any ground for striking it out. In other words that the litigation lawyer has not formed the view that this is a case which he could get struck out because it is without substance. So I want again, that's something I want to make quite clear that the reference to it being a weakness in the case doesn't mean that when the judge comes to Court he's going to look at it and say "well they never applied to strike it out therefore I'll take 10% reduction on their chances". It simply means this indicates that the litigation lawyer who has the conduct of the action has not advised that there's a ground for striking out.

Senator Syvret

May I ask a question on that point. Was Advocate Binnington ever asked at any stage by the P and R Committee or by the Crown Officers to explore the merits or otherwise of the striking out action, and if, Sir what was his advice? And a further point I would ask is that even if it were felt that a striking out application may not succeed why wasn't it attempted in any event simply in order to pursue every possible avenue.

Solicitor General

As regards to the request made by Advocate Binnington there are the ones that I have outlined this morning. Firstly he was asked whether he agreed with the previous advice, that in 1995. Secondly he was asked to advise in 1997 on the matter when there were early negotiations. As to whether he was asked to advise on whether there should be a striking out. It isn't the case that the client tells the lawyer what things he should be advising on. That is why it is placed in the hands of the lawyer. It is for the lawyer to advise the client on those matters which as the lawyer is conducting the case, the lawyer forms the view the client should be advised on. That is why it's in the hands of the lawyer.

Senator Syvret

There is such thing as an intelligent client and certainly in fact I had correspondence with the Solicitor General on this subject in I think the mid-1990s and it seemed to me then simply as a lay person that one

of the avenues we ought to be pursuing was to certainly initiate the action in some way. I wasn't aware of the legal technical phraseology but certainly to bring the matter to a head. And if it occurred to me as a lay person then that striking out applications or something of that nature ought to be pursued to bring the case to the head, why didn't it occur to the P and R Committee of the day? Certainly had I been employing Advocate Binnington that is exactly one of the things I would have asked him.

Senator M. Vibert

Sir, can I say something and if possible the Solicitor General can help. Wouldn't it be a matter of course for a litigation lawyer to consider the application of striking out in his review of the case and advise it if he thought it was right to do so?

Solicitor General

Yes, absolutely. A litigation lawyer is a specialist in litigation and that is why, stating the obvious, and I apologise to the House for stating the obvious that is why litigation is passed to a litigation lawyer, particularly if it is serious litigation and to go back over the ground which was traversed this morning the decision was taken in 1994 and implemented in 1995 that litigation would be in the hands of Advocate Binnington and I don't want to stand here repeating myself but Advocate Binnington is the lawyer with the conduct of the litigation and again I can only say I am not in the role of duplicating Advocate Binnington or indeed of telling Advocate Binnington how a litigation lawyer should be litigating.

Deputy of Trinity

Sir, isn't it correct and I hope the Solicitor General will confirm this or not, but in the light of Commissioner's Page's comments, in fact that the decision by the litigator, Advocate Binnington that he did not wish or did not proceed with the idea of a striking out case, is because in his mind it was not appropriate and that surely the reason why we are now having what one would call, what has been described by Senator Walker as a there's been a change in the legal advice, is because Advocate Binnington having looked at all the paper work that has been accumulated over the last several years and actually by the letter which the Solicitor General read out was actually laying out the before the case he was likely to approach in the Royal Court. Having looked at the whole of that and then being asked to give an assessment as to the risk is saying well now I've got to stand up in Court and actually sell this, I'm now beginning to find myself that the odds have changed and the odds have changed quite considerably. I've been trying to work out what the mathematics of the odds are, and it actually is quite difficult but on the face of it they have changed quite significantly but I hope Sir, that the Solicitor General at least could indicate that my thinking on this is least somewhere the truth.

Solicitor General

Yes it's entirely correct and when I get to Advocate Binnington's explanation which is in the, it lies ahead in my chronological trail that will be very close to what is said.

Greffier

Shall we try and get there. Perhaps we could

Senator E. Vibert

These are very important issues. This is one of the

Greffier

I'm not suggesting for one minute that we ought not to have to come back to it but I think it would assist the House to hear out the Solicitor General because then we'll know exactly

Senator E. Vibert

With respect you did say that we would be given every opportunity

Greffier

I'm not suggesting for one moment you won't be.

Senator E. Vibert

I wish to ask a question of the Solicitor General on this particular point over some issues that have just been said that are blatantly false and I wish to raise them with the Solicitor General.

Greffier

Well raise them briefly Senator.

Senator E. Vibert

And the first point I would like to make is that the trial judge was never asked to judge on whether or not an action should have been taken to strike it out. I don't know where Deputy Crespel got that idea from. It was never part of the deal. The important part and this is again what I would like the Solicitor General I would like to read, you see I'm confused about what I have on paper and what I'm hearing from the Solicitor General because it's made quite clear in this document that a weakness in our case has developed because the fact and I'm going to quote "the fact that the Crown and the States have not sought to make that application suggests that the case against the Crown and the States is not quite as obviously bad as we would have liked". Now there making it very clear, the Solicitor General and the Attorney General that we have created a weakness in our case by not going for a striking out situation.

Solicitor General

I'm sorry but I'm afraid I just don't understand the wording in that sense. What it is saying is that the fact that there is no striking out is indicative of no grounds for a strike out i.e. that the case is not an open and shut, gilt edge, guarantee and I cannot understand the words in the sense in which the Senator has put them forward. If I'm alone in the House Sir, I'll try again but I really can't take it to mean what he has just said. I've tried but I can't.

Greffier

Perhaps we could invite you Madam Solicitor to come back to the chronology and just reassure members there will be added opportunity to raise any of these points after as they arise.

Solicitor General

Actually I've nearly forgotten where I was up to.

Greffier

You're nearly there.

Solicitor General

And if members will bear with me I am going to have to try and identify the point at which I was. Oh yes. The request was made for the risk analysis and I read the risk analysis this morning. The advice which, the joint advice of January 2003 was a joint advice from the Attorney General and myself and it was a joint draft as well as being jointly signed and members have it so I don't think I need to go over it. And that advice was given to the Committee and the Committee was requested, or was invited, to consider the question of the settlement. The rest is history, the discussions take place and I advised the Committee during the course of the discussions on legal points arising. There was a stage in May, I think about 8th May, when the discussions apparently broke down and there had also been a variation in the valuation and I was so considerably concerned because of the combined effect of the increased likelihood of the risk happening combined with the disastrous consequences if the risk did happen that I gave, I was about to leave the Island on leave, I gave the Committee some written advice saying that I thought attempts should be made to recommence, and the Committee did indeed recommence, the discussions.

I now come to the question of the two questions of the change on the part of Advocate Binnington and the question of the costs and on both of those it was clear to me that the members would wish to have an explanation of the way in which Advocate Binnington's advice had moved from confirming the 'without merit' to the advice of his risk analysis and I think probably I can't do better, he let me have it in writing, and the best course is to read it to the States –

> "When I took over conduct of the case I saw nothing in the joint opinions with which I disagreed and was therefore happy to agree with counsel's conclusion that the claim was without merit. Further research did not reveal any substantial points against our case and thus in 1997 against the background of exorbitant demands by Les Pas and a plaintiff who was not demonstrating any great hurry to bring the matter to trial, the advice was that the exorbitant demands should be rejected.
>
> Since that date a significant amount of work has been carried out on behalf of the defendants in relation to discovery. Whilst this did not reveal any documents which were wholly detrimental to our defence there were certain documents which revealed that when an opportunity had arisen in the past for the same issue to be decided a final determination had been avoided. This has the potential for creating an element of uncertainty in relation to the question of ownership of the foreshore which could be of some limited assistance to the plaintiff and may cause the judge to take the view that the reason the issue was avoided was because the Crown was not as certain of its ground as it might have been.
>
> The Clarke Shipyard and Ronez cases are examples of this.
>
> Once discovery was complete the documents were analysed in greater detail and a considerable amount of further legal research was carried out. Furthermore, detailed skeleton arguments were prepared for trial and it was only at that stage that the final shape of both sides' cases and the authorities upon which they were to rely became clear.
>
> We were then asked to produce a risk analysis. That made clear that we still regarded the defence as a good one but emphasised that as we were dealing with customary law, which is in a continual state of development and is susceptible to policy consideration the outcome could not be guaranteed. For that reason a compromise was a sensible option to consider in order to achieve certainty as to outcome. It is well known that most cases which settle do so shortly before trial not only because many parties fail to consider settlement until that stage (well I interject there and say that was not the case Policy and Resources did give it consideration but it proved impossible) but also because it is only then that both sides have available to them both the documents and the

> authorities upon which their opponents intend to rely and are thus in a better position to assess the risks of the litigation than they were at the outset."

The other matter was the security for costs and in that one Advocate Binnington wrote in his reply –

> "The possibility of an application for security was first raised as early as 1990 by Terry Sowden, then Solicitor General writing to Advocate Michael Birt, acting for the plaintiff. The possibility was raised again during 1993/94. In November 1994 the then Policy and Resources Committee decided not to seek security for costs and the fact that there was no current intention to make (by no current intention I mean no intention in 1993/94) such an application was confirmed at a hearing before the Royal Court in March 1995. In the latter part of 2000 the possibility of an application for security for costs was revived. This coincided with the period of almost total inactivity on the part of the plaintiff in taking the action forward. In support of such an application it is necessary to produce a detailed bill of costs on a taxed cost basis both in respect of costs actually incurred and estimated future costs. The preparation of this document took some considerable time. In addition it was necessary to prepare an affidavit in support of the application".
>
> At this stage no judge had yet been appointed to hear the action and any interlocutory applications. Discussions were taking place between the parties and the Court as to possible candidates. In November 2001 the Bailiff nominated Mr. Howard Page, Q.C., as Commissioner to hear the case and a hearing was fixed for 11th January 2002 for him to give directions as to the further conduct of the action and to be notified of any interlocutory matters which the parties wished to raise. At that hearing the defendants' intention to apply for security was notified and it was heard on 25th June 2002. The application was refused on the grounds that –
>
> (1) the defendants had effectively blown hot and cold in relation to the application. This was not compatible with fair conduct of the litigation;
>
> (2) the application had been made late in the day given that the bulk of work on discovery had been accomplished;
>
> (3) it was undesirable to have an indefinite question mark hanging over the issue of title."

That concludes the response from Advocate Binnington.

I am now at the end effectively of the chronology. I have covered the sequence of advices given at different stages. The advices given by Advocate Binnington and the final matters of the advice to the Policy and Resources Committee which, as I say, was initially a joint advice from the Attorney General and myself and the subsequent advice of 8th May was my advice. Because I was going to be on leave I asked the Attorney General to confirm that he was in agreement with it. As it happened he did agree with it but that was my advice and it was that given, as I have said, the combination of the consequences of risk and the current risk assessment I advised the Committee that it ought to seek to re-open the negotiations.

Senator Le Claire

Can I ask a question please. Just a last clarification of the chronology please Madam Solicitor General. The last document you read from Advocate Binnington's summation which you said you could do no better than to read to us. Could you tell us what the document it titled and will it be available with the other documents in Morier House for us to peruse?

Solicitor General

It is in the form of an e-mail. Yes, it is the form of an e-mail. I can make it available.

Senator Claire

By making it available you mean available in a copy.

Solicitor General

Possibly once members have identified all the documents they would like a compendium can be put together and perhaps even more than one copy made so that members can read it and I shouldn't be committing the Greffier to this sort of thing but possibly that would be helpful that members could read it, or read everything.

Senator Le Claire

Madam Solicitor and through the chair, well actually I was going through Madam Solicitor to the chair to you Sir would it be available, could it be available then because I think we've mentioned the documents that we would like to see. You did say yes, sorry.

Greffier

Are there any points members wish to raise perhaps with the Solicitor General at this stage?

Senator E. Vibert

Yes. I don't know if this the appropriate time to raise this matter but do we let the Solicitor General have a list of the documents that we require to see in that folder or can I give them now? Would it be easier if I?

Solicitor General

I mean it's entirely up to members. The ones I have noted so far are the two advices of December 1993 that is the Attorney General's and the Solicitor General's, the Solicitor General's of November and the Attorney General's of December. I believe that members wanted to see the Committee Act of 6th December 1993 and then the e-mail of, well the one that's been referred to. So I have noted some but it would be helpful if members could actually confirm in writing what they want so that we do know exactly what members do want.

Senator E. Vibert

Would that include the copy of the letter of 3rd January 1995 to the Committee from the Receiver General?, is it that date?

Solicitor General

I'm sorry which letter is this?

Senator E. Vibert

It's the one where he advises that we should be seeking a compromise. 1993.

Solicitor General

I think that was December. I don't think that he advised that a compromise should be sought. It was that the Committee should give consideration to its options, I don't, that was, I think that was December 1993, 2nd December I believe. Yes it's the one I've referred to.

Senator E. Vibert

And also the minutes of the Policy and Resources Committee where sections have been blacked out for privilege reasons. They should now be restored to their proper condition so that we can read them.

Solicitor General

Yes. I think those have all been disclosed at this hearing so then the privilege will be preserved. I should add a clarification. Preserving privilege is very important. If I identify something where I think it should be privileged I think it will have to be made available to the States Assembly in a body. I did make the point this morning that if a settlement is not arrived at the litigation continues and it is absolutely crucial, firstly that privilege is preserved in every respect and secondly that nothing gets, well nothing gets beyond the eyes and ears of the members of the House.

Senator E. Vibert

Didn't the Attorney General, sorry, through the chair, didn't the Attorney General in fact let us see some documents on the basis that privilege could be preserved because this was 24 hours prior to the meeting and he thought that privilege would cover that. Surely that would cover today's situation.

Solicitor General

That is correct and the Attorney General discussed that with me, not before he gave that view but afterwards, and we agreed that it was sufficiently proximate to preserve privilege.

Deputy Duhamel

Thank you Sir, through the chair. I mean the Solicitor General referred to a firm starting off point being put forward by the plaintiff in Advocate Binnington's advice, such that he'd had cause to actually query the previous advice. Could the S.G. actually refer in legal terms as to what that starting off point is?

Solicitor General

I'm don't think I've completely followed that. What was the reference to the starting off point?

Deputy Duhamel

The indication was that the advice had changed and that whereas previously legal opinion had actually suggested that the case being put forward by the plaintiff was without merit was indicated that Advocate Binnington had come to a different opinion and the suggestion was that there was now a firm starting off point on which the plaintiff could, make his case. I just wanted to know when it was?

Solicitor General

Oh yes, yes it was when I was trying to clarify the expression "serious issue to be tried" and I was saying it doesn't mean it's a serious issue in the sense that there's going to be a serious result. It means it's a serious issue in the sense that the plaintiff has got a good starting point for its action. A serious not a flippant case. I'm indebted to

Deputy Duhamel

I'm happy with the wording but I mean can we actually have it in lay terms, in lay legal terms what is the good starting off point that the plaintiff will be putting forward which hitherto we didn't agree with but now perhaps we do.

Solicitor General

What is the point that Advocate Binnington thinks is now a basis of the plaintiff's claim which is not frivolous? Well I think that is covered in his risk analysis when he identified, he homed in on the customary law point, and I think he is correct on that one, and he advised that there is no, that Les Pas couldn't make a case on prescription or on express grant and I would agree with that. And he homes in upon the customary law point where the argument of Les Pas is that the owner of a maritime fief has at customary law, ownership of the foreshore adjoining the fief. And the advice given by Advocate Binnington in his risk analysis is that it is not possible to show that the, to point to a case in which it has been definitely decided. I don't want to bog members in a legal issue but I think I would like to explain two things about forestore and which will help clarify the different stances of the parties and the argument, and the documents. The various cases and the customary law do have plentiful references to wreck coming ashore on a fief and sometimes they use the words "*sur son fief*" on his fief, sometimes they use the word "*sur ses terres*" on his lands and the argument, of Les Pas is that because this refers to his fief it means it's his in the sense he owns it. Now the argument certainly the view which I take is that it doesn't mean his fief in the sense of what he owns, it means his fief in the sense of the area in which he has jurisdiction and can exercise rights. And members will recall this morning when I was talking about the rights of, that could be exercised, like the right to enjoy a property for a year and a day, it doesn't mean you own the property.

Advocate Binnington in his risk analysis has said that he regards it as there is no guarantee of being able to persuade the judge that there was a distinction between jurisdiction and ownership of this nature and he, having as I've said having reviewed the skeleton arguments and the authorities and documents, the view which he has formed is that he cannot give the cast iron guarantee 'the without merit' stance, which is dependent upon persuading the judge that there is the difference between jurisdiction and ownership and that what the document is talking about is jurisdiction. I hope that hasn't been too legal.

Senator Ozouf

One question which I didn't understand myself and I think some Senators share this question is what does prescription mean?

Solicitor General

Prescription means that after a certain period a right can't be exercised, and prescription in the context, proprietary prescription, it means you acquire a right of ownership, you can acquire a prescriptive right of ownership by 40 years open peaceful possession so if you have a field and I go and occupy it and I'm there for everybody to see occupying it and I do it for 40 years and you don't do anything, at the end of the day you can't bring an action calling on me to show my title to the field because I have acquired a 40 years prescriptive title. Therefore there's two ways of putting it. I've got a prescriptive title, your possible action is prescribed, you can't bring it.

Deputy Martin

Sir, I'll start with that point. At the end of the risk analysis you read out from Advocate Binnington, I haven't got the exact wording but it does concern me that the wording says something to the form of any other claim will be unlikely, that is if we settle being unlikely and also that there is the time constraint

being what you say of the 40 years, but unlikely and no other claim is what I'm disputing, if we settle then are we setting a precedent that we are going to be challenged by other people and secondly I was at the meeting where the Attorney General, and obviously everybody's read this, but it's got to be put in context of what the actual judgement was. It is on page 3 and he doesn't, it's the issue, it's just part, it's prefixed by, it would be, the judge actually says "It would be quite wrong in a case of this complexity and sensitivity of the present one for me as the designated trial judge to express any view whatsoever about the merits or demerits of the claim at this stage". And I really think this whole paragraph must be completely taken in context and the whole context and not just that one line of a series, and that it appears to me that's the trial judge, that there is a serious issue to be tried. This was the warning shot that supposedly jumped out across, from the pages of the Attorney General and made it, you know that this is the new advice, there is no new legal evidence and we thought something might have, you know somebody in the foreshores or the foreshores of other lands that had you know successfully had a claim against the Crown or the government and won. So really it's two questions. If we do agree to this deal are we likely, it just says it'll be unlikely that we are going to incur any other you know, people coming forward and saying well hang on a minute that was my fief this is my land, and as I say secondly that this has all been taken out of context every time it is represented by P and R and even other members of this House and I really think it should be taken in the full context as it was reported in the paragraph from the judge.

Thank you Sir.

Solicitor General

As regards the question of other Seigneurs my own view is that they would be prescribed because the lease of the entire foreshore was a lease passed in 1950 and that was an open act asserting ownership because only the owner can lease the foreshore and therefore the Crown was openly dealing with the land as owner and more than 40 years has passed and no Seigneur has made a challenge. I didn't understand the second part of the Deputy's speech as a question. I thought it was a comment.

Deputy of St. Peter

Sir, at our meeting in St. Peter I posed the question to the President of P and R regarding ownership and he thought it was better answered in this forum. In paragraph 4 of the report accompanying P.117 it is stated that Advocate Falle had formed the view that under customary law of the Island the foreshore belonged not to the Crown but to the Seigneur of the adjoining fief. He acquired the Fief de la Fosse which adjoins the foreshore, the claim to the foreshore was used to support the group's plans.

In paragraph 6 of the same report it was stated that in 1989 they formed a company which they called Les Pas Holdings Limited and the company acquired such rights as the Seigneur had in the foreshore. However, in a letter sent to the JEP dated 21st August setting out P and R's proposition Senator Le Sueur said that Les Pas Holdings Limited had not acquired the fief. Do these two statement mean that it is the view that Advocate Falle is still the Seigneur of La Fief de la Fosse? Do they also mean that the States and Crown side accept Les Pas has acquired the Seigneur's rights to the foreshore? Is that latter point still of legal contention or is it to your knowledge the intention of the States and Crown advisers to challenge the legal rights of Les Pas to acquire from the Seigneur legal rights of the foreshore.

Solicitor General

Yes. Certainly Advocate Falle is still the Seigneur of the fief. He retained the fief but sold such rights as he might have in it. Therefore the, he was the Seigneur and he would say he is the Seigneur, and he owned the fief and he has sold it that is how it would be categorised by Advocate Falle. And that is why the defence of the defendants is firstly that the Seigneur did not own the fief any way, sorry didn't own the foreshore any way. Secondly if he did he couldn't validly sell it to the company, and that is why when there was a compulsory purchase of all such interest as the company might have in the foreshore,

the public or the States acquired by compulsory purchase firstly all such interests as the company might have in the foreshore just in case he's , if he was right and they had the foreshore, then the interests been acquired. But secondly the States also acquired all such interests as the Seigneur had, might have, in the foreshore because if Advocate Falle was right and he owned the foreshore and if the defendants were right and he couldn't transfer it to the company, it would mean he would still own it if they won the action. Therefore both the hypothetical interests were acquired. So the answer is yes, he's still the Seigneur and certainly it's contested that he could transfer the interest in the foreshore.

Deputy of St. Peter

Sir, can I get back to that on the answer. I see in the judgement that we have that it is Les Pas Holdings, It's Les Pas Limited that are actually the plaintiffs in this case.

Solicitor General

The reason why Les Pas Holdings Limited is the plaintiff is that it the case asserted by Les Pas Holdings Limited and by Advocate Falle in his capacity as Seigneur they assert firstly that the Seigneur owned the foreshore and that secondly when he had transferred all such rights as he had in the foreshore to the company he validly transferred to the company the foreshore so that their claim is dependent upon saying Les Pas owns the foreshore that is why Les Pas is the plaintiff. But both Les Pas and the Seigneur are parties to the agreement. Les Pas to give up the litigation and the Seigneur to confirm that he doesn't claim to having any independent right.

Deputy Troy

Sir, I've got a whole stack of questions actually but I'll start with going right back to the beginning which is the transfer of the Fief to Samares and the Fief de la Fosse which were owned by one Deborah Dumaresq who inherited them from her family, who inherited the fiefs from her father and she had siblings who were arguing over the Fief de Samares and the Fief de la Fosse and they wanted the two fiefs split. Now Deborah applied for letters patent to ensure that the two fiefs did not become separated and there is a document dated 1696 which was registered in the Public Registry on 27th April 1696 which goes through that and it grants to her letters patent ensuring that the Fief de Samares and the Fief de la Fosse must be kept together. Now once you have the letters patent any subsequent transfers which are not by inheritance need to be confirmed by letters patent.

Now I know the answer that the Solicitor General is going to give me because I did have a quick word with her earlier but I'm, I still want to get to grips with this because if the Fief de Samares was given under letters patent and the Fief de la Fosse specifically for the intention of keeping them together, then when they came to be split I feel that they it would need to be under letters patent because it was obtained under letters patent that they came together and the Fief de la Fosse was at that time a minor fief, and is possibly still considered that way, but what I want to establish is how the fiefs came to be split. Whether it was letters patent and if not by letters patent, because letters patent had been specifically applied for to keep them together, would not that be an invalid transfer to subsequent persons? Thereby Advocate Falle, who I believe did not apply for letters patent but I'm not absolutely certain of that but I believe he did not apply for letters patent then if you take it to its logical conclusion he would have completed a transgression of the rules of transferring a fief. Because in the, up in the Fief de Noirmont for example, the Seigneur of Noirmont was fined by the Receiver General, a penalty was imposed for not having obtained letters patent. That was Mr. Jagger who took on the Fief de Noirmont at one point. And I'm convinced that there may be a cloud here. I can't follow it all the way through, I haven't been able to assess how the split came about and maybe the Solicitor General may know that.

So that is one point which I wanted to bring forward and then when Advocate Falle transferred the Fief to Les Pas he put in his transfer documents some wording which had not appeared in any prior transfers of the fief. Advocate Falle in his transfer, in the transfer from Mrs. de Carteret to Advocate Falle dated

14th November 1986 it states *y compris tout et autant de droit de propriété dans le rivage de la mer que peut avoir le dit fief*, sorry for my appalling pronunciations but that basically says and comprising all and as much proprietary rights in the foreshore as may belong to the fief. Now that was not, those words were not in any prior transfer of the fief, those are new words that Advocate Falle has put in or Mrs. Malet de Carteret's lawyer, I'm sure if she had some help from Advocate Falle, but these are new words that were put in for the transfer of the fief in 1986. And I just wondered whether these words can really just be struck out in any Court action because they were never there in any previous contracts, absolutely total nonsense in that transfer in 1986.

Greffier

Do you wish to comment?

Deputy Troy

Two further questions at the moment.

Greffier

Two separate issues there I think.

Solicitor General

Firstly I will go through the sales of Fief de la Fosse. Deborah Dumaresq first obtained letters patent effectively entailing the fiefs which she held of which there were a number. One being Samares and there were a number of other minor fiefs. The minor fiefs including La Fosse. She had it firstly entailed. She subsequently made a second application successfully and got furthers letters patent which allowed her to sell the fiefs. At this stage at which she obtained letters patent I think it was possible she thought she might have heirs in the event she then got permission to sell them.

Deborah Dumaresq sold her fiefs to a person called John Seale. At the death of John Seale the fiefs descended by inheritance to his son James Seale. James Seale applied for and was given permission to sell the fiefs and he sold the fiefs to someone called James John Hammond. Hammond then sold Fief de la Fosse to François Godfray without actually getting any permission or patent. Nine years after that he applied for permission and was given effectively retrospective permission to alienate these fiefs and this included Fief de la Fosse which in fact he had already alienated it but because he now had retrospectively the permission of the Crown to alienate Fief de la Fosse. Fief de la Fosse became in that way separated from Samares. Fief de la Fosse was then sold by Hammond to a Colonel Le Cornu. From Colonel Le Cornu it passed, I believe under his will to the de Carteret family and subsequently came to Mrs. Malet de Carteret. So the reason why the fiefs were severed that was done on the sale by Hammond to Godfray which to get a retrospective consent and once La Fosse being a minor fief had been severed from Samares the major fief the Crown consent was not required for further transactions.

The second question was about the words in the transfer by Mrs. Malet de Carteret to Advocate Falle. Starting with a question whether the words could be struck out. There wouldn't actually be a need to strike them out because if you put words in a document that purports to do something which you actually can't do then the document is just meaningless and so for example I went to Court and passed a contract selling somebody, Deputy Troy's house there would be no need to strike it out, it would just be a document that had no significance.

Deputy Troy

That seems to suggest that you agree that you can't amend the terms of a previous transfer de fief.

Solicitor General

If I can just finish what I'm saying about the wording in this transfer. The history of the wording of the transfers is that previous documents did not refer to a right of ownership, *the droit de propriété* which was put by the Deputy. That was included in the transfer by Mrs. Malet de Carteret to Advocate Falle. Subsequently when Advocate Falle came to sell his rights in the foreshore to Les Pas Holdings Limited the contract as engrossed repeated the words about the *droit de propriété* but in fact it was not passed in that form. The presiding judge who from memory I think was the late Vernon Tomes declined to pass the contract in that form because it asserted the right of ownership and the contract was amended in manuscript simply to say all such rights as he might have in the foreshore which if he had a right of ownership would be adequate to cover that right and if he did not have a right of ownership would simply refer to such rights as he might have and if he didn't have any, then he didn't have any.

Senator M. Vibert

Thank you Sir, I sometimes begin to wonder why my son has spent three years at Durham University studying law. But I'd like to ask the Solicitor General if she could explain to me being a non lawyer, what I think is a very important point so that in her own words I heard her read out what Advocate Binnington had to say and I think a very important point is why Advocate' Binnington's advice has changed from previously being supporting no merit to the current position where a better than evens chance of winning. I heard a bit of it but I think it would do well if I could ask the Solicitor General to give her view as to why she believes Advocate Binnington's advice has changed so materially.

Solicitor General

In fact on that one I'm not going to be able to take it very much further than Advocate Binnington's advice because it is he who has given the risk assessment and in litigation it is the litigation lawyer who assesses the risk of litigation. He did refer, as members will have heard me say, to the authorities which are to be relied on, the skeleton arguments and the documents and pleadings. The assessment of a litigation risk depends upon two things. Firstly what you yourself think of the action. Secondly what you think the judge is going to make of the action. Sometimes they will be pretty well identical, sometimes you will think to yourself I'm sure that we're right but I'm not so sure the judge is going to go along with us. It is really very much a question for the litigation lawyer who has done his own pleadings and is having to answer the other pleadings combined, if he has it, with any appearances which he has had in front of the judge to form the assessment and as for doing, I suppose the next question might be "what would my independent assessment be?" Now to do that I would have to substitute for Advocate Binnington and it would be necessary for me not only to go through the documents which had been prepared for Court that is the documents which had been selected from the discovered documents plus the commentaries, the authorities and the skeletons but also the discovered documents which hadn't been prepared for Court, just in case I myself would rely upon some discovered documents which Advocate Binnington has not relied upon. Now that would be as really long-term a task as preparing for the litigation myself as if I was a litigation lawyer. Now if I were to do that and at the end of the day I came to the same conclusion as Advocate Binnington the advice would be the same as it is today. If, on the other hand, I were to do that and were to say "well I've gone through all this, you know I've spent some weeks or some months whatever it would take and I actually think that it's not quite as bad as he thinks that it's not a real risk of losing it, it's just a possibility."

The question then arises, what then? Advocate Binnington's the person who's litigating. If he was then told you know you think you said there's a real risk but the Solicitor General thinks differently, so go ahead and litigate. If he then goes ahead and litigates and loses he is in the position of saying "well I warned you" and it's rather like the analogy of two people, one of them in air traffic control on the ground and one is piloting a jumbo jet and there's a bit of fog and the man in the jet says "I think that fog is too bad, it's going to be risky landing". The person on the ground looks at the fog and says "I don't think the fog's anything like that bad. You come in and land." It would be very dangerous to tell the

person who is piloting the jumbo jet to land in the fog because somebody who is on the ground thinks it's alright to me.

Deputy Ferguson

Yes. I'm a little confused about this actually. Land is an immoveable object and when the immemorial rights were set up over the foreshore you know, several thousand years ago, whatever, then the land over which the Seigneur has rights is not that of which he's claimed rights. You know I've seen old maps where there is a very large estuary in the middle of St. Hilary and this indicates a vastly different foreshore so that are we actually arguing over what he originally had rights in the first place. You know the land can't just move from A to B.

Solicitor General

Sorry, was that a question? I'm afraid I thought it was just an observation that land can't move from A to B which I think is quite so but

Greffier

Well you see on the actual foreshore

Solicitor General

If the question can be put as a question.

Deputy Ferguson

Yes, there was a question. My confusion is that land is land is land, we have an argument here that the Seigneur of the Fief de la Fosse says that he owns the land. But he's owning the land attached to the Fief de la Fosse. Well, and he's claiming it from customary law, time immemorial but when it was established that he owned the rights over the land, it's a very different piece of land to the one we're looking at today. I mean the bit we're looking at today was probably 60 feet under water when he got his rights.

Greffier

The issue of the foreshore moving and things like the reclamation of the church.

Solicitor General

Yes. The suggestion that it was 60 feet under water suggests that the tide now goes further out than it used to and I think we moving rather from legal points. I don't certainly I think this may be one of the ones where I will have to supply the answer but I can certainly remember in the earlier stages we put together a compendium of the plans showing, the earliest one I think came was Major Rybert's from the town of St. Helier. Successive plans showing the harbour area and I don't recall the tide ever did not retreat so as to expose the foreshore. Be that as it may, foreshore is, at customary law, that part of the beach which is covered at the extreme high tide and uncovered at the extreme low tide and if the tide does suddenly start going in a different direction that is actually a piece of luck for the person who has a right over the foreshore. It's rather like if somebody owns a piece of land, these things do happen that there are natural movements which affect the extent of property owned. To turn it the other way round if somebody has a house on the cliff and the tide comes in and the cliff collapses and the house is carried away the person who owned the house doesn't own it any more because it's out to sea. Similarly if the tide does go out further then the foreshore area is extended.

Deputy de Faye

I'd be helpful if the Solicitor General could clarify a number of points as I go through them because that will help me, extend to what I want to say. As I understand it we as defendants do not intend to dispute the fact that Advocate Falle does currently have good title to the Seigneurship of the Fief de la Fosse. Is that the case?

Solicitor General

Yes that's the case. There isn't a dispute over the acquisition by Advocate Falle of the Fief.

Deputy de Faye

Thank you. However as I also understand it we the defendants, do not believe that it's necessarily possible for the Seigneur to assign his rights either traditionally personally to a corporate body like Les Pas Holdings and additionally that although the Seigneur and Les Pas Holdings have commenced litigation because of the prescriptive period the fact that that has happened will not open the way for any other proceedings from any other potential litigant.

Solicitor General

Yes. On the question of whether he can transfer the rights in the foreshore to the company that is in issue. It's contested by the defendants and, as I've said, that is why they acquired both such interests as the company might have and also such interest as the Seigneur might have just to cover the possibility and the prescriptive question. The answer to that one is the prescriptive period, no, my advice on that one is that the prescriptive period began to run in 1950 and the 40 years are up. It is right to add to that that at various times Les Pas have reserved the right to say that the prescriptive period didn't begin to run but I've never seen any grounds advanced to saying why the prescriptive period didn't begin to run and if the agreement is ratified both Les Pas and the Seigneur put an end to any claims by themselves thereafter.

Deputy de Faye

Do we accept as defendants that in addition to the disputed area of the ownership of the foreshore, does Advocate Falle as the Seigneur currently hold any undisputed rights such as those pertaining to flotsam, jetsam, lagan, gravage?

Solicitor General

No, the Seigneurial rights were abolished in 1966 by the Seigneurial Rights Abolition (Jersey) Law and they abolished certainly all the rights which have been mentioned and I think a few others. I can possibly refer to the law if members want to but I mean the short answer is that they've all been abolished.

Deputy de Faye

Thank you. It takes me on to just two other areas. One I think the Solicitor General will probably be able to deal with quite shortly and that is in the existing agreement under obligations of the States this is in P.117 under the section 1.(a) there is an element that says as the sentence says "that it would be granted in perpetuity", this would be the site on the reclamation site, "be granted in perpetuity and free of all charges, encumbrances, restrictive or other onerous covenants and servitudes in favour of third parties", etc. What I'd like to know is does this mean Les Pas Holdings will not be obliged to pay rates and in respect of the deal as a whole is the deal enforceable in the sense that we are all expecting that should a settlement occur that a specific construction will take place , namely that of residential accommodation to the tune of roughly 100 units of accommodation with various housing categories attached, and so, but

is that in fact enforceable because nowhere in the document that I've read that we agreed to is there any provision that should Les Pas suddenly change their mind about building that specific construction but one we're expecting we don't appear to have any provision to say, well under those circumstances then you know, the settlement's off as we see it. So I would like to know will they pay rates, is the deal enforceable and thirdly and this I think is potentially horrendously complicated what will be the effect of the so called "Shenton petition to the Crown" –

(a) on any settlement; and

(b) on any potential litigation?

Solicitor General

Right, to take those in order. Firstly the reference to its being free of charges doesn't mean they won't pay rates. It means, like, you don't transfer it to them with a million pounds mortgage charged on it or something like that. Secondly about being enforceable, it's not actually a term of the agreement that they must construct a structure. But nevertheless the planning, they cannot construct something else without planning consent and this is part of an area for which there is a zone, it's zoned for a particular use and the third question was, oh yes

Deputy de Faye

The third question relates to the what is the precise impact going to be of the so called "Shenton petition to the Crown" which could impact either on a settlement or on future litigation.

Solicitor General

Well, I have some difficulty with that because at the meeting at which I attended the Shenton petition, though people were signing sheets supporting it the petition was no in evidence and I haven't seen it so I'm not perfectly clear what it is actually asking. Maybe if a member knows what he's asking.

Senator Le Claire

I believe Madam Solicitor that it was done, published in some full page advert in the Jersey Evening Post but I do not believe that I can rely on that as being the actual document he is going to send. So I think it's a relevant point that

Solicitor General

So I'd like to know what's he's asking.

Senator Le Claire

The document that we signed

Solicitor General (passed by Deputy of St. Martin)

I have been passed one and it says "we the undersigned residents of the Island of Jersey above the age of 18 wish to support the humble petition of Richard Joseph Shenton, O.B.E. K.S.G., requesting a Committee of Inquiry to investigate the background of the negotiations between the Crown Officers and Les Pas Holdings regarding the ownership of the foreshore". I wouldn't regard it as having any particular relevance to be honest.

Senator Le Claire

May I, I'm sorry Sir, on that point because I think we might be just missing the possible thing Sir, it's just did Deputy Hill pass you the piece of paper that Senator Shenton was passing around from the beginning because I do believe that that has changed and if it has changed the relevant question would be "what would the effect be of Senator Shenton's petition" and if the wording has changed then surely it must be a consideration that we might reflect upon. Is it possible if the Solicitor General can contact or somebody could contact Mr. Shenton and get the actual wording of the petition.

Solicitor General

I have to say that I can't think of any petition however worded and whatever it was asking for which could actually have an effect on what is, when one strips it down to essentials, a question of two parties to litigation or three parties to litigation reaching agreed settlement. I can't think of any petition that could have any effect on it.

Senator Le Claire

Then why did you ask for a copy of one Madam Solicitor when you first asked the question?

Solicitor General

To see what it said.

Greffier

Deputy Scott-Warren has been waiting

Deputy Scott-Warren

I'd like to ask through the chair if the Solicitor General could please elaborate further on the question of the abolishment of property rights on a fief. Because I've been told recently of an agreement if a business is made on this reclaimed land where Les Pas Holdings are mentioned and in the event that their ownership was established that the States have to pay certain amounts and obviously there is also a similar type of question where the tenants of the Havre des Pas swimming pool make payments to the Crown and obviously in the event of Les Pas winning an action I presume, and would like clarification on whether they will be reimbursement from the Crown to Les Pas of amounts such as those? Thank you.

Solicitor General

Right, the first question is about the abolition of rights. Can I just clarify are we talking about the Seigneurial rights that were abolished by the law or about the alleged property rights were acquired by compulsory purchase. I can answer both if that's of assistance.

Deputy Scott Warren

Right. I was actually thinking of rights of people, of the States compulsory purchase on the buildings that have been put on that area.

Solicitor General

Right so far as the compulsory purchase is concerned the area which was acquired by compulsory purchase is actually appended to the proposition and it's marked, if one looks for Appendix 2 the red line

is, the lower of the two red lines is the extent of what Les Pas claims to be the western boundary of the fief and there's an area coloured blue which was I think I'm right in saying is the compulsory purchased area and the area coloured red is the area which wasn't acquired. What was acquired was such interest as the company might have and such interest as the Seigneur might have in that blue area and at that stage a certain amount of work on infrastructure had taken place but buildings had not been erected and the interests were acquired subject as I have said earlier to a specific statement that it was nevertheless denied that there was later any such interest. Any way when anything is acquired by compulsory purchase the owner is entitled to compensation. In the case of these interests the compensation was not assessed at the time because quite clearly the compensation would be almost impossible to assess if it was not known whether there was an interest or not and so the claim to compensation is something which is on hold while the litigation is proceeding. If the action is settled it is part of the settlement agreement that the compensation claim is given up and so there is no further claim for compensation to be paid to Les Pas or to the Seigneur. If the litigation continues and defendants are successful then again there's no compensation because it turns out there never was an interest in the first place. If the litigation continues and Les Pas is successful then Les Pas will be entitled to compensation for that interest valued as at the date of the compulsory purchase which was 1998.

Shall I do the Seigneurial rights as well. That was the other thing.

Right, the Seigneurial Rights Abolition (Jersey) Law 1966 was a law to abolish Seigneurial rights from which financial advantage accrue and to make provision in relation in related matters. Some Seigneurial rights had been abolished at earlier stages and this really was the final windup. What was abolished, some were abolished and some were vested in the Crown. What was abolished was the right to the *lannée de succession* and that's the one I referred to of enjoyment for a year of a property. The right to the possession of a property during the *décret* and again that's one I referred to where the Seigneur could take possession of property during an insolvency. The things which were vested in the Crown were the rights to property by *escheat* or as it is known in Jersey *dehérence* that means when somebody dies without heirs within a sufficient, without a will, and without heirs of a sufficiently close degree to inherit the property, *escheats* to the Crown and the other thing what is described as rights to way force strays (it has *choses gaives*) wrecks of the sea, flotsam, jetsam and lagan (*varech*). So those were vested in the Crown and that's about all what's in the law. There is an abolition on the restriction of alienation or division of land or rentes in relation to feudal services and an abolition of tavernage dues.

Greffier

Is there one final question from the Deputy about the, for example, the Havre des Pas swimming pool?

Solicitor General

Oh yes, I'm sorry the Havre des Pas swimming pool. The question being would the Crown have to accounts for rents received? That isn't one that I have given consideration to before. My instinctive answer would be not but I'm afraid that is one I would have to research whether there is a liability to account. As I say my instinctive answer would be not if only because the Crown has been receiving the rents quite openly and no step has been taken by the Seigneur at any stage to seek an account for them or to take receipt of them.

Deputy Scott Warren

Because that was put to me by the person who told me this that if they believed their claim was genuine who have they not approached the Crown and said this money should be coming to us?

Solicitor General

Well, the answer is that I think the first lease of the bathing pool was somewhere in the 1890s that may not be particularly exact somewhere thereabouts.

Deputy Troy

1893.

Solicitor General

1893 thank you. At that stage the generally accepted view would have been, and I am relatively confident in saying this would have been it was owned by the Crown. Occasionally if I can just go at a brief tangent, occasionally I've been asked things like why did the 1966 law not deal with the ownership of the foreshore. Time and again the answer is because nobody thought that it did not, it was not present to anybody's mind that the Seigneurs had or might make a claim and therefore certainly the early stages of the bathing pool lease it would not have been the opinion and I think undoubtedly would not have been the opinion of the Seigneurs of the day that they had the claim and I think there is no secret about the fact that Advocate Falle, who admittedly does have a very considerable interest in customary law, first conceived the idea that at customary law for Seigneurs owned the foreshore. He acknowledged that the general view was to the contrary and so the probable answer, I mean, I'm speculating to a certain extent because you're asking me why Seigneurs didn't do something only they can say, but my assumption is that it did not, it was not, they did not think that they had ownership of the foreshore.

Senator Le Maistre

Can one pick up that point.

Greffier

Yes.

Senator Le Maistre

Otherwise it goes all over the place.

Deputy Troy

I've got a question on the same point.

Senator Le Maistre

The point that I wanted to ask was in relation to Havre des Pas as an example. There could be others within the fief. Where a building has been erected and a lease has been in place what is the effect of the time bar of the 40 year. If a lease has been established from the Crown in that case too, an organisation, is there a time bar effect or did that only come into effect after 1950 because the fief clearly is a bigger area than even on the diagram and it so happens that the outline has changed over a period of time so it's a progressive think obviously from 1893 whatever the date is a lease was established between the Crown and a body. Now if the claim had been made within that 40 year period presumably that would have been sufficient as a challenge but it wasn't clear so what effect does that have if any.

Deputy Troy

Can I add something to that before the Solicitor General replies because it's just that there was a lease in 1893 then that ran through to 1915. Then the lease was renewed again in 1935, so you've got 1935 as a start point of another lease which might suggest that there would be a time bar in 1975 so I just wondered what the Solicitor General's view point on that was in relation to what the Senator was saying.

Solicitor General

The lease of the bathing pool to the Club contained in the lease a reservation it said that it was subject to the rights of private individuals and the French phrasing was *le droit de particuliers.* It has been contended by Les Pas that this is an acknowledgement by the Crown that the Seigneurs own the foreshore. I would add to that that it's not a view that I agree with because in my opinion if the Crown was accepting that the Seigneurs own the foreshore the Crown would not actually be leasing the bathing pool at all. But it is one of the many points upon which there is an issue between the parties and the judge has not made a decision. But certainly that lease does contain a reservation of rights of individuals without saying what they are.

Deputy Hill

Would it be possible to add on Sir, because I have one or two questions. We know that throughout the town has been reclaimed and no doubt as it says here from the Dicq etc. what about the place like the Pomme d'Or and all that would that mean that if Les Pas were successful they could lay claim to that as well because that's all been reclaimed, that was part of the foreshore because you'll say that they will be able to claim the fuel farm, etc. How much will they be able to claim in addition to what we think we own.

Solicitor General

Anything that, anything on land which was reclaimed more than 40 years before they made their challenge would not be affected.

Greffier

Deputy of Grouville has been trying to get in.

Deputy of Grouville

I have two questions. Probably one is for the P and R Committee and the other one for the Solicitor General.

The first one is does the P and R Committee have any mechanisms in mind if this case is fought and lost by the States to act as a deterrent to Les Pas Holdings reclaiming huge amounts of real estate or cash? I was thinking along the terms of withholding tax or capital gains tax which could be raised on feudal rights and the second question this might be very obvious but I just want to be sure in my own mind. Why is this case being fought by the States and not the Crown?

Senator Walker

Sir, I certainly take the first of the two questions from the Deputy of Grouville. It is actually though in most respects a legal question as well. It's already, in fact a very similar question has been raised in a letter to the Attorney General by Senator Edward Vibert and the Attorney General has responded saying he does not believe that would be possible because it would be singling out an individual organisation no matter how suspect morally their position may be, in terms of a human right scenario it would be

singling out one organisation therefore is not likely to be achievable. Having said that it does seem to be absolutely necessary and certainly quite right that if the States do decide to continue with the litigation and we were to lose, or we were able to win, I think there are actions that the States will have to consider taking against the parties concerned. Now what those actions might be is too early to say and certainly we would want very clear legal advice on that particular point. But I think it's very true to say that the Policy and Resources Committee fully share the outrage of other members of this House, and indeed the public at the moral position we've been put in. Now I've been constrained in saying too much in public until last Tuesday because we didn't know for sure that the conditions precedent had been met and accepted by the other parties. But the Policy and Resources Committee feel equally strongly about the position taken by a number of the principals in this case and to other members. So we would be quite an enthusiastic party to taking whatever action is legally possible against the parties concerned whatever the outcome of the case, but I can't say at this point what action is possible.

Solicitor General

Yes. On the, I would say that I do agree with the Senator as to what he said in respect of the unsustainability of legislation which targeted one particular individual and was effectively punitive and intended, the idea that they would get any profits would be on the idea that there is something in their claim and any legislation that was simply targeted at one individual would be regarded as discriminatory and punitive. I agree with that one and the second question was sorry.

Well yes, the answer is that the Crown is defending it. The defendants are the Greffier of the States who defends it on behalf of the States and the Receiver General who defends it on behalf of the Crown. They are both defendants and they have both been funding it including funding the litigation and funding the various legal opinions and that indeed is why the Receiver General is one of the parties to the settlement agreement.

Greffier

In think the Deputy will correct me if I'm wrong. I think perhaps the question was also was why is the Crown not the sole defendant in this case?

Solicitor General

Well, the case is one to show title. It calls upon the parties to prove their ownership of the land which they claim to own. Now that much of the land which the Crown has not sold is the defendants say, owned by the Crown but any part of the foreshore which the Crown has sold to the public is now owned by the public so that Les Pas say for convenience sake, if I can just refer to it as west of Albert. West of Albert has been sold by the Crown to the public. Les Pas could hardly bring an action against the Crown calling upon the Crown to vacate west of Albert because the Crown will say well, you know, I don't own it any more.

Deputy Southern

Yes. I would like the Solicitor General to expand on the passage in pages 9 to 12 of the document that was received over the weekend 7th January 2003 from her office about the role of compulsory purchase in this affair especially in particular where she ends the letter rather, and helpfully the summary given to the Committee, after the potential compensation payable on compulsory purchase of La Collette and La Collette II is that the sum payable would be between 0 and perhaps £40 million plus the cost of the power station. How does that compare with the sums that we've been, we've had banded around or hundreds of millions of pounds which, if we lose, this will cost presumably we have, we will pay compensation in terms of compulsory purchase of the land we already have compulsory purchase. Is the sum more realistically between 0 and £40 million if we do lose the case?

Solicitor General

I shall have to look for the document if the House will bear with me.

Senator Walker

Sir, while the Solicitor General is looking for the document can I refer actually to the section the Deputy is referring to. I think it's on page 12 of the document of January 7th which was the advice given to the Policy and Resources Committee of that day. Page 12 paragraph 11.11 and all that is referring to is the compensation payable on compulsory purchase of La Collette and La Collette II which of course is only one relatively small part of the overall claim and what that there does say is that the likely sum payable would be between 0 and perhaps £40 million plus the cost of the power station. Now we're advised that the replacement cost of the power station alone is likely to be somewhere in the order of £150 or £160 million and, of course, that paragraph doesn't in any way refer to the land west of Albert which we have compulsory purchased but against which there would be a claim for compensation should we lose the Court case.

Solicitor General

Yes, I don't in fact, I'm, grateful to the Senator, I don't think I can add to that. The passage which was referred to is talking only of La Collette and La Collette Phase II, it doesn't refer to the overall areas.

Deputy of St. Mary

I wonder if I could just go back to the question before last concerning any tax payable perhaps on the development by Les Pas. Under recital (d) in the agreement it says it's noted and agreed that no capital or income taxes shall be payable by the plaintiff or its nominee in respect of the compromise of these proceedings or upon the transfer of the site to the plaintiff or its nominee which I guess pre-empts any question at all of a law being introduced to charge a rate of tax or a penal rate of tax on any profits that they might make.

Solicitor General

Yes I would agree with that and I'm grateful for the point.

Senator Ozouf

The point was I think that Senator Vibert, Senator Edward Vibert was making was that in the event that that agreement were not accepted and that the litigation would continue and in the event of Les Pas winning the claim then the States coming forward with some sort of legislation to tax the heck out of any increased value. I think that there were two individual points there. But the Solicitor General has answered the point that such a proposal by this Assembly would not work.

Deputy of Trinity

Can I open that up a little bit because it was an intriguing little sort of arrangement that has been worked into that agreement and the way I read it was that it's fair enough that the value of £10 million assuming that's the value, that that itself wouldn't attract a liability. But if the company concerned or whoever does the development in the end, develops the site that any profit made on that would be taxable or am I, I rather, I didn't get that impression from the Solicitor General I don't think it's just a question of saying that everything is tax free or the fact that if the property was ultimately let, if those were let, that that profit would have a tax as well. I think it's purely talking about the consideration of the value of the site but if I'm wrong about that perhaps somebody will be put me right.

Senator Walker

Yes Sir, the Deputy is absolutely right in that assessment.

Senator E. Vibert

Thank you Sir. In respect of the query that I raised about raising the tax the answer that I was given by the Attorney General was to the effect that it could be construed to be against human rights if the property rights were abrogated in any way and I did no take that to mean that that meant you could put a tax because he was the only person likely to be subject to that tax and it is a matter that I believe that the Policy and Resources Committee should be taking up in the event that we decide not to accept this agreement. I would like to raise a number of points relative to the proposition because I'm still very confused about the area that we're talking about.

I've had correspondence with a number of historians and I'm sure the Solicitor General would be aware that a lot of people have ended up in the Archives offices having a look at where the Fief de la Fosse is and a number of local historians have sent information to a lot of members relative to whether in fact Les Pas is not grabbing more than they are entitled to. What I don't understand is in paragraph 1 of the proposition 117 it states that the foreshore adjacent to the Fief de la Fosse and in paragraph 8 it talks of the foreshore adjoining the Fief de la Fosse. Now is that a bit of loose English and should it really read the foreshore which is adjacent to the Fief de la Fosse or does it mean the foreshore next to the Fief de la Fosse, that's the first question that I would like to put to the Solicitor General for some clarity on it.

The second matter is that the local historians claim that they've checked the area and believe that in fact the Fief de la Fosse begins at Bond Street and down Conway Street in a straight line out to the sea, and if that's the case the Waterfront development is not included in that so the question I really wish to put to the Solicitor General is she confident in the accuracy of the advice that we've been given or has it been investigated the exact area that we're talking about. So that's the first question I wish to put to her

Solicitor General

On the question of what's the difference between adjacent to and what is adjoining. I can only say I don't see any distinction between them. They both mean there's the fief and there's the foreshore next to it. If any other member has a problem on that one I'll try and do better but ……

Senator E. Vibert

I take it the claim it doesn't mean that the claim is for the adjacent area next to it, it means the claim is for the Fief de la Fosse. Is that what it means.

Deputy Troy

The fief is determined as finishing at Conway Street but, Falle has a claim to the foreshore off to the west up to Payn Street. There's a distinction there. This is what we discussed before. I think Senator Vibert is trying to get to that essential point.

Solicitor General

The next one was about the extent of the line. That one again members will have to bear with me for a moment while I sort the papers. I think in fact the answer to that one is probably most distinctly put in the risk analysis where these two separate boundaries are explained. The risk analysis that I read out this morning which, it stems from the bornement and the two separate distinctions, the Conway Street line and the Douet de Hauteville line. What has been put on the plans which are attached to the proposed agreement is the extent which is claimed by Les Pas. Now I think it's clear from what I was reading out

from the risk analysis that the defendants dispute that the extent is as great as Les Pas claims. This is one of the many things in issue but what has been put before members is the full extent of the claim, what is claimed and certainly yes I'm sure there are many local historians who would argue as indeed the defendants are arguing that the western boundary should not be taken as far over. But members have to know what is actually being claimed.

Senator E. Vibert

Thank you Madam. The second question I would like to put to you is that, through the chair, before Senator Ozouf says it. When the contract of the sale of the fief was registered in the Royal Court was there not an opportunity then to object to any claim of property in that contract? That was in 1986.

Solicitor General

It would not have been known to anyone what was actually in the deed. The words which were referred to the *droit de propriété* actually appear in the contract. I think most members have probably attended at the Royal Court on a Friday afternoon. The entire contract is not read out and the parties simply submit their contracts to the Court and the judge who is presiding calls upon the parties to stand and simply says "you swear that you'll neither act or cause anyone to act against this deed of sale of" and it would be that deed of a fief. There would be nothing to alert anybody to the wording in the body of the conveyance and therefore indeed, even if those words had been read out, an objection would be dependent upon either somebody who represented the Crown or somebody who represented the public actually happening to be in Court that Friday afternoon and hearing it and making an objection. But it wouldn't have been read out anyway it was simply by chance that the later contract was that, it came to the attention of the then Deputy Bailiff before the contracts were passed, that a contract was going to be passed which purported to transfer of right of ownership. But in the normal run of things the content of a contract is not read out and so all it would have sounded like to the casual listener or even to the careful listener would have that a fief was being sold, and there's nothing, there's no inproprietary in that and nothing for anyone to object to.

Senator E. Vibert

I would like to put through the chair to the Solicitor General the shock I think that all the members of the States have felt in that they have spent the last 10 years since 1992 and indeed if you look at the minutes throughout the whole of this episode the constant advice being given to the States was that there really was no case. The advice given initially in 1992 was extremely scathing of the Falle case of the Les Pas case to the point that Mr. Balleine, the historian had written about the character of Jerseymen and their litigisousness so throughout the whole of that when I read the minutes all I read is and we went through the chronology this morning, this constant repeating by the Solicitor General Mr. Sowden and then the Solicitor General and then Advocate Binnington that there was no case and we were going strenuously resist it was without merit, strenuously resist.

The question of the swimming pool came up and in fact that was raised by Advocate Binnington at a meeting of the Policy and Resources where in fact said as part of the strength of our case was that nothing was ever said by anyone in connexion with that fief that the swimming shouldn't have a lease with the Crown. So, throughout the whole situation the States have made decisions for developing the Waterfront on the basis of that legal opinion. So the question I wish to put and I know it's a question in the minds of a lot of members of this House is that where has the change taken place because we've gone from, if you put it in betting terms of Accrington Stanley versus Arsenal or Manchester United what bet would you put on and we're now in the realm of Chelsea versus Manchester United, what bet would you put on. Well you would, and if there's any support of Accrington Stanley in the House I apologise to them. But that's the way the position that members of the House faces. We find this incredulous that we should be in this position so the question I want to put to the Solicitor General, was she shocked when that opinion came to her because through the chair again, throughout the whole of this

the Solicitor General has been a party to giving this advice to the States that the case had no merit. And suddenly we're finding that, you know they've got a 50-50 chance. Well better than evens chance, I beg your pardon, a better than evens chance. So the situation is I'm asking how shocked were you when you got that advice, through the chair?

Solicitor General

The first thing is the Senator has referred to my constantly, I think I'm right in saying is referred to my constantly giving advice that the case is without merit. That without shocking me, did surprise me a little. The initial advice was not given by me. The advice which I have given has been, I've identified the advice which I gave over La Collette Phase II which was to draw the attention of the then President of Public Services to the imprudence of buying while there was a challenge. On occasions I have certainly in one States debate informed the States of the advice which has been received from counsel without wishing to split hairs. That is not the same as saying I have myself, I am conducting this litigation and I have myself assessed it and this is my advice. Leaving that on one side the question was was I shocked. Well lawyers don't use emotive language but I certainly regarded it as a very disturbing departure from the earlier advice.

Greffier

I still have Senator Vibert finishing his queries. Thank you.

Senator E. Vibert

The next question I would wish to put is that we're actually relying on, through the chair, on Advocate Binnington's advice. Has it occurred to the Crown Officers or indeed to Policy and Resources that we should in fact be getting a second opinion because it seems to me that what's happened is the analogy would be I'm an extremely fit person, I've been to the doctor and he tells me I'm going to die in three days time and I would want to go and get a second opinion because I wouldn't be really happy with the first opinion. So we've had this opinion, we've had this opinion from one person on a crucial matter on which the States is going to decide. Have we given any consideration at all to getting a second opinion?

Solicitor General

Yes. I think I have covered this and I apologise to the States for being repetitive I shall cover it again. The point which I made was that either I, or indeed anybody else could review the documents and this was the point in my address where I said that there are two matters in doing a risk estimate. One is what you yourself think of the case and the other is what you think the judge will make of the case and I said that the point is that only the litigation lawyer is the person who can best place to make the assessment of what the judge will make of the case. I then explained that, to do the assessment, it would be necessary to read not only the things to which Advocate Binnington referred, that is the authorities upon which each side is going to rely, the pleadings and the skeleton arguments but that it would also be necessary to read through the entire room of discovered documents because as I explained when I was covering this point there might be documents among the discovered documents which Advocate Binnington hadn't thought was relevant but which I, or the person giving the alternative view, might think was relevant.

I then said that what would happen if the alternative, second opinion, if the second opinion was the same as Advocate Binnington's then matters are where they are. If the second opinion is different that leaves the question of what does the House then do with the two opinions. One given by the lawyer who has conduct of the litigation and is going to have to argue it and the other given by somebody else. I then said that if I made the analogy of someone in Air Traffic Control and somebody piloting a jumbo jet when there's a bit of fog around and I said it is as if the pilot of the jumbo says "I think the fog has made it dangerous for me to land" and the person in Air Traffic Control said "no, it's not dangerous you go

ahead and land". I then said I thought that was an imprudent way of proceeding and to turn from the analogy to the litigation. If the second opinion were to be taken if after as I said the weeks or the months which it would take it second guess and double review all the documentation if the person giving the second opinion were then to say "no it doesn't look like a serious risk of losing, there's just a bit of a risk", if Advocate Binnington is then told go ahead and argue it and goes ahead and argues it and loses it he will of course be in a position to say that he had advised there was a risk.

I'm sorry to have had to go over that twice but I hope it's answered the question.

Senator Walker

Sir, may I just make the point that on behalf of the Policy and Resources Committee I did ask that very same question a number of months ago and was given exactly the same response.

Senator Kinnard

Sir, could I also add that there, you know we do live in a community where the legal community is quite small and if it became suggested that there was a disagreement with the advice that we had been receiving previously from the person having the conduct of the litigation it could well weaken our case. The other side may have a view that perhaps all that we've been told previously was not necessarily correct and I think politically and from the legal point of view we would have difficulties with that too.

Connétable of St. Peter

Thank you Sir. Question directed to the Solicitor General. In the projet under Appendix 1 the Planning and Environment Committee confirmed in principle to allow no fewer than 100 three-bed apartments. And under the section Obligations of the States 1(b) states again the Planning and Environment, Housing and the Economic Development Committees will be assured that they can develop the site as outlined in Appendix 1. My question is will there be an obligation upon the Courts and the respective Committees on any sites in the future prior to any of these plans or any plans or applications being made because I feel this is putting the Courts and Committees of the day following these particular guidelines in somewhat precarious position because there's going to be certain privileges it would occur to me accorded to certain applicants where others may not be treated quite the same and I rather fear that there may be a degree of injustice within that particular section.

Secondly, under page 22 the Restrictive Covenants paragraph 3 quote "ground developments may include retail, leisure, restaurant or similar uses". Now under this condition I would submit that they could build a swimming pool. If they can how does set with the contract which stated that with the approval of the States that the Fort Regent shall close upon the opening of the Waterfront pool and that no new pool shall be built within a given dimension because clearly under the restrictive covenants that does not preclude the company from building a swimming pool.

Solicitor General

Well on the question of whether it causes difficulties with the, taking it in two, firstly whether it causes difficulties for Committees in subsequent applications I take it that means if somebody else comes and makes an application for a development elsewhere. Is that correct. No, in my opinion it does not, it is incumbent upon Committees to consider every application, individual applications on their merits and a consent is not a precedent in the sense in which a Court judgement is a precedent. As regards the Courts it could not cause a problem for the Courts because the Courts in applying the law cannot be constrained by an agreement by private individuals. The Courts just apply the law and that's it really.

On the question of the restrictive covenants and can they build a swimming pool. The restrictive covenants are, they are in addition to, and not in substitution for, the overall development plan for the

area and therefore the, there are two sorts of controls exercisable over the west of Albert waterfront. One limb of that control is the control which the public has as owner but the other is the planning control which the Planning Committee has as a Planning Authority and the Planning Committee in considering applications will do it within the framework of the Development Plan so that it would be open to the Committee to refuse an application for a swimming pool, even though, I mean irrespective of watrver is in the restrictive covenants.

Deputy Baudains

Thank you Sir. What I would like is to clarify some basic procedural matters. Could the Solicitor General advise which Queen's Counsel had been contracted for the projected trial of the Les Pas issue in March of this year and which lawyers accompanied Advocate Binnington to the Royal Court for the hearings in March and my second question is whether the Crown Officers considered advising the Policy and Resources Committee to limiting the damages depending on how the other side are conducting their case. I've been advised that Advocate Falle is billing his side at a considerably discounted rate.

Solicitor General

The first question as to Queen's Counsel accompanying Advocate Binnington. In fact Advocate Binnington has not been accompanied by a Queen's Counsel, he has been accompanied by a barrister and the barrister is, I can check this but I believe that it is Mr. Simon Coulton who had assisted him previously in other litigation where it was necessary to research Jersey customary law and Norman customary law.

The second question, is the question whether the public should be asking Mourants to discount the costs?

Deputy Baudains

Basically whether there was any way of ensuring that we're not, in damages, we're not paying too much at any time.

Solicitor General

Oh right. Well as to Advocate Falle charging discounted costs that is because Advocate Falle has a personal stake in the litigation and therefore he is himself standing to benefit by it so that it very much a personal litigation. The lawyers acting for the States and the Crown have got no sort of personal contingency benefit to come and therefore it is simply a matter of ordinary charge for a litigation lawyer.

Deputy Baudains

If I could just go back to my first question, Sir. Do I then take it that no Queen's Counsel had been contracted for the case in March.

Solicitor General

No. The counsel who was assisting Advocate Binnington is not a Queen's Counsel he is a barrister.

Deputy Ryan

Thank you. Going right back to the early 1990s we had originally had an opinion from Messrs. Kidwell and Gadney and then it was followed in 1993 by an opinion from the other side by a Mr. Fysh. You'll have to, I give you apologies in advance for perhaps a somewhat jaundiced view of the legal profession

but whenever I've looked at legal opinion from anybody in the commercial sector I always try and be influenced by my knowledge of who's paying the bill in each particular case.

To what, I mean we heard from Madam Solicitor General that we, quite a lot about the credentials of Messrs. Kidwell and Gadney. We're left with credentials I think, when it comes to our opinion on how we perceive a particular advice and opinion from Queen's Counsel. We heard a lot about the credentials from Messrs. Kidwell and Gadney but very little about the credentials from Mr. Fysh. I think it was about a sentence that Madam Solicitor General gave us on that. My question to her is and to others that may have been involved at the time, to what level did we investigate the credentials of Mr. Fysh and you know would it be that his, if his credentials were equally as good as Messrs. Kidwell and Gadney, would it not have followed from that that both opinions should have really have been discounted by the Policy and Resources Committee of the day and they would then be left to make up their own minds almost.

Solicitor General

Right the status of Mr. Fysh was checked in Who's Who if members are interested I will read it to them. Fysh, Michael Robert, Q.C. 1989, born 2nd August 1940, then it gives his sort of family whatevers, education: Downsize School, Exeter College, Oxford M.A., called to the bar Inner Temple 1965, N.I., I think Northern Ireland 1974, New South Wales 1975, Ireland 1975, India 1982, Pakistan 1987, S.C. Trinidad and Tobago bar 1990, S.C. Dublin 1994, Commonwealth British Association for Estonia, Latvia and Lithuania 1991 to date, editor Reports of Patent Designs 4th edition 1974, the Industrial Property Citator 1982, editor of the Spycatcher Group 1989, Recreation: swimming, well I won't bother his recreations unless members want to hear about them. There's a little bit more if I can just round it off. Mr. Fysh's credentials were verified to the extent that it is possible but advice, I've mentioned earlier Mr. Paul Matthews the solicitor who was assisting Mr. Sowden, and Mr. Matthews gave some advices on opinions which again I must ask the House to bear with me while I locate it which has actually got some relative, some remarks which are pertinent to the weight of the advice from Mr. Fysh, I think.

Yes what he has said is it is nearly always possible to find member of the bar to agree with one's own view because in the nature of things there will be more than one opinion that could possibly flow from a given set of facts. Even if everyone always thought and like no two counsel will be instructed in exactly the same way and supplied with exactly the same information. Now instructions mean when you write to counsel saying "would you please advise, these are the facts, these are the relevant bits of law. Mr. Matthews goes on to say indeed if anyone ever tries to send me a copy of an opinion supplied by their counsel I have always asked to see the instructions upon which it was based so that I can judge exactly what information their counsel had in front of him. Now obviously with Mr. Fysh, we were supplied with the opinion but not with the instructions and then the Fysh opinion was that the, was followed up by the second Kidwell Gadney opinion, the conference in London and the two separate advices of the then Attorney General and the Solicitor General.

Deputy Duhamel

Thank you, through the chair. Bearing in mind that no formal claims were made by the owners of Le Fief de la Fosse for compensation for buildings built on the foreshore prior to 1989 could any such claim now made be judged as an unconscionable action thereby dismissed?

Solicitor General

Yes, they could not now claim, I take it we're talking of things which have been reclaimed historically.

Deputy Duhamel

The point that worries me through the chair, is that we're told in the documents that there could well be a claim for example of £150 million to the J.E.C. and the J.E.C. was built prior to 1989. The owners of La Fief de la Fosse could make a claim

Solicitor General

Ah no.

Deputy Duhamel

Could a claim be forthcoming?

Solicitor General

If the, the position is that if they are successful the area upon which the reclamation took place belonged to Les Pas and therefore Les Pas owns it. It's not a question of Les Pas getting compensation it's a question of Les Pas actually owning the reclaimed land and what is on it apart from those areas where the interest has been acquired by compulsory purchase.

Deputy Baudains

Could I just seek clarification on that point because I am not clear, reclamation from what date because there have been reclamation of that area going hundreds of years right up to the present day.

Solicitor General

Any thing that was reclaimed historically and had been reclaimed more than 40 year before 1989 would have been acquired by prescriptive possession.

Deputy Duhamel

Can we just be clear on that because we were told earlier on that there's no claim through prescription but presumably is that only through to the Crown or……

Solicitor General

What I said is that Les Pas are not making, that Les Pas would not be able to make good a claim for prescription. This is the other side of the coin. The question was about the historically reclaimed properties. What I was saying is that anyone who occupies a property which was reclaimed historically over the foreshore would be able to claim prescription against Les Pas.

Deputy Le Hérissier

Thank you Sir. Moving on to another issue, the security for costs and this obviously has been seen by people as one of the most disturbing issues because it makes it a no lose situation for Les Pas. Could Sir, the Solicitor General tell us whether there is any circumstances in which this situation could change, for example, it's been suggested it could change because Les Pas has expanded but not not yet filled so to speak, it's shareholder base. That's the first question, Sir.

The second one which may be a policy question as much as, or as opposed to a legal one, is this issue where it appears, and it was raised in question time last week by Deputy Bridge, it appears that if planning permission is granted one of the conditions goes against the settled policy of the Planning

Committee, namely there shall not be two parking spaces given to each tenant or each resident, there shall be one. Would the States open itself Sir, to legal action from people who have had to abide by the previous, or by what was apparently the policy, namely there should be one space per residence, when they then Sir, this policy contravened and contravened as a deliberate act of States policy. Thank you Sir.

Deputy Bridge

Sir, I was actually referring to the policy about underground car parking because the agreement here is for, in principle, for two storeys underground which seems to me to contravene the decisions that we've made at the time of the Island Plan.

Solicitor General

Well, on that question the, I was actually present at the meeting of the Committee when it considered the policy of one space per unit and there was a considerable debate upon it. Members did assess the merits and demerits of allowing two spaces and decided on the basis of the development of the application that it was a proper application to grant and while I'm not here to recount the entire debate it was quite clear that members were assessing the desirability, they were assessing what was a proper planning factor. That is the desirability of having one or two spaces there and my advice on that point would be I do not think there could be a challenge on the basis that there was any sort of non planning factor operating. As to whether other persons who had been dealt with, who had been required to have only one planning space I cannot think of any basis upon which a proper claim could be made. They would have to show malice or bad faith. I can't think of any way in which it could be done.

Deputy Le Hérissier

Well Sir, if it could be proven by an aggrieved person that there had been a whole string of approvals based on one per resident and then all of a sudden the policy, allegedly for good planning reasons, changed to two per residence wouldn't that in itself be the basis of a possible complaint.

Solicitor General

Can one be quite clear where a possible complaint is, I thought we were talking about an action for damages? or is it just a sort of general complaint. We are actually talking about, we're not talking somebody simply saying I think I'm aggrieved, we're talking about somebody actually bring an action for damages. I have to say I can't think of any way it could be brought. I mean I just can't think of it. I can research it further but certainly my answer now is that it doesn't seem to be feasible.

Greffier

There was your second question Deputy about security for costs. Your first question I think might need to, perhaps, to be reminded.

Solicitor General

And that was, oh yes whether there was going to be a change. The judge did say that he gave his reasons for declining the order and then he said circumstances might change. Now he did not specify what the change of circumstance were. Certain people have raised the fact that Les Pas has, that the value has gone up. That I would not regard as being a change in the circumstances sufficient to justify a further application because, I mean if anything, it would enable Les Pas to say well we're obviously a much more well-off company and we may well be able to pay the costs if we're ordered. So that in fact it would be a weakening of the defendants' position on an application rather than a strengthening.

Deputy Troy

Sir, I wanted to go back to the risk analysis which I haven't seen it, but assuming that this, we've heard that the power station for example is £162 million, the risk analysis would be on the worse case scenario would it not and in the event that Les Pas actually had a claim, could, if there not had been a counter claim that the public have improved the foreshore, because it obviously it was sand at one point and then land has been reclaimed, then items have been built on it and all at public expense, so is there not a counter claim against any claim from Les Pas as to whether they own the land and the buildings and all the enhancements thereon?

Solicitor General

No, it wouldn't be possible to claim, let's suppose hypothetically Les Pas win they now own that land and that power station. It's not possible to say that we've built you a very valuable power station and we're going to claim the cost. That would not be possible.

Deputy Martin

Thank you Sir. I just want to over a few notes I wrote down this morning and like everyone else I'm not legal and I do appreciate, I'm not of a legal post, oh you know what I mean. I would like to thank the Solicitor General for a very, very, you know it was put in quite layman's terms and I did think, I understood most but I just want to press this point so I know exactly, I've got this clear in my mind and probably a lot of other people as well.

In 1994 when it, we were going to purchase, La Collette Phase II was going to go ahead, and the Director of Property Services, Mr. Tucker said, pointed out to the Solicitor General then that it was a bit iffy basically that we went ahead without securing title, and then by this time because of what, this is my understanding from the notes I made this morning, because of the problems with the workload of the Solicitor General the then P and R President, Senator Carter appointed Advocate Binnington and he attended in 1995 the P and R Committee, and asked, and he was asked at this meeting if he held the same view as Kidwell and Gadney in 1992, I'm think I'm right so far. I've a question mark here against my notes because I don't know if he actually asked the question there, what I think was said that each party was then asked to supply all relevant documents to discovery and then, this discovery was subsequently completed in 1997.

Discussions between P and R, Les Pas, Solicitor General, Advocate Binnington to again attend a P and R Committee to answer the question of discovery. Advocate Binnington advised, he had not, the discovery had not, shown any seigneur rights having ownership. Negotiations were terminated due to the advice and high demands of Les Pas and compulsory purchase and that is the part that we did, I think then so we could carry on with the Waterfront development, have it, was agreed and such that the company, I'm sort of a bit lost here, what I'm trying to get to is where from 1995 or 1997 after discovery did Advocate Binnington's advice go from, because of the case of Les Pas the demands were so high that we couldn't discuss with them or we would not enter any other negotiations or was it now in 2002 or 2000 that we are in a lost situation because we haven't got costs awarded to us that we are going to settle? I need to know if the actual advice has changed or that the actual what we we're being asked to consider that we could lose. Because it seems to me, I still haven't been convinced that the advice has, where or why the advice was changed from the discovery down to today, except we are supposedly to believe that they were asking for the sun, moon and stars and now they're only going to be given the moon but should they be given the moon when they have no right to it and I can't see that there is any legal argument to say that any of the advice has changed. So I don't know really Sir, if this is a question. Partly to the Solicitor General and partly to P and R because I think it involves both and as a member of the States I really must be clear in my mind of what we have been told today, and I say again I thank the Solicitor General for her clear explanation on most of the points. But this is where I really need some expert clarification. Thank you.

Solicitor General

Yes, if I can just, starting at the very beginning there was a reference to Mr. Tucker advising me that it was a bit iffy what in fact happened was that Mr. Tucker contacted me because he was concerned that there was an acquisition at a valuation which had been fixed by the vendor's valuer and no valuation by the purchaser's valuer, it was I who then advised the President of Public Services that it was, I drew attention to the results which would happen if it was acquired without a guarantee of title and then the action was subsequently, Les Pas were subsequently successful, so I was actually advising Public Services. It wasn't a question of Mr. Tucker advising me what the legal position was. I gave the advice and I've gone over that this morning, I advised that it was a political decision whether that was prudent or not.

Moving on to the question of the sequences of the change of advice. Yes Advocate Binnington attended upon Policy and Resources in 1995 and in fact I can recall the meeting because I attended as well and the then President, as one would expect, wanted confirmation that the new litigation lawyer, now that there was going to be litigation did not differ from the previous advice and he put the specific question "did Advocate Binnington agree that the claim was without merit" and Advocate Binnington as recorded in the Committee Act, replied that he did. As to the question where and why the risk analysis from Advocate, I'm sorry and then in 1997 this was when these were negotiation with Les Pas and the amounts which Les Pas were asking were unhandlably high, if I can put it like that, they were amounts which were almost up to just conceding the action and the only further communication had been that they were happy to start discussing again but their claims would only go up. And it was then that Advocate Binnington was asked to advise and he then advised that discovery, the discovery process had not thrown up any evidence of the Seigneur's claiming the foreshore and the final relevant advice is the risk analysis and that is the risk analysis of Advocate Binnington which as he explained was put forward at the stage after, not only discovery but the selection of the relevant documents, the compiling of the documents and authorities, the preparation of a skeleton argument and the overview of the case as it was going to be argued on both sides was then completed. That is the stage at which he gave his risk analysis.

Now the next point has been made about giving Les Pas something if they're not entitled to anything. The matter which has been drawn to the attention first of the Policy and Resources Committee and now of the States is the fact that the lawyer in charge of the litigation has advised that there is a real risk that the Court might find that Les Pas are entitled to something. And if the Court finds, if successive Courts, because there will no doubt be appeals, if the final Court to determine it does find that Les Pas is entitled to something, Les Pas would be entitled to everything. And is it that and the other factor which is that the costs both the direct and obvious costs, which is what is paid out to the lawyer as his bill and the hidden costs which are actually, can be, both substantial, that is the cost to the public of funding Courts which sits for weeks and weeks with judges who have to be flown to and fro and stay, put up in hotels and also paid on their daily rates. The further hidden cost of any liaising with the Law Officers and I have to say that if the litigation continues I would expect once it's actually in its swing that there would be a far more constant liaising with the Law Officers whether we can afford the time or not. If one takes into account all those costs, that is the other factor which has brought this before this House.

Deputy Breckon

Thank you Sir. Just a couple of observations. As a layman yesterday I did go in and read the papers that were attached which did not accompany what we got. I actually got mine on Monday and I must say as a layman I wasn't unduly concerned with what I read there. There was nothing that jumped out and hit me in the face and set alarm bells ringing and I did ask a question when Policy and Resources met in June at the RJHS, what has changed and I still haven't heard anything that convinced me what has changed. We talk about risk, and nobody has actually said that there's 10 good grounds for Les Pas' case on which we have to fight like billy-oh to put away and I haven't seen that and you know I've heard everything the Solicitor General has said and that still hasn't happened.

And the other thing is in my limited experience in dealing with lawyers they will be ultra careful and ultra cautious wherever they can the risk will be with the client and not with the lawyer and what they will say is "yes you have a good chance here but there is a downside", and the downside will be whatever and as the trial approaches they'll dig this deeper to say well you know you did insist on proceeding and this is the bad news and I have to tell you this and you've got to appreciate that but there's been other instances where I know where they're said to a client "the clock is ticking now there's a marker there, if you proceed then the cost is yours" and the client have insisted and in three cases that I know of, that have sprung to mind. I'm trying to think of it the client was right to do that but the lawyer was being cautious so I think we must bear that in mind and I think here, that to say it's better than evens is actually ridiculous because 11-10 is better than evens and so is 1,000-1. And if you're going to have money on, you'll rather have it as 1,000-1 than 11-10 so I think with some of this I still haven't heard enough substance to convince me that we should walk away from a fight. I still haven't heard that and there's a risk but there's a risk when you walk out into the street tonight and I for one think we should be taking some of these risks and we should give these lot what they deserve.

Senator Walker

Sir, Can I just comment on that. I think the point is here that nobody is saying and nobody ever has said that if we go to Court we're going to lose. But what has happened here is that the advice has turned, it's gone from Les Pas' case has no merits to there is a real risk of losing. That's a fundamental change in the advice that the successive Policy and Resources Committees have received and that surely is the point. Well I think Advocate, Senator Syvret just said "why", I think the Solicitor General has read out Advocate Binnington's response to the request why has his

Senator Syvret

Can I just clarify the question I'm trying to ask. It's not entirely clear to me why in the decade, or whatever this matter was ongoing, why Advocate Binnington's opinion should suddenly be a real risk of losing as opposed to, of the case being no merit. Why, why has his opinion changed.

Senator Walker

That as read out by the Solicitor General is his current assessment of the position having gone through discovery, etc. that is his current assessment of the position. Now whether we like it or not that is the position we are all put into, that if we continue in Court there is a risk of losing. And there's a chance of course, and probably a good chance of winning but there is a risk of losing and the costs of losing are incalculable, almost certainly unthinkable. That's the advice that my Committee have had. And that's the question we have to answer. That is the position we're in today, if we continue in Court there is risk of losing and can we really afford to take the risk of losing what is hundreds of millions of pounds of public money? That's the question we have to address of course, not today but whatever date the States agree to debate the main proposition.

Deputy Southern

Sorry, we're having a competition here to get up first.

I'm still trying to get my head round the change from they have no case to better than evens chance and the risk assessment that we now face. Whilst I'm aware that there's no such thing as a rash lawyer, how small 'c' conservative would the Solicitor General give her impression of, of how small 'c' conservative, the reputation of Advocate Binnington is, how cautious is he? And how cautious is he playing?

Solicitor General

I certainly can't give an indication of how conservative or otherwise he is, he is an experienced litigation lawyer, he has been a litigation lawyer for a very considerable period. He has handled a lot of heavyweight litigation and as to whether he's conservative or not conservative, it's really not something on that I can give a view.

Deputy de Faye

Thank you Sir. I think we've dwelt for some time on the risk analysis element but I would like to hear a little more about actually how sound how Court case is because it seems to me that whilst I found the descriptions of our arguments very compelling from the, let us say the 19th century to the present time we appear to be on far more shaky ground as we go further back into history into customary law where things do seem to rather hang on whether the words, I think it was *litorus maris* mentioned, or not. This slightly an unfair question to put to the Solicitor General because I realise that the S.G. is not the litigation lawyer but if, on the assumption that we were all judges in the case, what would be the three key strongest points in the States case that she would want to put forward as our strongest ground.

Solicitor General

Well as the States are the defendants it's best answered by the States actually have to have a strong defence to every ground that Les Pas has and so it's more a question of what are the strongest grounds of Les Pas and how good is the States defence to those grounds. Among the grounds which Les Pas might urge are prescription and express grant, I don't think those are strong grounds. I do agree with Advocate Binnington that it is the customary right of Seigneurs to maritime fiefs which is the area where the matter will probably be decided and as I say it only needs one, Les Pas only needs to be successful on one of their grounds and that one's the strongest, so the question is how strong is the States defence to that. The, as the Deputy has said, I do not have the conduct of the case, and therefore I am not able to give the fullest summary of the arguments which are going to be advanced on both sides but in essence the argument of Les Pas is that the documents which refer to, that whenever a Seigneur has a right of wreck on the fief he must own the fief because the documents refer to wreck arriving on the fief in contexts where it clearly is arriving on the foreshore and also refers to things landing *sur ses terres*, on his lands where the inference appears to be that it's on the foreshore. There is also said to have been some occasions when the feudal Courts sat on the foreshore, but I have to say I never saw any of them at the stage when I was, had an involvement but I must admit that was in Mr. Sowden's time.

So it's a question of how strongly the States can answer that and the argument of the defendants is to the effect that these are acts of jurisdiction only. That the Seigneur had rights over the fief and that the concept of the fief was simply an area over which he had rights rather than an area of which he owned the solum. Now to give the, to give a forecast of how likely or otherwise success is. one has to estimate which side the judge is going to come down on because it has not been previously determined and the members have heard the assessment by Advocate Binnington. It is that he thinks that the States case is the better but there is a real risk of its being unsuccessful.

Deputy Troy

Did he say "real risk" because I've got written down here that he said "there is a risk of loss, not real risk. Did he actually say "real risk"? Maybe I didn't write that down correctly.

Senator Walker

Sir, I can confirm that the words used by Advocate Binnington are "real risk of losing".

Greffier

Just to clarify paragraph 32 of the risk assessment, Madam Solicitor does state "on this basis we consider we have a better than evens chance of success but must emphasise that there is a real risk of losing".

Deputy Breckon

Sir, I think there is a bit of a play on words because it's real it's not unreal, if he said there's a 10 per cent chance or whatever

Senator Walker

Sir, may I answer that. The informal advice that my Committee was given on the real risk of losing, better than evens chance was that in the order of 60-40. That was the position we were given. Now of course how meaningful is that because the lawyer advising Dr. Kelleher for example, advising Les Pas may well be saying that they've got a 60-40 chance of winning or 70-30 or whatever and it depends what legal opinion you go to but I think that the odds are serious enough obviously in the mind of my Committee and certainly taking into account the comment by Advocate Binnington "real risk of losing", those are serious enough odds for us to bring forward this proposition.

Deputy Dorey

The Solicitor General has mentioned on a couple of occasions today that this question has not been previously determined in the Island although it has been raised in one form or another on a few occasions. Could she give a notion of, when obviously if the case went to Court then there would be determination, there would be certainty for all future possible cases. If on the other hand the States were to opt for a negotiating settlement where would that leave us in terms of similar questions being raised in the future by other Seigneurs of maritime fiefs?

Solicitor General

Well. Advocate Binnington in his risk analysis, there's two answers. One is the prescriptive point that other Seigneurs would be met by the answer that there now, more than 40 years has elapsed since the lease, there is also the advice with which Advocate Binnington concluded his risk analysis which was the States could then pass a law putting the matter beyond doubt and that he did not consider that this would be challenged by any Seigneur. Now as to that one if I were to give advice on the passing of a law point I would like to give it further consideration if independent advice is wanted but I think it is answered by the 40 years point.

Senator Ozouf

Just one comment. Being a member of P and R I've heard the arguments and some of these seem, which have been said today I've heard as a member of P and R and I'm pleased that the President of P and R has actually elucidated this point about putting some numbers to this risk point. Because certainly for myself they were a defining moment in actually trying to get my head around just what we were dealing with in terms of risk and from a personal point of view I remember what those odds were, I don't remember them and I ask, my question's going to be will the Solicitor General be prepared to tell the Assembly what she thinks the odds are in terms of a percentage risk, to put some numbers against the risk, not in a betting, gambling sort of stupid sense. There is a real, normally as I understand it in litigation percentages of losing, percentages of winning are put and these are important considerations. For me personally I remember that when were given, I thought it was 70-30 chance, may be it was 70-30, 60-40, I don't know. I remember it was 70-30 because I was told there was a 70 per cent chance that my hair would grow back and I've just remembered that. Now it hasn't and there we go, you know. I

remember, it's not very nice but I interrogated the position and said what are the chances, I want to have some numbers.

Deputy Baudains

You'll have to wait 40 years.

Senator Ozouf

Would the Solicitor General, I can't sue him, no. But would the Solicitor General seriously be, I thought it was a defining moment for me. Would she be prepared to put some numbers.

Solicitor General

Yes. It's difficult to put the numbers with absolutely point, point point per cent but we certainly did assess it at 40-60. Going back to the remark which was made by one speaker about the real risk that it was a play on words I'm sorry if it seemed a play on words I don't suppose Advocate Binnington thought that it was going to come across as a play on words. If a lawyer says that there's a real risk what he means is you should really be concerned about this. You have got, you know this isn't just something you can dismiss or say, never mind that you have got a real problem.

Deputy of Grouville

As we're talking numbers, could the Solicitor General please be a little more specific when she says that in 1994 there were huge demands made by Les Pas Holdings. Could she be specific as to what they were and also how they would differ from the settlement that is being proposed by P and R and how they would differ from the actual cost of Les Pas winning and also if she could just clarify her point because I didn't understand what she meant when she was answering Deputy Martin when she said that the action, that she said just conceding the action. I don't know what that means.

Solicitor General

Right. I can't say what the demands were because these discussions were political and I didn't participate in them. My reference to them being exorbitant was the feed back from the political representatives who had discussions. As to being tentamount to conceding the action what I was intending to imply was that to give in to demands on that level, it may have been an overstatement, to give in to demands on that level, you all might just as well throw your hand in as be held down to demands of the nature that were made.

Senator Walker

Sir, may I clarify this, I actually have a copy in front of me of a letter from the then President of the Policy and Resources Committee, Senator Horsfall, to all States members and it's dated 5th September 1997, and I quote

> " Dear member,
>
> Les Pas Holdings Limited's claim to ownership of the Waterfront foreshore. Earlier this year I informed members that discussions had been initiated at the request of Les Pas Holdings Limited to discuss on a without prejudice basis the merits or otherwise of establishing a process in parallel with the current litigation which might lead ultimately to an out of Court resolution of the issues to which that litigation refers. Two meetings have been held and at the second of these meetings the representatives of Les Pas Holdings Limited informed the representatives of the Policy and Resources Committee, namely myself, Senator Walker and the Chief Adviser, that as compensation

> for withdrawing their claim to ownership of the Waterfront foreshore they would need a payment from the States as a lump sum or spread over a number of years of what was described as tens of millions of pounds."

Now informally the view that then Senator Horsfall and I and the Chief Adviser arrived at was that they were seeking something up to £50 million at that point.

Deputy Baudains

Thank you Sir. Yes, a question of Policy and Resources I think. If we do in fact decide not to settle there is no doubt that the Court case would run for some time. Surely an opportunity for settlement would arise again at some time in the future and presumably with our better that evens chance the case would, Les Pas Holdings would realise that there, they stood a perhaps a greater chance of losing than they now consider to be the case and would it not then be likely to be a settlement. Would they then perhaps debate a settlement at a lower level than they currently are? What my question is, have Policy and Resources considered such a scenario?

Senator Walker

Sir, I'll make a few comments on that.

Firstly of course if we were to continue with the action the costs are increasing all the time, that's inevitable I know. Secondly of course the points the Deputy makes that the odds might improve in our favour, of course the reverse is also possible, that the odds could move against us and there again we come back to risk and whether or not at any point in the future Les Pas Holdings would be prepared to consider an out of court settlement I can't say. I know of course because we're here that they are prepared to consider this particular settlement at this time. Whether they'd be prepared to consider any other settlement at any other time is absolutely unknown, I'm afraid.

Senator Kinnard

Sir, and also I think we have to take into account that if the Court case starts to go against us even if we get them to the table to consider a future settlement under those circumstances they would require a much larger settlement.

Senator E. Vibert

I wonder if I could just go through the situation if one makes an assumption that we lose the case I wonder if the Solicitor General could explain to the House the compulsory purchase procedure that would take place and also what would happen if we decided not to compulsory purchase but just leave the matter as it was. Which is that Les Pas own the land.

Solicitor General

Right, well there's two compulsory purchase aspects. The first is the area in respect of which the interest has already been acquired. What would happen there would be that the value of the ownership of the lands that then would be as at the vesting date would have to be assessed with the compulsory purchase procedure which can be lengthy and can be costly but there would be no way out of it. It would have to follow through and that can go beyond the Arbitration Board. Any members who are familiar with the case of Lesquende will know that it has been as far as Privy Council and back so it can be very expensive and it would also involve the expenses of the experts because what would be assessed would be the, one of the things to be assessed would be the whole value of the area as at that date which would require experts, in a planning experts, development experts, and so on. The other area and I'm, can I

make sure I'm getting this right, the other area is would the States want to try and compulsorily purchase La Collette and the Elizabeth Terminal?

Senator E. Vibert

Or would we yes, Would we have to do that.

Solicitor General

No. the States would not have to compulsorily purchase them but if the States did not compulsorily purchase them they would be the property of Les Pas Holdings, with everything that's built on them.

Senator E. Vibert

Actually there are two other matters that I can raise. One is to the Policy and Resources. We had suggested, and it was agreed I think, that the costs that would be involved in this could be assessed by a company that specialises in making these assessments and I wondering whether the President would confirm that the States would be prepared to pay for that to be done.

Senator Walker

Yes Sir, that was actually confirmed at the meeting we held last week.

Solicitor General

I'm sorry, I wonder if could just, I wasn't at the meeting last week and if could be just be clear what is actually meant by assessing the costs by a company and whether it's an assessment prior to the actual litigation for the purposes of

Senator E. Vibert

Yes, we've had through the chair, we've had, I asked a question relative to a breakdown of the costs which we've now received and I put it to the President whether he would be prepared to have those sent to a company that assesses legal costs and that would be done obviously before the action so that assessment could be made by him or by the company of whether those costs are reasonably accurate.

Senator Walker

Yes Sir, just for the purpose of clarity that cannot be done before we're back in Court or before the States is asked to debate the action because that will take, I'm advised, some considerable time. I would also make the point that it's only relevant if the States win the Court case because were we to lose the Court case then, of course, we're subject to the costs and also any compensation and so on and we've already discussed the magnitude of that. So what is really at issue here, I suppose balancing the risk between winning and losing the Court case is whether or not the assessment of £7 million cost to the States of winning the Court case is challengeable and, of course, we would wish to investigate and challenge that to the full but it doesn't take away any shape or form the risk to the States or the cost to the States of losing the Court action.

Senator E. Vibert

I put to the President that in fact we are being asked to make a decision and part of that equation that we have is the cost by and up to running the Court case. So we have to make a decision as to whether we do that or not. Now we've been given a set of costs that I think need to be queried and the query has to take place by the case starting, otherwise what's, there's no point in doing it other than to make sure that the

States haven't been ripped off by the lawyers. We need to know whether that's a reasonably accurate assessment of the case because after all they are lawyers' assessments of their fees and all the rest of it.

Senator Walker

Sir, I understand the point the Senator's making but I don't think it's by any means the most important point in the argument and which ever way it goes should we win the case the States are going to have to pay a number of millions of pounds. Now £7 million is, or it can be is a rough estimate of the costs assuming that the case goes from the Royal Court to the Court of Appeal and up to the Privy Council. Now if £7 million we're advised is not over the top as an assessment, even if it did turn out to be challengeable and we're down to £5 million or £4 million we're still talking millions of pounds and I repeat that's the cost of winning it does nothing to mitigate the risk of losing or the cost of losing.

Deputy of St. Martin

Yes Sir. Maybe one for the President of P and R. I think it can't go unnoticed that there have been several thousand people have signed a petition. I gather also that the television polls was 80-20 showing that and obviously there's certain disquiet in the House here and I'm one of those also that feel it, rather abhorent that we're going to almost having a gun held to our head by Les Pas and you know, you yourself share those sentiments.

Is there any chance whatsoever of going back to Les Pas and pointing out the public feeling, the feeling of the members of the House. I don't know if they need that, but anyway to make them aware of it, if they're not already aware and possibly renegotiating the deal because I find it very difficult to hear that we're being asked to make decisions which, you know, are giving Les Pas certain rights which we wouldn't normally give the public and we've already heard about the two car parking spaces etc., the planning permission and we're going to pay for the tipping charges and dealing with toxic ash and all these added goodies that we could put on. Is there any consideration being given may be to go back and say look some of these decisions are a bit distasteful would you reconsider maybe lowering some of your ambitions to what we're going to ask for?

Senator Walker

Sir, just to take a number of points here I think. Firstly the Deputy of St. Martin refers to the 7,000 signatures on Mr. Shenton's petition to The Queen well we've heard from the Solicitor General today and indeed previously from the Attorney General as well that they do not consider that the petition to The Queen will have any impact on the position of the States or on the Court case and I have to say that I can't say all of those people obviously, but it has to be a fair bet that a significant number of those 7,000 people and of the 80 per cent who voted in favour of fighting the case on Channel TV have got nothing like the information available to them that we as States members have and that's inevitably the case when we're facing legal action. That's inevitably the case and in all honesty you cannot in my view, you have to listen to public opinion but you cannot in my view take full account of it in an issue such as this and I did refer at the meeting we had last week, to the Social Security debate many years ago when there riots in the Royal Square and goodness knows what but the States having all the information they had, States members of the day took a very courageous decision and introduced it and thank goodness they did. But the question of a gun being held to our head, whether we like it or whether we like it not and none of us do, we are in Court and we have a window of opportunity here to settle out of Court. We are in Court. So that's the only gun that's being held to our head but that's been a factor now for a number of years as we know and we've negotiated this window of opportunity should we wish to take it. So that's the gun that's being held to our head but it was there in any case it's not something that's newly arrived on members shoulders or whatever. I have, I can assure the House as have others, thoroughly warned the principals behind Les Pas, the negotiating team of behalf of Les Pas, of public opinion and we warned them of that from day one and we have told them that there will be consequences in our view to all of the parties to the action, all the parties associated with Les Pas and clearly that's focussed to a

great extent recently on Channel Island Traders because they're the big public company that's associated with Les Pas and that's quite natural I think. All the points that are in the agreement are part, I'm talking about the possibility of renegotiating, all the points that are in the agreement are part of the package that Les Pas agreed to to drop the case should the States agree. Now I can assure you despite the very discouraging comments that Senator Edward Vibert's made in another place about the negotiating team of myself and Senator Michael Vibert that we refused point blank to continue negotiations on a number of occasions and we said we are not even going back to the Committee with that proposal and we negotiated extremely hard indeed. I have incidentally successfully negotiated with Mr. Scott in the past, Senator Vibert but that's another matter.

We negotiated very, very hard indeed and we got to the package that we got to. I do not believe at that stage we could have negotiated them down any lower and we did try very, very hard to the point that they walked out of negotiations and negotiations broke down for a period of time during which point the Solicitor General advised the Committee that we should seek to re-open those negotiations. Whether they would be in a position, whether they would be willing to renegotiate now I really don't think there's any chance at all that they would do so. They're well aware of their position, I've as I said informed them during negotiations of what public opinion would be, I don't, can't , if it's come as a surprise to them it shouldn't have done because they were warned about it. I don't believe there's any chance at all that they will seek to renegotiate and we need to consider where negotiations started. Never mind the extent of the claim members have in front of them various maps showing what they were originally seeking in a negotiation and that amounted to colossally more than the package in front of members at this time. So I think those negotiations I know they were tough, and I believe they were successful and I really don't think there's any chance at all of re-opening them at this point.

Deputy Hill

No chance you ever thinking about going back. The answer is no, you would not consider going back.

Solicitor General

Can I. If I can just answer, add one thing which I think would be relevant to the question which was raised about going to Les Pas, that the members of Les Pas and pointing to the public disquiet. They're certainly, and I'm adding this bit because I was at one stage contacted by Mr. Daniel Young a solicitor in Bois and Bois on the subject of press statements. They are certainly aware of public outcry but the reason he contacted me was Les Pas, and I use the term collectively for the Les Pas people, they were disturbed because much public outrage was being stirred up by statements of fact which were actually untrue and the, Mr. Young contacted me on the question of whether it would or would not be right to make some press statement actually controverting things and at the end of the discussion in fact it was really rather more to tell me what they were to do than to ask me. What they did was simply put in, I think a very simple thing saying they did not accept the things but this was not the time to controvert them but it is to my knowledge that while the members of Les Pas are aware of public reaction they are also of the belief that a lot of public reaction has been stirred up by distortions and in some cases untrue statements and I think in due course when the decision has been taken and litigation has run its course and has been settled Les Pas will be formally identifying those things which were untrue and I'm not going to go over everything that's been said but for example the statement that Advocate Falle taped a lunch which Mr. Bailhache, when he was then in private practice had with I think it was Mr. Stevens. Now that was a statement which was completely and totally untrue. There was no lunch. Since there was no lunch it was never taped but nothing was ever taped by Advocate Falle. And it is things like this that have contributed to the public reaction and so I think if one were to go to Les Pas and say "look, the public think you really are the lowest of the low", the first thing Les Pas would say is "we realise that and we think that is been artificially whipped up by a lot of things which we're in a position to say actually aren't true".

Deputy Farnham

Thank you Sir. Following on directly from comments made by Deputy Hill. I think that P and R have probably done, probably deserve to be congratulated for the negotiations they've done and come to this deal because if you look at the upside and this leads on to a question which I ask myself. If you look at the upside of the deal potentially for Les Pas which is potentially hundreds of millions to what's been negotiated either an excellent job's been done on the negotiating or Les Pas aren't that confident of winning. So that's the question I have but I think that P and R in the circumstances have done an excellent job of negotiating and if you look at the shareholders I mean, I'm probably one of the only people in Jersey that Senator Vibert hasn't accused yet of being a director of C.I. Traders but if I was a director of C.I. Traders I think I'd be advising the Board to step out of this as quickly as possible. Because if you look at the upside for them what they're going to get after all done and told may be a couple of million pounds and that's a significant amount of money. But in the light of a company that makes £15, £20 million a year, I mean the damage it could potentially do to them so, if I was a director of C.I. Traders I'd be advising the Board to off load their shares as quickly as possible. But I think the conundrum for me is we're such a big upside why is Les Pas prepared to take what I think for us is a very good deal and I would congratulate Senator Walker and his team for negotiating it down so far.

Solicitor General

Once again I would just like to add something which is simply a matter of fact from our files and it's on the subject of why did, why are Les Pas negotiating, does it mean they think they have a weak claim? The President has already told the House that he made it very clear to Les Pas that there would be public revulsion and I can certainly confirm that from the Law Officers' notes of the early meetings one of the basis upon which Les Pas were invited to negotiate a settlement was that if they litigated and won there would be real public outrage, possible boycotting, possibly even vandalising of their premises. So that it was if you win you may well get a backlash so that I don't think it necessary, I don't think the fact that they have been beaten down to a reasonable settlement necessary reflects the fact that they think they're onto an absolute loser. I think these points were very forcefully made to them if you carry on litigating and win, you may have a lot of problems.

Senator Walker

I think also I did explain this at the informal meeting last week. The original backers of Les Pas, the principals, definitely believed or so we understand, that had a very strong case and they were prepared to push that through almost come what may and hence the total breakdown of negotiations in 1997. Since C.I. Traders have become involved there has been a more pragmatic approach to negotiations and you got a difference in philosophy. There's the Falle's philosophy if you like which is, I think, I genuinely own this piece of land and I have a case and I want to pursue it and there's the C.I. Traders, Mr. Scott philosophy which is we can make a bit of money out of this basically and that's why the negotiations have been on a much more pragmatic basis recently than they were previously.

Now the morality of it is absolutely deplorable, absolutely deplorable but that doesn't change the legality of it or the position that we're in and that's, but it is I think it explains why we've arrived at what is compared to the cost of the risk of losing a very modest settlement for the public, I think it explains why we've arrived there that C.I. Traders in particular are happy to take the certainty of a result and some money and believe that there would be less public odium if you like, I think wrongly, nevertheless I think that's what believe then there would be if they pursued the case.

Solicitor General

Can I raise something which is absolutely completely different. I am supposed this evening to be attending on behalf of the Attorney General a meeting of the Vingteniers and Connétables' officers

Association. If this going to run on I won't be able to attend it. I would like to notify them and if possible to arrange for some other member of the Law Officers. Is it possible to know either

Greffier

Yes Madam, I was about to raise the issue of the time. Is it possible to get a feel from members of how many more points in the 'in camera' debate are likely to be raised are we looking at half an hour, are we coming back tomorrow, is anybody, how can we express it?

Deputy Bridge

Sir, can I propose that we adjourn and come back tomorrow.

Deputy Le Hérissier

May I propose we try and finish, Sir within the next 30 minutes.

Greffier

Well, it's quite simple, there are two simple options, we either continue 'in camera' this evening until we finish and I think it's only fair to members as I've expressed in my letter we should not try in any way to artificially curtail the debate unfortunately we don't also want to put the Solicitor General in a position with her prior engagement or we come back tomorrow 'in camera' and carry on as long as it takes. Now Deputy Bridge has proposed that we adjourn and come back tomorrow.

Deputy Troy

Do we know how many wish to ask any further questions? I've finished.

Deputy Le Main

It would only be fair on the Solicitor General to have a bit of a rest as well because she's been on her feet all day.

Greffier

Deputy Bridge has proposed that we adjourn and recommence tomorrow morning, how many in favour of adjourning until tomorrow?

Very well the 'in Committee' discussion will be adjourned and recommenced at 9.30 a.m. tomorrow.

17th September 2003 – morning only

Deputy of St. Martin

Yes, thank you Sir. I'd like to begin actually by complimenting you on the way you handled it yesterday. I thought it was tremendous but also in particular to Miss Nicolle because I think she was superb to start all that length of time yesterday. I sincerely hope we won't be that long this morning but I would just a little bit of clarification if I could please from Miss Nicolle, just the sequence of events surrounding Mr. Binnington's advice. Could I ask as she was the advice, his advice sought as a consequence of the security of finding of the judgement being done or was it sought before that and also the advice that he gave and he quoted, or it was a mention about some more documentation come to hand. Could I ask when that documentation came to hand that led him to believe that there may well be, our case may not be as strong as we thought.

Solicitor General

There were three points at which his advice was specifically sought beyond the normal reliance upon the lawyer to keep the client informed. The first was when he took over in 1995 and the then President of Policy and Resources, Senator Horsfall, asked him if he confirmed or if he agreed with, the previous advice which was that it was without merit and on that occasion he said that he did agree with the advice and he added that although the points for the plaintiffs looked superficially attractive when one analysed them they fell away. That was the first occasion. The second occasion came in 1997 and that was when discussions were going on with representatives of Les Pas but their demands were extremely high, very high, and their negotiating attitude was one of simple intractability and on that occasion the discovery procedure which as I say, is the reading through all documents which may be relevant and listing those which it's decided are relevant. That was substantially advanced. Advocate Binnington was then asked for his advice because the Committee had to make the decision of whether to attempt to continue negotiating in what looked like an almost unconditional surrender scenario, or to continue litigating. So he was asked for his advice then and on that occasion he said that the discovery procedure had thrown up no evidence of the Seigneurs making any exercising any acts of ownership in relation to the foreshore. And on the basis of that the Committee did not continue those negotiations.

The third occasion upon he was specifically asked for advice was when he was asked for a risk analysis following the delivery of the security for costs judgement and that judgement was significant in two ways. Firstly, it made it clear that there was now a very large exposure to costs. Secondly it did contain the passage of the serious issue to be tried and he was then asked specifically for the risk analysis and he gave the risk analysis which the House heard yesterday.

As for when the documents came to light the procedure for discovery was a long drawn out one because of the volumes of documents which had to be read and the preliminary reading of the documents was done by an Assistant in one of the litigation departments in Advocate Binnington's office because that preliminary work meant reading from cover to cover things like the Receiver General letter books which contain a lot of material that had nothing to do with foreshores just in case there was something there and it wouldn't be cost effective for the lawyer in charge to do it. So the first exercise was carried out by somebody who had to read all these books of States Archives, the Receiver General Archives and so on, and identify everything that related to foreshore in any way. Once that had been done and there was a discovery room at Mourants there was then a selection procedure carried out by Advocate Binnington and with the assistance of London counsel and they began the exercise, I believe in 2001, the completion of discovery of going through discovered documents and identifying those which really were of significance. And part of the, one of the case management exercises was that the Commissioner gave a direction that each party should, in accordance with the timetable put together in batches the documents upon which they really were going to rely and the significance which they attached to them. And that exercise I think began somewhere in 2001 but it was a progressive exercise.

The finalising of the skeleton arguments which drew together the relevant documents and, and it was during this period that Advocate was now receiving from the other side the documents upon which they were seeking to rely. So it was a progressive exercise sort of crescendoing, if I can put it like that as one moves into 2001 they began the business of in batches identifying their crucial documents and exchanging them and that was continuing into 2002 and I think possibly even beyond the security for costs judgement it was still continuing.

Deputy of St. Martin

Sorry, could I just follow on that and thank Miss Nicolle for the answer. The point I'm trying to get to actually is this has been a progressive instance of searching, but obviously one must do that. But it would appear that even though we went to Court in asking for security for costs in 2002 still believing that we had a strong case, would that be the thought or were you starting to having doubts, because you found information before 2002.

Solicitor General

Certainly it's the case that the client still believed that the case was strong because the litigation lawyer who was dealing with these documents had not got in touch and said anything to the contrary. There had been change in the advice, so that when the security for costs application went to Court certainly there had been no communication from Advocate Binnington saying "I should alert you to the fact that my advice is now changing".

Deputy Voisin

Thank you Sir, Could the Solicitor General then confirm that we have received documents which Les Pas are going to rely on as being significant and if so can she shed any light as to whether these documents were new to our legal team?

Solicitor General

I can certainly confirm that Advocate Binnington has been receiving them, I haven't received them myself for obvious reasons. Certainly some of them would have been documents which were already known to Advocate Binnington. Some of them would have been new. I know he was still asking for sight of documents which he hadn't seen, and maybe still hasn't seen, that had been referred to in the pleadings but not produced.

Senator E. Vibert

Sir, may I take the answers to mean that other than the application for costs case there was no other reason that Advocate Binnington feels the case has changed. In other words there was nothing in the disclosure, so the only area of concern was the judgement on costs. Is that the situation?

Solicitor General

I'm sorry I'm afraid I'm going to go back to the start of the debate, I thought I had explained this. No it is not the case and I must have explained very badly yesterday. Perhaps I should start again. Do members actually think that it's only the application for security for costs that is of significance?

Senator E. Vibert

That has changed the opinion from that there being no case to answer.

Solicitor General

No, it's

Deputy Baudains

Could I perhaps try to help because I was intending asking a question on similar lines, I might put it in different words. I understand it. Could the Solicitor General advise me if I have it correctly that the facts of the case have not changed? It is Advocate Binnington's assessment of the case which has changed.

Solicitor General

It's Advocate Binnington's assessment based upon the documents and the documents and the authorities which have gradually come to hand and the skeleton arguments which have now been exchanged and which have finally crystalised the arguments of the parties. One talks of facts, in facts are really historical. It's pure law as a matter of customary law does the Seigneur own the foreshore or not? And what has changed is his assessment, and his assessment has been based upon documents to hand and to research and that has been a continuing process over the years. I would add that when my predecessor left office having given his advice he did advise in strong terms that there should be continuing research and I have no doubt that he would, had he continued in charge of the case, he would have continued an assessment of the basis of all new research coming to head.

Deputy Voisin

Can I ask the Solicitor General to confirm that the assessment would have been changed on documents coming to light and research undertaken on both sides?

Solicitor General

Yes, as and when it came to hand. That is what the lawyer in charge of the case would do. You would continually review it.

Senator Ozouf

Sir may I raise the defaut on Deputy Farnham. (Defaut raised)

Senator E. Vibert

On that point, can I just make it so I'm clear, that up until 29th July 1997 when Advocate Binnington attended the meeting of Policy and Resources, he explained that, to date, the process had yielded no surprises and there was no reason to depart from the view previously expressed by counsel acting for the State? So I take it the disclosures and the information we've had since 1997 is what has changed Advocate Binnington's position. If that the situation?

Solicitor General

Yes. It is the continued, as I've explained, it's a continuing process, the initial discovery work was done by the process of reading all documents and identifying those which relate to the foreshore in any way and what has changed is the analysis based upon the final accrual of documents, if I can put it like that and authorities.

Senator E. Vibert

Sir, I've a whole series of questions to ask Sir. Do I take it from that the fact that there is no record in the minutes of the Policy and Resources Committee of the Crown Advocate finding matters that have been concern means that the Policy and Resources Committee were not informed of any of these disclosures. Because there is nothing in the minutes to indicate that there were any disclosures of any sort, in fact the reverse.

Solicitor General

Well, I'm not sure how many members here ever had personal knowledge of litigation. I'm aware the Senator has but this is very large scale litigation and discovery is now a far more complex matter than it was 30 years ago. But I have conducted many an action on behalf Committees and it would never occur to me to tell the Committee about every document that was discovered. A Committee would have nothing else to do all day but read a letter from me saying "this is a list of what's been discovered today". It's what's the lawyers are there for to deal with discovered documents.

Senator E. Vibert

I have to say with respect to the Solicitor General we're going from 1997 to 2003 and there's not even a report to the Policy and Resources Committee of any doubts in anybody's mind. It isn't a question of giving them a piece of paper because we found it on one particular day. For five years there has not been an indication to that Committee that there was any likelihood of a change of opinion. Well read the minutes.

Solicitor General

I take it that is not a question.

Greffier

It doesn't seem to be a question. More questions Senator.

Senator E. Vibert

Could I ask about the leave of absence of six months taken by Advocate Binnington. If you could inform the House when that was during the case?

Solicitor General

I'm not aware of Advocate Binnington taking leave of absence for six months at all.

Senator Le Claire

Sir, I think what Senator Vibert is trying to arrive at is the same position that I think we'd all like to be in, in a position where we can feel that we're making the right decision for the right reasons even though we may not vote for something on principle we at least can arrive at a settled agreement in our own minds that it's going to go the way that it's going to go because we're satisfied with the information. And I think the question I have to really put in that context of the Solicitor General is can you help those members such as Senator Vibert and myself who are struggling to see the actual final building pieces of this change of opinion. Apart from the final accrual on the final assessment and the skeletal arguments is there is anything that you can point to that Advocate Binnington has brought into play apart from these final assessments and his final accruals and his final skeletal arguments and these non awarded costs, Is

there anything in particular that would give us something to be concerned of, some historic research that became a very crucial building block in the final decision to seek to settle before we force it to Court?

Solicitor General

No. What I can I can point the House to is a risk analysis by the litigation lawyer who has given us his view that there is a real risk of losing an action, which if lost will lose, well members know what it will lose and it is the public that will lose it.

Senator M. Vibert

Sir, I don't know if this will help. Perhaps the Solicitor General can confirm, I made notes during the Solicitor General's delivery yesterday, including Advocate Binnington's risk analysis and one of the things I picked up and perhaps the Solicitor General can confirm if members want to know actual things was that previously settlements in such cases had been avoided by the Crown in the past which strengthens Les Pas' case.

Solicitor General

He referred to the fact that there had been cases in which ownership of the foreshore was part of the issue and that had not been pursued to a determination. Instead some other ground had been found of resolving the litigation. Yes that is correct he did.

Deputy de Faye

Thank you Sir. It does seem that the process of discovery in other new documents leading to re-assessments of opinion has been relatively crucial and I'd be very grateful if the Solicitor General could assist me in how the process of discovery works because if the litigation is to continue it might be assumed that the parties put all their documents that they intend to rely on on the table and then the Court process goes ahead. What I would like to know is at what time does the discovery process stop. Is in fact possible for either of the parties to put in as the Court process has got underway any new evidence because it seems that as the discovery process continues there is always the danger that the critical killer document may emerge which will definitively oblige the judge to rule the case one way or the other. In essence is there a point in time during the full gamut of the litigation where a killer document can no longer emerge?

Solicitor General

No. In fact there is a, there will be a timetable for discovery and parties will be told you will make discovery by such and such a date and they should try and meet that timetable. But if the parties have made their discovery and the date is past and one or other party then finds a relevant document they're not only entitled but they're actually obliged to say "I've got a document that I should have discovered and I didn't because I hadn't found it but now I've found it so now I'm discovering it".

Deputy de Faye

So, if I could just follow that up. Is it in fact the case that whilst we make an assessment on all the information we have at our disposal at this current stage it would be varying between possible or probable that a critical document could yet emerge which would completely confound all our existing calculations.

Solicitor General

Yes, theoretically it is possible that a document could emerge. Documents shouldn't emerge after discovery because discovery is a quite serious matter and parties are supposed to make every effort to find everything that is relevant and to discover it openly. So it shouldn't happen but occasionally it does happen, the more complex the action the more the chance is that it will happen and this is a very complex one and particularly this is an action where a lot of the documents are historical, therefore they're not you know normally discovery is quite easy. You go through the Committee's file and that's it. Zoom, zoom, zoom. But in something like this where it ranges over the centuries there is a greater risk of it.

Senator Le Claire

Sir. May I ask, it might be an inappropriate question Madam Solicitor General, for an opinion if possible. Do you think that these discussions and these proposals coming before us might actually weaken our case if we went to Court. Having had these discussions are we perhaps giving strength to the other side's argument that there was more merit in their case than there would have been before.

Solicitor General

No. The fact that there have been discussions, I mean it cuts both ways. The fact that there have been discussions shows that both parties think that there would be mutual benefit by a settlement and an experienced judge, Mr. Page is a very distinguished and experienced lawyer. He would be well aware that in litigation parties with sense usually prefer to settle than to carry on expensive litigation where quite often even the winner comes off out of pocket. So he won't read any significance into it at all.

Senator E. Vibert

I'm still having difficulty with the timetable of when Advocate Binnington decided that we were at 60-40 chance because on 13th July 2000 Advocate Binnington set out, I'll read the minute to the Policy and Resources Committee. "Advocate Binnington set out the current position in relation to the company's claim and noted there had been a period of inactivity on the part of the company which had led him to the conclusion that it would be appropriate for the States to apply for security of cost", etc. etc. and he goes on to talk about why they should be taking an action for security of costs. There is absolutely no indication at that point in time that he had any reason to change his mid. So could I take it that we could get it as far as 2000 that prior to 2000 there was no reason for him to have changed his mind?

Solicitor General

I don't think that's really a question for me, it's simply what inference do members feel inclined to draw from a document. I mean members may draw what inferences they like but I don't really see that it's something that I can give more of a view on than anyone else.

Senator E. Vibert

Based on this advice that's in this document I take it it was Advocate Binnington who advised the Committee to take the action for security of costs?

Solicitor General

Yes indeed. What I can add to the bit about timetables is that I believe that it was shortly after that that Mr. Page was appointed and that under Mr. Page's case management that the documents began to be exchanged in tranches in bunches of so many according to timetable, I forget the, I must confess I've not

researched things like the case management because I thought that what members would want to concentrate on was what is the risk. Not when did it come to light.

Deputy Troy

Yes. I'd like to go back in time to 1832 when there was a Royal Commission on the civil laws of the Island of Jersey. And is it correct that the Commissioners found that the foreshore was owned by the Crown in this Royal Commission?

Solicitor General

I'm not aware of a Civil Law Commission in 1832. There was a Criminal Law Commission in 1846 and a Civil Law Commission which heard evidence in 1859 and 60 and published its report in 1861. I wonder if the Deputy could give

Deputy Troy

I may have the date wrong on that one I would say I did know the date of the lease of the Havre des Pas swimming pool.

Solicitor General

I'm not trying to be facetious. There has been more than one Royal Commission but certainly among lawyers the Commission which is generally referred to as the Civil Law of Commission is the one of 1860. So can I

Deputy Troy

And the results from that ?

Solicitor General

They certainly did not find that the Crown owned the foreshore. I can go and bring the thing back, I have a copy in my office but when, there was some evidence was taken from Seigneurs and there was a certain amount about Seigneural rights but, I mean the book is something like that I can't recall anything in it about the Crown owning the foreshore and I'm sure if there had said, and the Civil Law Commission is one of the first places that anybody goes when they're researching customary law, You starting working back. And if the Civil Law Commissioners had said the Crown own the foreshore that would have been point 1 in everybody's documents.

Deputy Troy

Because one of the things that comes out from this all the way through is that if you've got all the cases in the past, let's say there are references to it in the Royal Commission on the Civil Laws then we've got the Crown exercising its rights through granting leases and claiming the foreshore at Ronez then you've got the Crown exercising its right by passing the land to the States of Jersey. There's all sorts of examples where the Crown has actually exercised its right over the foreshore and when you get at this accumulative effect it would appear that the case is very strong and that the original legal advice is actually correct.

Solicitor General

Well that's certainly the case that's being argued by the defendants but equally the plaintiffs point to cases of the Seigneurs exercising rights over the foreshore claiming wreck and documents which refer to

wreck landing *sur ses terres* in cases where the context makes it clear that the wreck has landed on the foreshore. The documents refer to it as landing *sur son fief* i.e. on his fief or *sur ses terres* i.e. on his lands and the argument for the plaintiff is that if the wreck is landing is said to land on his land and it's clearly landed on the foreshore that means the foreshore is his land. So that there are the conflicting arguments.

Deputy Ferguson

Yes. I must crave the indulgence of the House. My question yesterday I think the answer, we didn't get an answer. Yes perhaps I'm just a simple engineer but am I right in thinking that the foreshore is that area between the high and the low tides.

Solicitor General

It's the area between the high and the low tides at the spring equinox.

Deputy Ferguson

Right, so a thousand years ago or two thousand years ago when the first rights were established then the foreshore was probably nowhere near it is today.

Solicitor General

I'm not a geographer, I've no idea where the foreshore was 2,000 years ago I'm afraid. Though I have got, if members are interested to the variations in the foreshore, certainly in the days when Mr. Sowden was doing this we put together an album showing where so far as it was possible, from old maps, showing old maps, where the foreshore had varied starting with the Ribert map then some maps of I think 17th, 18th century the de la Garde maps, Godfrey maps, and so on showing the various configurations of the foreshore. So if members are interested in the changes in the configurations of the foreshore they can look at the maps. I would be happy to make them available.

Deputy Ferguson

Yes, so that if the foreshore is moving up and down how can the Seigneurs actually claim to own the land at the foreshore because the land cannot move up and down. This is a concept that I'm having trouble with.

Solicitor General

Well I don't know if I can resolve the trouble. The fact is that the foreshore is what at any given time is covered by the high tide and uncovered by the low tide and if at given times that differs then the foreshore differs and the area over which the Seigneur has his rights differs.

Deputy Ferguson

So that if we reclaim just to get this straight in my own head, if we reclaim sufficient land round the Island so that we're three miles from France the Seigneurs can actually claim the foreshore going through to France. You know, you see my problem that land is fixed so that I don't how somebody can claim land.

Solicitor General

To be perfectly honest I don't think I've actually seen it as a problem. The fact is that the foreshore did vary and in past times it probably varied more than it does now because before foreshore, before land

was embanked, you know I'm sure I'm not the only member of the House that can remember standing on the sand banks at St. Clement and watching the sea taking a bit out to sea. The configuration does change and in medieval times I don't think they would have had a problem with that. It would be simply that the area had changed over which the rights of, the proprietary rights, if it was a proprietary right had changed and the rights of wreck, etc. if it was rights of wreck etc. had changed as well. They would have changed.

Deputy Ferguson

Yes, I can appreciate that but I can't appreciate that the ownership of the land can change, this was really my problem.

Solicitor General

When we're talking about the ownership of the land, is this a reference to the foreshore in a sense that it's land or the ownership of the land which adjoins the foreshore?

Deputy Ferguson

Ah well, as far as I can understand it, in my simple non legal manner the claim is that Les Pas owns the land.

Solicitor General

That is the soil of the foreshore.

Deputy Ferguson

So if the foreshore keeps moving unless the land which I'm just sort of saying, is the land to which they're claim actually disappeared under half of St. Helier at the moment and this is just …..

Solicitor General

Suppose for example historically, we'll have to talk historically because the whole thing is prescribed and anyway suppose historically a Seigneur had had a tract of foreshore there was a very high sand level and the retreating tide retreated quite say, two miles out. Suppose a very violent tide excavated the seabed so that never again did the tide go as far out. He'd have lost some of what he'd had.

Deputy Troy

Can I just add to this in that Wharf Street, for example, they used to tie ships up at Wharf Street and near the Town Church there are rings which they used to tie the ships up to as well and there wasn't a sea wall and Sand Street was sand deposited by the tide so it was, well I can see what the Deputy's getting at, if the sea was up at a higher point it's now at a much further out point, who, for example transacted on all the land that became available. Who actually, when you've got Sand Street, how did it actually get to be transacted, was it the fief who transacted it or was it the Crown or who?

Senator M. Vibert

Sir, on this question of land can we make it clear about the 40 rule, which I think may be confusing some people that it doesn't refer to anything that's been put there and been there for over 40 years.

Deputy Scott Warren

Sir, can I raise the defaut please on Deputy Bridge.

Greffier

Yes, I propose the defaut on Deputy Bridge be raised. Those in favour. The defaut is raised.

Deputy Fox

It's a very interesting point that's being discussed at the moment and I would question in my own mind this question of the foreshore and wrecks coming up on to it. Now looking at the maps there, parts of this original claim included something like the Jersey Electricity Company land which is not reclaimed land in the 40 year rule. It is ?? Then I sit down.

Senator Walker

Sir, can I just make an observation, it seems to me, this thing intently to Deputy Ferguson is asking and the problem she's having, but it does seem to me that the issue here is that the land shown on the report and proposition is the land that they are claiming, That is the area they are claiming and whether we like it or not there's a 40 per cent chance as we're advised, that they will be successful. That's absolutely the part of it and I understand your struggle but at the actual heart of the issue is that is what they're claiming and we're advised to have a 40 per cent chance of success of winning.

Senator Syvret

Sir, I wonder if the Solicitor General could explain to us in lay person's terms the arguments that were used by the Island and I imagine the Crown over the dispute concerning the Ecréhous and Minquiers at the International Court of Justice and whether the arguments deployed in that particular case have any kind of bearing on the present case and whether similar arguments might be being relied upon by Les Pas?

Solicitor General

I'll have to get a copy of the Ecréhous and Minquiers judgement it is in two volumes so it will take rather a long time for me to go through it in layman's terms or otherwise, it's a two volume judgement. I cannot summarise the arguments here without a copy of the volumes.

Senator Syvret

I do think it's an important point that we will need some form of explanation on because it has been suggested that the arguments the Island deployed in that particular case are now the similar arguments to which are being relied upon by Les Pas and I think we do require some kind of encapsulated analysis of that particular case.

Solicitor General

Well I have to put members on warning. I cannot give it out this morning.

Senator Le Claire

Thank you Sir. I think it's a shame that we're trying to get to an understanding of what was what in 1840 and not focussing on where we're at at 10.15. It seems to me that we're going to be in a position in the next few weeks to make a decision and the decision is going to be made in my view that we do the deal.

Then we would hopefully get towards a Committee of Inquiry and I think that that would be in many respects satisfactory although unpalatable in some people's view, satisfactory inasmuch as we get on with things which are probably more pressing but I think it's important for the Committee of Inquiry to know and I would certainly like to know why we took 12 months to put in the application for the costs and perhaps although it's been covered briefly, perhaps it's not a palatable question either but it may have to wait for the Inquiry to look at it and it may not wish to look at it too hardly.

But I think it's an important area where we understand precisely why it took 12 months to apply for the costs as this did have a bearing on us being awarded them or as it turned out, as we were not awarded them, and I do understand that getting everything together took some time. But why did the Commissioner believe that we took too much time or at least that is a part of his verdict. His judgement was that we took too long. Now perhaps he misunderstood the volumes of material that had to be researched. Perhaps his opinion of it taking too long was unappreciable of the volumes of paper work in here, in the Lieutenant Governor's residence and the archives, etc. and perhaps that might be reflected upon by somebody else. Or perhaps the Commissioner knew exactly what had to be researched and just found that the time taken by our team was too long. I really would think that's a very important thing for us to know. An important thing for the Committee of Inquiry to bring out. I may be something that the Solicitor General would want to tell us now or to cover now but if possible it would, I think it would be helpful to give us some indication even if it was that it that would have to wait for the Committee of Inquiry.

Solicitor General

The answer to that one is firstly I do agree that members are entitled to know. Secondly I think it's probably better to wait for the Committee of Inquiry.

Senator E. Vibert

Thank you Sir. I still want to keep trying to get the timetable correct because I'm not satisfied with the way in which it's been given to us. But I've been reading the minutes of 13th July 2000 which I'd already quoted where Advocate Binnington gave no indication and in that he told the Committee that the States costs in the matter were considerable and likely to be much higher than those of Les Pas Holdings. Extensive research has been undertaken including the position of the Island pre-Norman Conquest and it was estimated at approximately 20,000 documents in addition to the 12 files of documents already exchanged were to be disclosed soon. Now I take it from reading that that he had not read or he had not had any ill feelings about the case from having read those documents otherwise surely he would have told the Committee. So can I come back

Deputy of Trinity

Senator, for a point of clarification he said, I think you were saying that he hadn't yet read them.

Senator E. Vibert

He said they were to be disclosed soon. (Interruption)

No it doesn't say that. It says they were to be disclosed which means they were going to give them to the other side. It doesn't mean that he hasn't read them. If you're going to disclose them you're surely, they're your documents, you would have read them, but there is no indication here in this particular meeting that he had any doubts about the case at all. Now if I take you to August 2002 again at a meeting of Policy and Resources that the Committee noted that the Commissioner had refused the States agreement for security of costs and noted the Commissioner commented in his judgement that no satisfactory explanation was given as to why the application could not have been made at least 12 months ago. Plus he went on to make the rest of his judgement.

Now at no time at that meeting did any of the legal team express to the Committee any fears they had about any part of the judgement that had been made. So if they were fearful of the statement that there serious issues to be tried as they were in 2003 why did not express their concern to the Committee when they were reporting back on the case because they were actually doing.

Solicitor General

Right. This one I answered yesterday, but I'll answer it again today. I attended on the Committee on that occasion for the specific purpose of addressing the Committee on that part of the judgement which related to the delay because as Senator Le Claire has pointed out it is a significant matter. It was one upon which the Committee needed an explanation but it is one as I have already indicated which should be left over until the completion of the action and I thought that it was important for me to attend upon the Committee and give the Committee a personal, you know to turn up in person, not in writing and to give an account. I did not refer at that stage to the other aspect of the matter because that was not the purpose of that attendance. We had not then got from Advocate Binnington the risk analysis and there was very little purpose in referring the Committee to a risk analysis that hadn't arrived yet.

Senator Walker

Sir, the question I hopefully canclarify something here. It was at or about that time that the risk analysis from Advocate Binnington was sought and the risk analysis from Advocate Binnington is actually dated November 2002 so there was a time there when it was felt that the risk analysis should be requested, quite rightly, very correctly it should be requested. The risk analysis should be provided or was stated in November and it's that risk analysis which drove the previous Policy and Resources Committee to enter into some without prejudice discussions with Les Pas and which, of course, then continued over the changeover of Committees and led my Committee to do the same.

Senator E. Vibert

I would like to ask a question on what I've speaking on, if I may.

Senator Le Claire

I was really before. If I may ask Senator Vibert to give me some leeway because I'm still trying to trace the issue of the non award of costs and I think, I don't wish to turn this into a Committee of Inquiry although at some points in the day and yesterday it does seem that way for the Solicitor General. I do have some sympathy for her in the difficult position she's had in answering all of these awkward and sometimes difficult questions but I think there's three points that I'd like to know if possible and one has sort of boomeranged back from Senator Walker rising in the interim of me being able to respond to the Solicitor General from the last time. I appreciate that these things are best left over for a Committee of Inquiry was the answer that I received to the question I put but I didn't get a chance to go from there and this is what I'd like to take it to its conclusion as I say but however there's been since then Senator Walker's intervention.

Can I take it in its chronological order the three questions. The first one would be to the Solicitor General as with the second and the third one to perhaps both the Solicitor General and Senator Walker because I don't have my full notes with me or the minutes obviously. The first question is from you answer Madam Solicitor General can I take it then that it is unlikely or impossible for us to succeed in an appeal for, if we were to go that route, in an appeal the re-awardal of costs to appeal the decision.

The second, I don't think it's an irrelevant question it may not be, maybe it is I don't know. The second one is is it beyond our capabilities at that point then to seek redress on monies that have been spent. If for example, we go to the Committee of inquiry and we find that there really was no excuse for the delay

and we've already decided to settle and obviously would have done by them because or we'd have gone to Court because the Committee of Inquiry isn't going to happen till after that point. But are we going to be in a position where we can seek redress for the monies that we've spent so far from the law firm involved over this particular issue or are we giving them a, by employing them basically a free run and with no accountability because it does seem that if we cannot appeal then obviously that's very significant and if we are unsuccessful or unable to appeal because of that reason we should be able to seek redress for some of those monies in my view, maybe we're not but it would be nice to know.

And the last question is to, as I said to Senator Walker or Madam Solicitor General the risk analysis was sought dated November 2002, can I just be quite clear can we have that clarified, was this prior, was documented request for the risk analysis prior to the decision by the Commissioner that costs would not be awarded?

Solicitor General

Right. To take the questions in order. The first question was whether it would be possible either to appeal or to make further application for security of costs. As regards appealing, obviously when a judgement comes out it is immediately analysed if there could or should be an appeal. That was done in this case. The analysis was provided in the usual way with the lawyer of the conduct of the case giving his analysis of the judgement and advising that he did not consider that an appeal would succeed. That was examined by the Attorney General and myself and we agreed that an appeal would not succeed. Therefore there was no appeal and the time for appealing is passed anyway, so appeal no. As for a second application, the Commissioner did say in the judgement, he gave his reasons and then he did say that if circumstances changed there could be a re-application but to make a re-application it would be necessary to be confident that one could successfully overcome the points upon which the Commissioner refused it previously. And certainly I cannot think of any change of circumstances which would make it possible to do that.

The second question was redress from the lawyers acting. Now I will answer this one as a hypothetical question and I'll try and explain how and when a client can get redress from a lawyer. I'm not going to answer it with specific relation to this action for two reasons. Firstly because there are already too many imponderables which I couldn't say, Secondly because the firm is in fact representing the States at the moment. If the settlement is not arrived at the litigation will continue and it would be disastrous if there was litigation continuing and the litigation lawyer thought that the client was thinking about making any sort of claim. So I'm going to answer it only in an abstract way and I would not like that last bit to be taken by any member or

Senator Le Claire

No, I appreciate that Madam Solicitor General, I appreciate what you're saying.

Solicitor General

As suggesting that I think there is a ground for making a claim. It's something impossible to say at the moment. The position between a client and a lawyer is that the lawyer has a duty to the client to deal competently with the client's affairs. Competently means to the generally accepted standard, it's the same for any professional negligence, it means to the generally accepted standard of a competent person in that profession and therefore if a lawyer, it doesn't mean that the lawyer has got to be infallible. It doesn't mean that the lawyer has got to win everything because if it did seeing that in every case somebody wins and somebody loses it would mean that there was always one of the two lawyers was always being sued. It simply means that the lawyer must not fall below the general standard. So the first thing that would have to be done would be to examine what the timetable was, to assess what the timetable could and should have been, those activities haven't been carried out yet and therefore I can't relate it to this action and then to decide whether what the lawyer did satisfy the standard which a

competent lawyer would satisfy or whether it fell beneath it. If you find it falls beneath it then you have got to, the next question is has that caused loss or damage to the client.

Now the loss of an order for security for costs will cause loss or damage to the client if the litigation continues the client loses, sorry the client wins gets an order for costs but can't satisfy it because the other side has got no money and there has been no security. So you've got to have not only, you got to have firstly an act of negligence and secondly loss or damage which can be referred to the act of negligence. Now, and still speaking theoretically if in any legal action both those can be shown then there is a ground for an action. Sorry, I should add to that there is a general rule that a lawyer cannot be sued for negligence in the way in which he argues the case and it's a long standing rule and it goes back a long time to a case called Rondel v Worsley and it was last before the Jersey courts in a case which was called Picot v Crills which went as far as the Court of Appeal. One of the judges of the Court of Appeal wanted to depart from the rule and say the time has come to say that a lawyer can be sued for his conduct in court but the other two judges didn't go along with that so you cannot actually sue the lawyer for how he argues it in Court. The reason for that is that it's very much a lawyer can argue a case well and lose it, I'd like to think so because I've lost cases in my time and I would not like to think that they're all because I argued them negligently, but a lawyer can be sued for negligence for the non-court things, the sort of things that a solicitor does which, I mean an argument in Court you can't say that was demonstrably right or that demonstrably wrong but when it comes to do something like meeting a timetable, filing a pleading, you can say you know you should have done it by the deadline, you didn't. So that can be sued and while in England the rule was that solicitors could be sued because they did the sort of out of court things and barristers couldn't. In Jersey the profession has more of a merge and an advocate sometimes the work of a solicitor. The preparatory work. So the lawyer still can't be sued for what he does in court but can be sued if there is negligence in the actual progressing of the action.

Senator Le Claire

Just one last comment on that, there was one last question I needed to be answered.

Greffier

Yes, your last question was the risk analysis.

Senator Le Claire

Can I thank you up to this point, Madam Solicitor, it's very helpful.

Solicitor General

Sorry, Yes the risk analysis was asked for after the security of costs case, although the risk analysis, the written risk analysis is dated November, in fact there was a preliminary, Advocate Binnington was contacted by phone and he did indicate that he was going to give a risk analysis which would show there was a risk so that the early discussions, the early preliminary field to see if there was a way forward for discussion was against a background of knowing that there was going to be a risk analysis that says there is a risk.

Deputy Breckon

May I just comment on that Sir. There was a common or garden version which the Solicitor General will be aware of better than I, but it was done by Sir Godfrey Le Quesne in the early 1990s and what they said in reference to costs were it's not scientific, it's a grey area because if we employ a lawyer and he does lots of research but it's inappropriate then you can be charged a lot but not get a good service. Whereon the other hand they can do a lot of work which is effective but still lose the case so, you know you need somebody well qualified to judge the cost but having said that it's not an absolute science and

that is freely available and it is easy to read and perhaps if members did look at that if they were concerned about the cost because it's one of my concerns then that gives you an idea of what you're against when you're looking

Senator Le Claire

I'm sorry, I didn't quite understand, I don't mean to be rude but I didn't quite understand Madam Solicitor General's

Solicitor General

Yes, the risk analysis the request for the risk analysis and the receipt of the risk analysis followed the security for costs judgement.

Deputy Farnham

May I just offer a brief respite to the Solicitor General in tiring the legal minds of my colleagues for a minute and just move the debate on a little bit to the actual consequences and the financial consequences of the deal on offer for the States and I might need the President of P and R or indeed any members of WEB to help on this one. Because the land on offer has been valued I presumably commercially, independently commercially, and I understand it, it's currently earmarked for housing in the WEB plans, is that correct? So how was WEB planning to deal with this land commercially because I don't believe there are any financial consequences for the States of this deal. It's going to cost the States nothing essentially. It might cost WEB, is there cash involved in this or are we just, the way I see it we're offering the land and houses are going to be built there or some type of housing is going to be created there and I'm just looking ahead to see we're actually going to end up with what we'd end up if we didn't do the deal. Can I just have confirmation on that.

Senator Walker

Yes Sir, essentially that's correct. The difference of course is that the WEB plan, the master plan for the Waterfront, the Island Plan, etc. they all have put forward that there will be housing of something like this type on that site and indeed other sites as well. So the only difference is, I'm not saying it's not an important difference is that, previously, of course, the plan was that the land would be sold now of course the proposition is it would be given to Les Pas. But that's the only difference. The Island will end up with the same, approximately you can't say what another developer might have sought to put on the site exactly, but very similar type of accommodation to that would have been put on the land any way. Yes.

Deputy Fox

That's not correct.

Senator Le Claire

With respect that's not correct Sir.. I'm sorry, this is rather a political side of things that could be left to the open and I don't think it's appropriate to be using these arguments at a time when Madam Solicitor General has given her time and skills for us to ask confidential questions in relation to the legal side of things. You're putting forward political arguments that might sway people's opinions and it is totally incorrect to say that these are the only reasons for, it's a political thing.

Greffier

Well Senator I do hear what you're saying. I think there's some merit in what you're saying. We don't want to get bogged down. The Senator is correct we don't want to get into the political merits or otherwise of the thing and if Deputy Fox wishes to intervene.

Senator Le Claire

And before I sit down and give way if I may Sir, and before I sit down and give way if I may to finish, is there are other things in respect of excavation etc. that are also contingent on this deal that other developers who may have given us more money for it would not have to be ….

Greffier

Senator you're straying, I think Senator you're straying from areas you asked other members not to do. I don't think we want to start an issue on this Deputy Fox.

Deputy Fox

I wasn't planning to start an issue Sir, I was just planning to correct the point. What the President of P and R said is correct either than that it's against normal planning policies except because of the circumstances it's deemed to be an exception to the rule and therefore has been exempted in the interest, sorry, in the public interest, that's the difference and it also, the plan is what you like, it goes down another floor which is against all the planning principles and policies that are laid down for the Waterfront.

Greffier

I think these are issues that can be correctly referred to in the main debate. I think we don't wish to go on that area.

Senator Syvret

I think whilst we're 'in camera' we do need to perhaps discuss some of the political aspects, as indeed we've been doing throughout this discussion yesterday and today. And I would like to move on, if I could to the political considerations that actually confront us all in having to make a decision on the P and R proposition as opposed to the perhaps the legal details. It would appear quite strongly to me that there have been a number of political errors certainly over the years in the way the case has been approached and handled by the States and quite possibly some legal failings to, for example the 12 month delay in the security of costs issue. These are issues that will be addressed of course when this Committee of Inquiry is established hopefully if it has the correct remit and it's a truly independent Inquiry but whether we spend a great deal of time arguing about those particular points now is not necessarily that germane whether we as individual members of this Assembly vote in favour of the proposition by the P and R Committee or not. I really wish we had simultaneously voting now because the vote

Deputy Troy

Sir is this a speech or a question of the Solicitor General?

Senator Syvret

It's actually a speech, but there's no reason for a

Greffier

The whole purpose is to discuss the issue, Deputy, it's not just purely a question

Deputy Troy

I've got questions for the Solicitor General Sir.

Senator Syvret

You will have your chance to ask those. I'm dealing with what I consider to be actually really quite important political considerations that we need to address in making decisions as, for example, whether we debate this in two weeks time, whether we debate it at all. What members might wish to do when we're debating it and how we vote on the question. Because I think simultaneous voting would have been important is because Senator Walker said yesterday that this was a matter of courage and that we had to exercise courage to do the right thing even though the public may not like it and he cited of course the example of the Social Security Scheme and suggest that the public sometimes don't understand the full issues. And that of course is true sometimes one does have to exhibit courage in making political decisions that may not be popular. But I rather take the different view of this question to that taken by Senator Walker as far as I'm concerned and from everything I've heard so far the courageous thing is to vote against the Policy and Resources Committee's proposals because there is a risk in so doing as has been elaborated quite comprehensively there was a risk that if the litigation proceeds the public interest may in fact lose. But there are very important public policy considerations at issue here and not just at this particular case.

Whilst of course the other Seigneural rights have been extinguished and the 40 rule will cover other foreshore claim one has to consider whether it's really in the public interest for the States generally to be seen to be bowing to chances and carpet baggers and opportunists of this nature. Is it appropriate and is it a good thing for the States to be adopting that kind of stance I actually don't consider that it is.

Now I would actually like to be persuaded to vote for the Policy and Resources Committee's proposition. I'm not yet in that comfortable position but I would like to be because whilst there would be I think public disquiet and outrage at such a deal going through the chances the dust will settle and it will be forgotten about after six months, may be, may be not, may be the public might actually remember those who voted for it but my suspicion is that quite possibly the dust would settle. But we have to ask ourselves, given the public view on this matter and given the public policy considerations in terms of the States resisting this kind of opportunism we have to ask ourselves what kind of conditions would we have had to satisfy in order to be able to credibly vote for this proposition in the eyes of the public.

Now I could be persuaded to vote for the P and R proposition if it absolutely was the position of last resort. If there were no alternative. If in fact recent political, sorry, recent legal investigations had delivered some kind of knock out punch, some kind of killer blow to the public case and that certainly has not revealed so far. A risk of losing certainly, a figure was put on at 60-40 yesterday in the public interest favour. But certainly no killer blow has been landed on the public case and certainly the public are going to need to be satisfied before voting, their representatives vote for this deal and I would need to be satisfied can had a strike out action still be taken. Is it feasible, is it possible for that to take place and if so, should that not be attempted?

Two other issues that I think we could address and there're obviously legal implications to these but one is some kind of retrospective legislation to annul any kind of right that Les Pas may be claiming. Such legislation would of course be claimed by the plaintiffs to be a breach of their human rights and some kind of action thwarting their property rights or their human rights in terms of seeking justice. One could also to move on to another point, introduce some kind of retrospective tax measure that perhaps sought to introduce a 99.9 per cent recurring tax on any profits or gain accruing through the realisation of

property rights on the foreshore. Now it will no doubt argued that these two measures annulling the rights retrospectively and seeking some kind of tax mechanism would be most unusual and would be applying retrospectively and would no doubt be claimed by the plaintiffs to be a breach of their human rights, a denial of natural justice, etc., etc. But in order to challenge that they would then have to pursue that issue I would imagine on a human rights basis and there are two well understood grounds for the State being able to defend itself against charges that it has been broken the European Convention of Human Rights and that is the necessity of the action could be cited as a defence and also the proportionality of it. And I would imagine as a lay person, given the carpet bagging nature of this exercise and the potential harm to the public good perhaps a loss of you know, it's been suggested £250 million the really quieter robust justification plea could be filed in terms of both necessity and proportionality. Now certainly it may be argued for legal reasons that those two avenues aren't doable but certainly before I could be satisfied that those two avenues were not pursuable I would require an independent, impartial, fresh legal opinion on the pros and cons of pursuing those two avenues probably from a particularly professional and renowned Q.C. in London perhaps. The public is going to want to be absolutely convinced through some kind of robust independent legal report or opinion that those two avenues were not feasible and if we haven't done that before we vote in favour of the P and R proposition our position will have seriously lack of credibility in the eyes of the public.

The fourth point is a peer review. I've certainly given the gravity of the case before us and before I could be persuaded to vote in favour of the P and R proposition I could be persuaded to vote in favour of the P and R proposition would require the deal, the risk analysis and the skeleton arguments that would be required to be peer reviewed again by a completely fresh independent legal team and a fifth issue is the pursuit of the backers of the Les Pas claim it has been suggested that this could be pursued. I honestly think that again this could be suggested as one of the political failings but really there ought to have been a clear public policy statement some years ago that come what may that in the event of the case taking its full course through the courts and in the event of the States side winning that all of those individuals who were backers of Les Pas or parties to it in some way would be personally pursued for costs and I honestly think if that were, had been a robust public position some years ago it might have put possibly, one doesn't know for sure but it might possibly have put a rather different complexion on the willingness of the plaintiffs to pursue the matter so far. So those are some of the issues that the public certainly are asking and they're I think perfectly legitimate questions and before I could be persuaded to vote for the P and R proposition and thus if you like, dock the perhaps the less palatable and more risky but perhaps more responsible path of rejecting and fighting this carpet bagging exercise, all of those kind of those points would have to be demonstrated to our satisfaction and demonstrated I mean verbally in a debate won't be sufficient. We need to actually have professional independent reports on the subject and until such independent analysis was offered to us then I don't see how frankly this Assembly could credibly vote for the P and R proposals while these question marks remain outstanding and without an independent written legal and expert opinion.

Greffier

I wonder Madam Solicitor, I jotted down a few points which you probably did yourself ….. such as strike out, possibly …

Solicitor General

Yes I did. There were some legal points and although I accept from the Senator's reference to robust independent legal advice that my advice is probably not what he wants I think I should give it to the other members of the House. The first point was if there were a knock out killer blow. If there was a knock out killer in the documents it would have been a document to disclose to Les Pas and if Les Pas had received a document which disclosed a knock out killer blow to the States Les Pas would not be settling for what is in relative terms a modest deal.

Secondly, retrospective legislation and the suggested retrospective legislation was a tax on profits accruing which would wipe out the profits and the Senator referred to the human rights aspect which is certainly correct. Such legislation would be defective on human rights grounds. It would be discriminatory and it would be interfering with a property right. He referred to the, I should say that there such things the hard human rights which cannot be derogated from any circumstances and the soft human rights which can be interfered with, if I can use the term, are specified within specified limits such as necessity and proportionality and it was suggested that a good case could be made for saying that it was right to make discriminatory, a discriminatory attack penalising Les Pas and interfering with their property rights on the grounds that it was necessary and proportional. Now the only ground on which it can be said that it was necessary is if one takes the starting point that this scenario is only going to happen if Les Pas succeed in the, if the settlement doesn't happen and Les Pas succeed in the action, I think I'm right in saying that. If that happens Les Pas is like any other citizen, Les Pas is a person who is entitled as a matter of law to a piece of property. The necessity consists in saying the public would actually prefer to have the money rather than let the owner of the property have it and I cannot see that would find favour of the Court. One could say, you could apply to that, for example, compulsory purchase, say we would like to compulsorily land from an individual it would be much nicer if we didn't have to pay for it so necessary means we're not going to compensate them.

As for proportionality the Senator referred to Les Pas as carpet baggers and speculators and said that the Court would regard this as giving rise to proportionality. I think I ought to put, I'm afraid this is going to take a bit of a historical retrospective now because if that argument was to work the Court would have to be convinced that they were carpet baggers. Historically the Les Pas group were people who thought that Havre des Pas could be reclaimed. They thought it could be reclaimed for housing and the plan included housing for local people. They thought it could be claimed for a marina and they thought that the marina would benefit tourism. They also thought that they would, they did expect to make a profit themselves but they also expected to sink money into it. They sank a lot of money into preparing plans, they put the plans to the politicians, they received, it is true that there was some opposition, there was also some support. There are on the Law Officers files for example, documents where they attended on the Island Development Committee, as it then was, under its then President, Senator Shenton and he said that he liked the plans and would prefer to deal with a local company. They believed genuinely, and it is quite clear on the papers, they quite genuinely believed firstly they were doing something which would benefit the Island as well as themselves. Secondly that they were committing their own money to something which might benefit the Island. Thirdly that they had political support.

Now all those documents would have to be disclosed and it would be quite impossible to persuade a court, or my assessment is that it would be impossible to persuade a court, that these people are carpet baggers. These people are people who sank their own money and a lot of it into a scheme which they thought they were being encouraged to pursue. So I don't think it would be possible to persuade a court that they are speculators and carpet baggers. They had, when they began, absolutely no views to seeking to be given by the States reclaimed land to the west of Albert what they wanted was to be allowed to put their own money into developing land the other side. And the personal pursuit for costs will certainly, the individuals behind Les Pas have been told that if there is no satisfaction by the company they may be pursued for costs and have replied that they do not feel any concern for that because they're confident that they will win anyway. Certainly they can be pursued for costs, but pursuit is not the same as success whether that would be successful would be entirely in the hands of a Court.

Greffier

I think there was one, just one last matter the Senator raised which was actually his first point about would it still be possible to strike out the application.

Solicitor General

Ah yes. I think it would be virtually impossible to do a strike out for two reasons. One is the stage at which we've reached but possibly even more persuasively an action of this nature where the claims of the parties on both sides depend upon a mass of documentation. Some of it historical. It would only be possible to satisfy the strike out test which is that the action has no prospect of success by effectively asking the judge to decide who was right. It would be tantamount to a complete trial of the action.

Senator Ozouf

May I ask, Senator Syvret raised two issues of retrospective legislation. The issue, he suggested the 99.9 per cent which is above the tax rate that was suggested yesterday, the Solicitor General dealt with that one, but he also I think suggested that we could somehow pass a law retrospectively taking away some property rights in a sort of an addition to the 1960s Abolition of Seigneural Rights. Could the Solicitor General

Solicitor General

No, one could not pass a law depriving people of property rights without compensation. I mean it could be passed saying "the property rights have been removed with compensation" but then the compensation would have to be paid.

Senator Ozouf

Would the compensation be similar to that which would be the compensation payable under compulsory purchase?

Solicitor General

Well, the compensation payable on compulsory purchase is the value of the land at the date of the compulsory purchase which was some years ago, but for the rest of the areas it would have to be compensation for the full property rights of ownership.

Senator Ozouf

So in summary the two suggestions made by Senator Syvret of a 99.9 per cent tax is not possible and secondly some sort of retrospective legislation in relation to taking away the property rights. That is also not possible without hefty compensation. It sounds to me as though that's significantly in excess of £10 million.

Solicitor General

Oh yes, absolutely.

Senator Ozouf

Thank you Sir.

Deputy Bridge

I just wondered whether the Solicitor General could answer whether the fact that Human Rights Act is not actually in force yet in Jersey, whether that has any bearing on what Senator Syvret is asking and also another question which I've been holding back from asking because it's one of those Jersey things where one was in a restaurant and Advocate Falle didn't realise he was sat behind me whilst he

explained his case to someone and his first line “well essentially my case is unanswerable” and I’d like to know what exactly that means when someone says “essentially my case is unanswerable”.

Solicitor General

Taking the first one which is the fact that the Human Rights Law is not yet in force. What the Human Rights law will do when it comes into force, the effect will be that somebody whose human rights have been breached, or who wishes to complain that their human rights have been breached, they will be able to start their action in the Royal Court instead of having to start it in the European Court. The position at the moment is that the Island is bound by the terms of the European Convention and so anybody who believes that his or her human rights or its, in this case, human rights have been breached can bring a complaint but it has to be brought, they have to start off in the European Court. So it’s a procedural distinction. It doesn’t, the fact that the law is not in force doesn’t mean that people can’t invoke their rights under the European Convention, they can invoke them and indeed they can get, they can get a judgement in their favour, they can get awards of compensation. The second question, when he said my case is unanswerable, if you say your case in unanswerable you mean that the other side haven’t got a hope of answering it, that you’re absolutely 100 per cent sure and confident that you are, you’re there, that you are going to win.

Deputy of St. Ouen

I would like to ask the Solicitor General actually, we’ve been discussing obviously, and we’ve got to decide which, whether we settle or continue in the Court case. Will she be kind enough to describe the likely process that would follow if we continued with the Court case and the timescale involved?

Solicitor General

The, if the Court case is continued with, firstly there would be the Royal Court case, it was set down for a few months and it would presumably still take those months. In a case of this nature it is inevitable I think that the judge will want a transcript of the case. It is certainly my experience that when a judge hears a very complex case they do want a transcript. I know that the Judicial Greffe get the transcripts done, well some of them are done in house, some are done professionally, but the longer the case the longer for the production of the transcripts. Once the judge has the transcripts he then prepares his judgement. Now that’s unquantifiable and it depends on the complexity of the case. This is obviously a very complex one so I can’t do much of an estimate. The last case I argued in front of Mr. Page, I think was argued in the January of the year and I think the judgement came out something like the March but it wasn’t a case of anything like this complexity and it had only taken a few days to argue, so there would be a significant delay, I would envisage between the hearing of the case and the judgement. Once the judgement is delivered the unsuccessful party has one month within which to give a notice of appeal. The timescale for appeals is that the appellant has four months to file the appellant’s case. The respondent then has a month to file the respondent’s case. After that the matter is set down for hearing by the Court of Appeal.

I would expect a Court of Appeal hearing on a case like this would take quite a while. The only case I can remember which came anything near to this complexity was the criminal case of Foster which was about whether fraud was an offence of customary law. I know the Court of Appeal was over on two separate occasions for one of them it was a full week and I can’t remember the other, but this is probably a more complex case and I think with a lot more documentation. So that the Court of Appeal sitting would take longer. The Court of Appeal then have to prepare their judgement. Again the speed with which you get a Court of Appeal judgement depends very much on the nature and complexity of the case. In most cases the Court of Appeal will give their judgement, usually in a simple case, they will give their judgement during the actual week of the Court’s visit. But in a complex case it would be reserved and again going back to the Foster case there was a delay of some months, I can’t remember how many between the Court concluding the hearing and giving the judgement. Once the judgement of the Court of

Appeal is available the next stage is appeal to the Privy Council and I don't feel able to give a time estimate for that. Again it's obviously a very complex case and I think both sides would need to instruct a silk for it so that there would be a considerable length of time. I mean we're certainly talking years not months.

Deputy of St. Ouen

Could I ask you just to be a little more specific, I mean are we talking, if you give a minimum/maximum figures, is it two to five years. Would that be the sort of, or would it be five to ten years?

Solicitor General

I'm a bit reluctant to give estimates because they're going to be very much guesstimates and I don't want to mislead the House. Certainly two would be a bottom estimate, as for the top estimate I don't know if it would be done within five, it would take a while. I should add to that that if when the final costs, there is of course, always the further step from the Privy Council to the Court of Human Rights. My thought was that I didn't see that there was a human rights point but I think that Les Pas might think that, I think they have said they would think that it could go further than the Privy Council. The other point to make on the subject of timetables is that if, having gone through all the courts to the ultimate court the public has been unsuccessful there then starts the matters in relation to assessing compensation for the areas in which the interest has been compulsorily purchased.

The sequence for that is that a Board of Arbitrators to assess the price. That can be the subject of a reference to the Royal Court and theoretically from the, I mean the last one actually did go Board of Arbitrators to the Royal Court to the Court of Appeal to the Privy Council, back down again, I think it's got back to the Court of Appeal again. It began in 1991 and that's compulsory purchase proceedings. But that probably wouldn't be as, Lesquende probably wasn't as complex as this one.

Greffier

I was just going to say from the chair, that before we take the next speaker that unlike the usual sitting when members are in and out of the Chamber having a break I'm conscious that most members wish to remain in the Chamber, it's been quite a long morning, I don't see that we're going to finish before lunchtime. Would members like to take a 10 minute break and, there's nodding round the Chamber and thatwould also give the Solicitor General a chance to get a cup of coffee. Shall we adjourn and reconvene at 11.15 a.m. by that clock up there.

Reconvene

Greffier

Very well, does any other member wish to …..

Deputy Breckon

Sir I wonder if I may address something of procedure about how we go on from when we finish this debate, I think it's disrespectful to take Resource Plan after this on a Wednesday afternoon and treat it too lightly and I wonder how members would feel, through you Sir, of actually sitting next Tuesday and possibly Wednesday to do that, it is a major item of business and I don't think we should tag it on to the of this when members have had a particularly difficult day or two or whatever it may be.

Greffier

I just feel that I think you raised some interesting points. I feel slightly uneasy addressing those points in the absence of members, who, for example declared an interest. I think we should possibly finish this debate, call people back and take that decision in the proper forum, I think. It would be slightly inappropriate for us.

Senator Walker

It's also linked of course Sir, that it's to the decision the House has agreed it would take at the end of this debate on when indeed when we go ahead with the Les Pas debate.

Greffier

I think so, and also we don't know when we'll finish this one.

Connétable of St. Helier

Can I raise the defaut on the Connétable of St. Helier please?

Greffier

Yes it's proposed that the defaut on the Connétable of St. Helier be raised. The defaut is raised.

Deputy Troy

Sir, I think I've got one final question of the Solicitor General, and it's just going back to the core of the land transaction around the foreshore and the Fief de la Fosse. If, from Wharf Street the tides were at Wharf Street and then they've receded and , or you had all the alluvian sand and then you had, so you've now got the reclaimed land. Can I get it confirmed that the Crown actually claimed the land and that if, for example you've got the Pomme d'Or which would at one point been under sea, then if you trace the title back to on any of the lands, any of the properties along the Esplanade or the Pomme d'Or and so on, they will eventually go back to the Crown claiming the land and transacting with a third party. Is that correct.

Solicitor General

Yes. What happened with the Wharf Street stretch of land, the land seaward of the Town Church generally was that the Seigneur of the time was asked for consent to, for the proposed reclamation. The Les Pas' argument is that this showed that the Seigneur owned the land, the defendant's argument is that this was only because reclaiming the land would interfere with the Seigneur's right of wreck so that's not conclusive. As regards the Commercial Buildings reclamation. The reclamation was done by private individuals. They asked the Crown if the Crown wished to assert an interest. The Crown said that the Crown did not wish to assert an interest. Les Pas' argument is that this shows that the Crown did not have an interest. The Crown's argument and indeed the States argument is that it shows that the Crown did have an interest and that was why the Crown was asked and simply said they didn't want to assert it but nobody asked the Seigneur therefore the Seigneur did not have an interest. So that in both cases something happened and there are rival arguments as to the interpretation that should be put on it.

Connétable of St. Clement

Sir, there's been a lot of talk in the debate about human rights which I understood related to the rights of a human individual. Can the Solicitor General explain how they can be extended to a limited liability company.

Solicitor General

Well it's simply that under the convention and the law any, a person is taken to be either a natural or legal person. A natural person is a human being, a legal person is something like a company or an incorporation but both enjoy the rights under the European Convention.

Senator E. Vibert

I wonder if I can go back because we were interrupted in the discussion we were having about the meeting in August of 2002 and I understood you to say and would you correct me I'm wrong but I need to be clear of this in my mind that that meeting you were specifically or the legal team was specifically at that meeting to discuss the fact that you'd lost the case on security of costs. Now I think you also said that's all you discussed. It was quite specific on the security of costs and I put it to you that the judgement was all part of the security of cost which included the words that are now used as part of Advocate Binnington's reasons for believing that there was only a 60-40 chance that there were real issues to be tried here and that is what the Attorney General told us at a meeting. Jumped out of the page when he read it, rang alarm bells. Now you've told us that you didn't discuss it at that meeting. I really find that quite extraordinary. I wonder if you could just comment on that.

Solicitor General

If the Senator does not believe my account of what I said when I attended the meeting there is nothing I can do to persuade him, I can only ask other members to believe me.

Senator E. Vibert

The point I'm making is I find it quite extraordinary..

Solicitor General

Well I'm sorry I cannot help the Senator further. He is entitled to his views. I have given my account and I have given my explanation and I can only leave it before the members.

Senator E. Vibert

Can I ask a question relative to Advocate Binnington's leave of absence. You answered it by saying you were not aware of it. Does that mean that it's possible it could have happened and could the House be

Solicitor General

I said I was not aware a six months' leave of absence. Advocate Binnington had a three months' sabbatical.

Senator E. Vibert

Oh, it was a three months' leave of absence, or three months' sabbatical.

Solicitor General

Leave of three months it certainly wasn't six months.

Senator E. Vibert

And could you inform the House when that was?

Solicitor General

No, I'm not able to inform when it was.

Senator E. Vibert

Could we be told over the lunch break when that was?

Solicitor General

If I'm able to find it out, I can find out when Advocate Binnington had his sabbatical. I don't know if members want to know where he went, what he did, who was dealing with the action in his absence, which members of the team were delegated to deal with it, what they were doing and any other points. If any members have any points relating to the day to day conduct of the action please let me have them and I will do my best to find them out.

Senator E. Vibert

Thank you, that's precisely why I'm asking the questions, with respect, is to find out. Could I now turn to the fief situation that when the States extinguish fiefs was that simply an

Solicitor General

I'm sorry the States have not extinguished fiefs.

Senator E. Vibert

Was that not a matter of extinguishing the rights on the fief. Is that the situation, because that's the question?

Solicitor General

Yes. That is quite correct. They, some rights were abolished, some rights were transferred.

Senator E. Vibert

So somebody could still today buy a fief but they wouldn't have any rights.

Solicitor General

Someone can still acquire a fief, they no longer have the customary rights.

Senator E. Vibert

Thank you. Could I ask you about a quotation of Advocate Falle's which was reported in the Evening Post of 1993 in which he was interviewed about the legal problems that would occur or could occur in putting his proposal for the marina into action and he said "I don't see any legal problems but it means that as Seigneur of the fief, which incorporates that area I would have to have an agreement with the Crown. The development is perceived to be for the benefit of the Island generally and we would hope that the Crown would see it in that light. The scheme is so attractive one would expect to be able to

come to an amicable arrangement with the Crown" I'm sorry I've already given you that "and we would hope the Crown would see it in that light". I wanted to put to the Solicitor General whether that quotation is helpful to the case in any way?

Solicitor General

No, it's not helpful to the case. The case will be decided by the Commissioner on the basis of the documents evidencing the position at law, not upon remarks reported in the Jersey Evening Post.

Senator E. Vibert

I would like to ask the Solicitor General who, you made a spirited, through the chair, you made a spirited defence of the people behind Les Pas this morning, when we, when somebody called them

Greffier

I think the Solicitor General set out factual basis on which the company relied.

Solicitor General

If I can clarify that. I was not making a defence, spirited or otherwise of Les Pas, I was explaining why I thought a court would not be able to be persuaded that Les Pas were carpet baggers. That explanation was necessary because a previous speaker had suggested that a court would find that the human rights of Les Pas could be interfered with because they were carpet baggers and it was necessary for me to say why I thought it would not be possible to demonstrate to a court that they were carpet baggers but that on the contrary I thought it wouldn't, the contrary would happen.

Senator E. Vibert

And I understood everything that you said relative to that which was that they were property developers, they were not property developers, you didn't see them as that, you saw that they were making a contribution to the Island by putting this plan forward and it had been well received by the politicians, some politicians of the day including a meeting at Planning which Senator Shenton was the chairman. Now have I paraphrased that correctly?

Solicitor General

I'm sorry if I'm beginning to seem difficult and I hope not impatient but if the Senator is going to repeat what I have said do I need to be here because the House has heard me say it and all that's going to happen now is that he's going to say it again possibly I could go back to my office and do some work.

Senator E. Vibert

I'm simply asking you to make sure that what I'm about to say reflects what you said.

Greffier

I think you must ask a question Senator, if you have a further question ……..

Senator E. Vibert

It's not a further question, it's a further position that whether the alternate position to that is in fact that there was a 10,000 petition against the project. That it had never gone through Planning and Planning

had spent a lot of years trying to sort the whole project out because of intractable planning proposals and that the people involved were in fact property developers, i.e. Mr. George Carter.

Solicitor General

If the question is whether there is a 10,000, I thought I was here to give legal advice but whether there was or was not a petition signed by 10,000 people is a matter of fact which I really don't think it's a Law Officers' job to go and research, I mean I believe there was a petition whether there were 10,000 signatures on it 9,999 I really can't tell the House.

Senator Walker

Also I'm having real difficulty in understanding what impact.

Greffier

Senator Vibert …….

Senator Walker

Can I interrupt.

Greffier

I will ask Senator Vibert to take his seat.

Senator Walker

I'm having difficult, understanding what impacts these "facts" that Senator Vibert's putting forward would have either on the legal opinion received by my Committee or indeed on the outcome of the court case?

Senator E. Vibert

I thought we were here to try and satisfy ourselves that we were going to make the right decision and that's what I'm trying to do and it bores you then I suggest you leave the Chamber.

Deputy Bridge

Sir, I apologise and it might seem that some members might consider this a trivial matter but given the nature of the discussions it would seem to me that the orderly and appropriate conduct of the Chamber is very important and the fact that Senator Vibert does not sit down when the Solicitor General is speaking whilst the Solicitor General is affording the Senator that respect is something that I'm afraid I'm not particularly happy with. It's very important when matters become emotional or difficult that we have good orderly statesmen like behaviour, if you will.

Greffier

Thank you Deputy.

Deputy of Trinity

Yes, I think that we have the benefit of having the Solicitor General here and what she was doing there was rehearsing if you like, the argument that if the suggestion was made that the plaintiffs were carpet

baggers or any other sin they're accused of that the sort of arguments that would be rehearsed would be as she put them and I believe, if I can speak for her that what she's really saying is that in her view the arguments that she rehearsed to give you some idea of the way the argument might go, it wasn't her argument but it was the way it might go was compelling. I think that is quite perfectly reasonable, I believe it is quite wrong to accuse her of sort of being on the side of the plaintiffs, I don't think she was, I think she was giving us some clear idea and advice and I believe that's what our legal advice is here for, it's here to advise us of what, how she sees the situation, whether we individually choose to accept that advice, that because is a matter for individuals but nevertheless I don't think we should accuse her of not being actually absolutely scrupulously fair and I certainly believe that she is.

I think I just like to move it one slightly point on because we are where we are and the sort of arguments that are being, a lot of the arguments that have been rehearsed are going to be dealt with by the Commission of Inquiry and so therefore are not issues I hope which are going to be rehearsed at all in the open debate which we have because if there's damage to be caused, that will cause it if we undermined the position of our legal team in any way at all. I do not believe personally that it would be helpful but I would like to ask members if some are having difficulty in trying to decide which way they should vote I would suggest that probably most of us or all of us at some stage in our lives have been trustees of something, either school funds or church funds or whatever and I would add to that suggestion that because we are now all in a way trustees of public funds and that is a very real responsibility and in that capacity we're not here to play politics we are here to look at a very serious commercial case, commercial risk and we really should think of that downside amount of money as if it were ours as good fathers responsible to the residents of this Island for those funds in the same way as trustees should think.

And I believe that it's only in that way that we're going to be able to make a decision and I implore members when they come to the open debate to think like that Think if you were a trustee of a fund which looked after handicapped children and it was quite a large fund and you put those funds at risk whether the decision was right or wrong, whether the action was right or wrong or whatever we thought of it. You are nevertheless sitting there and you are saying we are putting the whole of our savings, if you like, at risk and we have been given the opportunity of settling for a small fraction of those funds because the ultimate liability here is serious and 10 to 15 years worry in which time we would find it very difficult to use our money, even if we needed it because we'd have this sword of Damocles hanging over us which we wouldn't know whether we were going to be facing huge costs or not and that is the question we should ask ourselves. We should really look when we have this debate in the open and say "this is as if it was own money and as good fathers we are looking after that money for other people". That is what I implore the House to do and I think all the niceties and disadvantages of, that are around and all the nit picking that is going on will be sorted out at the Commission of Inquiry. There may well have been mistakes, I wouldn't know, but it doesn't alter the main thrust of the decision we have to make and unfortunately for the general public who've had votes and everything else at general meeting, they are not in possession of what we are now in possession of, thanks very much to the efforts of the Solicitor General. So I hope Sir that I haven't over spoken, but that's how I feel.

Greffier

I don't think you have, every member is entitled to express their views I don't think we wouldn't want to go too far down the road of having the merits of the debate today.

Senator Le Maistre

I was following that Sir and was about to make a plea to members that we, I'm sure that Deputy Crespel has made some valid points but that sort of speech really is kept for the debate. We are here to focus on the legal issues that the benefit of the Solicitor General being able to give us the advice which I'm sure has been really appreciated by members thus far. I think it would be a pity if the time spent now were to

disintegrate into a debate which is better kept for the day and I think that unless members can really focus on the legal issues we ought to begin to wind up this part of the session.

Deputy Dorey

Coming back to the legal issues I don't pretend to be any expert on the law at all but I have heard that it's happened in some civil cases, particularly in cases related to liable that if when the case comes to trial if the judge sees that one party has had the opportunity to settle out of court and has failed to take that opportunity that then affects his assessment of what the damages in a case like that should be. Would that actually be an issue in this case?

Solicitor General

It's certainly the case that in cases where there are matters such as liability at issue where there's been an opportunity of a settlement and it has not been taken. Yes that would affect the judgement when assessing damages. In this case I don't think that that is of such relevance because the judge won't be assessing damages if this case is lost by the public, it's going to be winner takes all. The Les Pas, there will be nothing for the judge to assess because Les Pas will get everything it is claiming. The entire foreshore which has not been compulsorily purchased with everything on it and anything that's been reclaimed within the last 40 years on it and compensation for the area in respect of which there was compulsory purchase. So it won't be a question of assessing compensation it will be as I say, winner takes all.

Greffier

Are there any other members who wish to raise any other points in this discussion.

Deputy of Grouville

Thank you, I'm not sure if this is a legal question or one for P and R but if we were to decide to fight the case and not go along with the proposition would it be our intention to continue with Advocate Binnington at Mourant, du Feu and Jeune given the rather unfortunate oversight of costs issue or would we look to employ another legal adviser.

Solicitor General

There's a number of strands to the answer. Firstly the reference to an oversight in relation to the costs, Advocate Binnington has given an explanation which I read out. It was relatively brief but it may be expanded upon by him and it may be that he will show that the thing was dealt with as quickly as it could be. So I think it is, I don't think that it would be right to make any sort of judgements as to negligence or otherwise. As to instructing another lawyer I have previously advised the Committee in respect of this and my advice was against contemplating it. In the first place the material, the documentary material is, is massive and I did tell members that I went to look at the discovery at a time when I hoped I might be able to read the discovered documents which didn't prove possible but I did see the discovery room at Mourants. It's an entire room, one half has the discovery from some other case but one half has got nothing but the discovered documents and just the discovered documents for the States, it's not the documents which have been received from Les Pas. The Commissioner would expect the case to be back in court. It is back in court on 13th October. Even if there could be a brief adjournment it would be brief, I don't think it would be realistic to think that the Commissioner could be asked "can we have as long as it takes a new lawyer to read into this". I cannot think of any lawyer who could possibly read into that amount of material in the time. I have myself some previous knowledge of the issues historically at the date when Mr. Sowden was dealing with it so I have some familiarity with it. I also have a certain amount of knowledge about Jersey property law, which not all the Jersey lawyers specialise in, but I don't think I, well I don't say I don't think, I'm quite confident I would not be able

personally, I certainly wouldn't be able to do that task and I can think of no other lawyer in the private sector who could do it.

The second point is that to have what, to put it colloquially would like a public bust up with the defendant's lawyer would be, it would be very damaging, it would show Les Pas that there were some problems between the defendants and their lawyer and I would add that when one gets into a litigation a lot of it's law but a certain amount of it is tactics as well and for the other side to see that the defendants were in apparent disarray would mean whoever then went into court was going to be not really on a level playing field in a difficult position. Indeed it might all also suggest to the judge that there was a lack of confidence in the defendant's case. The further point of course is the fact that Advocate Binnington acts for the Receiver General as well as for the States. It would be necessary to canvas the views of the Receiver General so that my advice is that frankly I don't see it as an option. The only other thing I can add is that the number of firms with big litigation departments is relatively limited. Some of them are already conflicted out. Conflicted out at the time when Advocate Binnington was instructed another firm is now conflicted out and that is Casey Olsen because of Advocate Kelleher's involvement so that one would be down to a very small handful of firms anyway.

Senator E. Vibert

On that matter is it necessary that it has to be a Jersey based legal firm?

Solicitor General

Yes.

Senator E. Vibert

On what basis?

Solicitor General

On the basis that only a *personne diplomée* within the meaning of the *Loi 1961 sur l'exércice de la profession de droit* has a right of audience before the courts of the Island.

Senator E. Vibert

I wonder if the Solicitor General can give it to me in English please?

Solicitor General

The title of the law is in French which it is why I've given it in French. It is a law passed by this House and it is the Law on the Exercise of the Profession of Law in Jersey and what it says is that only a person with a Jersey qualification has a right of audience before the courts.

Connétable of St. Peter

Sir, a question of the Solicitor General. From a legal point should the matter be contested in court and Les Pas were to win would they then be able to revisit the Havre des Pas marina development proposal knowing that they would have conclusive proof of ownership of that area.

Solicitor General

Yes, they would certainly own the foreshore at Havre des Pas and they could revisit it. It would obviously be subject to ordinary planning considerations but the application would have to be dealt with

on planning grounds but they would certainly own that foreshore and would be in a position to make any applications they felt inclined.

Connétable of St. Peter

Could I just add to that Sir. Given that I'm sure all of use have heard from time to time that Crown owned property, wherever it may be has no obligation under planning law, you actually submit plans in the normal manner of individuals or persons who wish to develop would there be any conflict given there is an interest from the Crown in this particular land or particular area?

Solicitor General

So far as the Havre des Pas, certainly it is the case that the current planning law, the 1964, Law does not bind the Crown though it is intended that the new Law will, in certain respects apply to the Crown as well but certainly the law that is in force at the moment does not bind the Crown. But if the hypothetical scenario is that Les Pas have won. Now if Les Pas have won, they own the foreshore, if they own the foreshore it is not owned by the Crown therefore the Crown hasn't got an interest, therefore it's just like any other piece of land it is subject to the Planning Laws.

Senator E. Vibert

On that point, through the chair, isn't the situation the fact that the area is a marine conservation area and it's part of Ramsar and in fact couldn't be developed.

Solicitor General

It is part of Ramsar, that doesn't mean it cannot be developed, it means that the presumption is against development.

Greffier

Are there any further matters, I sense we're coming to a conclusion. Senator Walker do you want to?

Senator Walker

Yes Sir, this is not to raise a question or make a point it is merely to congratulate and to thank firstly members of the House for the numerous questions and points that have been made through the debate but particularly, of course, the Solicitor General for a quite, in my view, outstanding marathon, and so members are indicating in the best possible way their appreciation of the Solicitor General's advice and assistance that we've all gained so much from over the last well, goodness knows how many hours, a day and a half and quite clearly this debate and her detailed and clear advice on such a complex subject was entirely essential and I'm sure that members now feel much better informed and much better equipped to deal with the real issues whenever the House decides they should be debated and Sir, I reserve the right if I may to make similar comments again because they should be heard by a wider audience to make similar comments again when we're back in the public domain because I believe the public should know the service the Solicitor General has performed for the States today.

Greffier

Thank you Senator. I'm sure all members would echo your comments. I wonder Madam Solicitor if I may just indulge one last comment from you. The debate has for reasons you explained previously been held 'in camera' I wonder if you wish to make any comments to members about the possible implications of discussing.

Solicitor General

Yes, the debate has been held ‘in camera’ and members are aware of the reasons and I would stress that the an ‘in camera’ debate should not only be held ‘in camera’ but what is said ‘in camera’ should not be disclosed elsewhere, should not be put into the public domain. If it is done the only interests that can be damaged is the public interest.

Greffier

Now where do we go from here. I’m looking at the clock. It’s 11.50 a.m. I think in relation to Deputy Breckon’s point we need to assess possibly before the lunch adjournment what we do now, where we go from here. I think it’s only fair that we should contact members who are not present and we have arranged with mobile phones, etc. to try to do that. Would it be appropriate for the House to adjourn until 12.10 p.m. and then

Senator Le Sueur

Before doing that Sir, we were going to discuss at the end of this ‘in camera’ debate what we might do for next week or the week after.

Greffier

Yes. Well that’s want I intended to do before lunch. I think we should possibly have that discussion before lunch as members may say they don’t wish to do anything this afternoon, as they may wish to say “we start the Resource Plan after lunch”.

Senator M. Vibert

Sir, surely the members who have declared an interest would not take part in deciding when the Les Pas debate should be.

Greffier

They need to take part in what we do in terms, I think the two things are together aren’t we need to talk about the Resource Plan and the Les Pas matter.

Senator M. Vibert

I think one would influence the other Sir and if we decided on the Les Pas I think it would clarify and other members could come back for the Resource Plan.

Senator Walker

Sir, I have to say Sir, I agree with that I think the most difficult subject very clearly is the date upon which we debate Les Pas and I think we should decide that first and then other things will slot in around that.

Greffier

Yes you’re probably right.

Senator Syvret

We’ve had that discussion in open session.

Greffier

I was just going to say Senator that there's no need to sit 'in camera' to do that. I think we should conclude this discussion. Shall we take that decision straight away once we've reconvened properly in open session.

Deputy de Faye

Sir, just or two points Sir. Before the Solicitor General actually retires I rather think we need to take, possibly the Solicitor General's advice on how we ought to properly conduct the debate on carrying out the, on whether to press ahead with the Les Pas settlement or not. In the meantime may I thank her myself very much for her excellent exposition and I know yesterday afternoon that Deputy Farnham congratulated the Policy and Resources Committee for their excellent work and as we are 'in camera' I would actually like to add my effusive congratulations to what I may say is a most and brilliantly and ably led Committee led by a President who I deeply respect and admire and when he presses ahead with ministerial government I'm sure he'll want to surround himself with people who deeply respect him.

Greffier

I think the remarks on today's debate could be made in open assembly, Madam Solicitor.

Solicitor General

Sorry, the debate as to when the debate is to be held, whether that should be held in open assembly. Provided members say absolutely nothing whatsoever, which in any way repeats anything which has been said in the 'in camera' debate it can be done openly but if there is any chance of any remark or reference being made to anything that has been said in the 'in camera' debate that should not be said openly.

Deputy Fox

Sir, with respect I think it would be if we sorted it now Sir.

Greffier

Very well.

Deputy Fox

A slip of the tongue, the best intentions and the Solicitor General is here to check and put the checks in balance if it's so needed. Greffier there will an issue Senator Walker as to whether you are, I understand you are required by the terms of the agreement to request the debate to be held 'in camera' anyway. Is that correct.

Senator Walker

Yes Sir. We have got to request that but we do so and I have to do that formally but we make it clear we do with no enthusiasm nor do we actually recommend that the States should proceed along those lines. Now that we've had this debate over the last two days 'in camera' I believe that it's quite appropriate but of course we are totally in the hands of the House, but I believe it's quite appropriate that the main debate should be held in open session. That was indeed the wish of my Committee but we were of course as with so many other things subject to legal advice but I do believe that this sitting has overcome the need to hold the main debate 'in camera'.

Solicitor General

Can I just add one word about the Policy and Resources Committee and the holding of the debate 'in camera' it is correct that the agreement says the Committee must ask the House but it also says that both parties must act in good faith so I think that when the Committee asks the House to sit 'in camera' even though members may privately prefer it to open I think the members must support that request otherwise the agreement may be jeopardised on the basis they are not acting in good faith on one of the points.

Senator Walker

Sir I take that point so ignore my last comments and can I put it then to the House officially that the debate on the, whenever we decide it's going to be held should be held 'in camera'.

Connétable of St. Peter

Before you take a vote. Is it not a fact that if this should be contested in court then at that time any member of the public could witness that case?

Solicitor General

Certainly once the case is in court the public can go and listen to the court case.

Deputy of St. Martin

Could I just seek a little bit of clarification on this point because having read the Committee minutes this was this area about concern as to whether Les Pas would want it 'in camera' because I think initially through the Solicitor General you're suggesting that the need not be 'in camera' but that would be subject to clarification with Les Pas. Could we ask what were Les Pas feelings about 'in camera' it might be helpful for us to make a decision.

Senator Walker

Les Pas declined to allow the Policy and Resources Committee to move away from suggesting to the House that it should be held 'in camera'. They insisted in accord with the terms of the agreement that we should put to the House, and I think this is the point the Solicitor General is making, that we should put to the House that the debate be held 'in camera', that is what, but the agreement is that I will, the Committee it to the House, the House must of course decide for itself.

Deputy of St. Martin

I'm a little bit confused. Would Les Pas prefer it 'in camera' or not. That's the question?

Senator Walker

Les Pas want it 'in camera'.

Solicitor General

If I can just add. Les Pas could of course be asked if they have changed their mind if that's of assistance if the Committee wishes it in open House they can of course be asked again.

Greffier

The Solicitor General suggests they could be asked again but I understand they were asked relatively recently.

Senator Walker

They could indeed be asked again. I certainly got the impression when I last asked that it was an important point to them but I'm certain if the House wishes I'm certainly prepared to ask again, most certainly.

Senator Syvret

Can I just be clear about the procedural issue here. The appropriate time to ask the Assembly to go into 'camera' is at the commencement of the debate of the proposition. We can't make that decision today.

Greffier

I think it could be done either way Senator for example the House decided last week that this debate will be held in this discussion, be held 'in camera' I think it could be one or two ways. You can either do it, decide in advance or you could do it on the day of debate, either option is available.

Senator Syvret

Can we ask that we make that decision on the day of debate.

Senator Walker

I see no reason why we can't make that decision here and now.

Senator Syvret

Senator Walker has proposed that we take the debate 'in camera' and according to Standing Orders that's not a question that can be debated it goes simply straight to a vote. On that basis I would propose that we suspend Standing Orders to enable us to debate whether we go into 'camera' or not.

Greffier

Can I just clarify Senator, I'm sorry to interrupt you. Just want to clarify where we are. We're still sitting as I think, effectively still sitting as a Committee of the Whole House 'in camera' if I can say from the chair I hear what Deputy Fox says but I can't personally see any public interest in having the discussion of the debate in private I think the public are entitled to hear that I think we should invite the radio back into switch the sound on. I don't see any reason why we can't decide at 12.15 p.m. to reconvene as an Assembly and take these decisions in the open. I believe that would be an appropriate way to do and have those discussions that Senator Syvret and others want to do at that stage. Perhaps in fairness to other people we should reconvene at 12.15 p.m. I do believe that I do accept the point that those members who have declared an interest probably should not be participating in this decision so we will not invite them back till after lunch if we're still here.

Senator Le Sueur
For the sake of planning Sir can we confirm that the Resource Plan will not commence until 2.30 p.m.

Greffier

Whatever we do. At the earliest.

Senator E. Vibert

Would it be possible if I could ask the Solicitor General whether it is to our advantage that it be held 'in camera' and that it's really to protect our interests that we should do it. Not Les Pas. Les Pas don't really come into in that respect.

Solicitor General

Well that depends entirely on what members are going to say. If members are going to debate it without saying anything which will refer to the legal advice which the members have received then there is nothing against having it 'in camera' but as I said it depends entirely what members are going to say during the debate.

Senator Le Claire

Sir, sorry, I beg your pardon. May just on a separate altogether different issue just to raise a concern. For the last 25 minutes or so I've been trying to get into the real problem, I'm trying to get an usher to fix Norma's kettle which is acting up, but the point being that during the time I was trying to find an usher which I've been unsuccessful in doing I've noticed, I've come and gone from the main building which the doors have been open and unattended, not the one with Alan at the front and I can't find the President of Public Services, so whoever's in charge could they please fix the kettle and close the door.

Deputy Bridge

PPC will sort it out.

Senator Walker

Sir, could I make just one point please if I may. I think it would be helpful when we resume in open session if the Solicitor General repeated in open session her health warning about the procedures that we should adopt.

Greffier

We must adjourn and we'll reconvene at 12.15 to take these decisions.

23rd September 2003 - morning

Deputy Greffier

The States are asked to decide whether they are of opinion (a) to implement the agreement made on 27th May 2003, by and between Les Pas Holdings Limited, Her Majesty's Receiver General, the Policy and Resources Committee and Richard Arthur Falle, Seigneur of the Fief de la Fosse as set out in Appendix 1 to the report of the Policy and Resources Committee dated 25th July 2003; and (b) to authorise the Attorney General and the Greffier of the States to pass the necessary contracts in connection with the proposed transaction.

Greffier

Very well, the Assembly has agreed as the Bailiff has already stated this matter will be debated in camera. - I therefore ask any members of the Press, members of the public and other persons who are not officers of the States and members to withdraw. Sound will be turned off.

Very well, I call on Senator Walker to make the proposition.

Senator Walker

Thank you Sir.

Sir there is no doubting whatsoever the importance of the debate we are having today and no doubting whatsoever the difficulty of the decision the States is being asked to take. And there is also no doubting the fact that we have to take a decision – we either decide to accept the proposed out of court settlement or we remain in court – and I emphasize remain in court because we are effectively in court with a stay merely to see if an out of court settlement is possible but the court hearing resumes on October 13th, just something like three weeks away.

Sir the debate has been long, emotional and at times, sadly, very misinformed. So bearing in mind the hope, very much hope, that the public will have the opportunity of hearing this debate at some point in the future, depending, of course, upon the decision we take, I would just like to, relatively briefly, recount the, what I consider to be, the salient and most important facts. I think as everyone is now aware the whole sage, for such it's become I think, started in the 1980s with a proposal to build a marina and associated housing at Havre des Pas. That proposal was not supported by eminent politicians of the day and for a variety of reasons did not proceed and as a result, Les Pas Holdings to whom the rights over the Fief de la Fosse had been transferred by Mr. Richard Falle who had previously acquired them, Les Pas Holdings commenced legal proceedings in 1989 to claim ownership of the foreshore, the entire foreshore or most of it, between Le Dicq to the east and effectively Payn Street halfway along the Esplanade to the west and the claim includes the bathing pool at Havre des Pas, the Power Station – the J.E.C. Power Station at La Collette, much of the La Collette reclamation scheme, Maritime House, Housing developments West of Albert, part of the Elizabeth Terminal and also part of the Elizabeth Marina. That is the claim – an enormous piece of land with some very valuable property included in it. Now the case was much delayed, basically or initially as a result of a procedural agreement between both parties, Les Pas on the one hand and the States and the Crown on the other. But it came into court in 1995, the pleadings closed in 1996 and discovery commenced in 1997. Now discovery was in itself a major exercise involving many tens of thousands of documents and took many months. But it is true to say that the case at that point had no great momentum and the momentum only really came into it quite recently. But the current position and the position – the background – which is the background to the decision which we are being asked to take today is that Mr. Howard Page, Q.C., who has been appointed a Commissioner to hear the case, has felt that it has dragged on quite long enough and it needs to be pushed along to one conclusion or another and he has only agreed to the further delay while the parties concerned discuss the possible out of court settlement. I would again remind the House that the case is

due to recommence on October 13th. There have been previous attempts to reach an out of court settlement and the previous President of the Policy and Resources Committee, the then Senator Pierre Horsfall and I met with representatives or the then representatives of Les Pas a number of years ago but their claims, their conditions if you like for ceasing to proceed - not proceeding with the court case – were absolutely unacceptable. We were told very clearly that they would only accept "tens of millions of pounds" and we formed the opinion that we were looking at something like £40m. or £50m. in order for them to pull away from the court case and we did not believe – certainly against a background of the legal advice pertaining at the time – we did not believe that that in any way represented an acceptable conclusion in the public interest. But towards the end of last year based upon new legal advice given to the previous Policy and Resources Committee, further 'without prejudice' meetings were held with different representatives of Les Pas and on this occasion the meetings were held between the then again Senator Pierre Horsfall and myself, together with the Law Officers of the States and Les Pas being represented by Mr. Tom Scott, Advocate Richard Falle and Mr. George Carter together with their own legal representatives. Mr. Scott had entered the frame by then because of the 12 ½ percent interest acquired by Channel Island Traders in Les Pas and his appointment as Chairman of Les Pas in the meantime. Now this was the position my Committee inherited when we came into office at the end of last year and I've already said this to the House but I repeat it – it was a position that we deplored – we were not at all impressed to be put in this position – certainly I of course knew of it already, my six colleagues on my Committee did not and it is fair to say they greeted the news that this was the position we were in with horror and dismay and I'm not exaggerating – they fully recognised the political position that it put the Committee in. They fully recognised that they had a very very tough choice to make and that choice was, and today is for the House, what is in the public interest? What is the best conclusion in the public interest? But we had another choice basically we could have said nothing and just let it as it had done – been as I've said for a number of years – let it stay in court and be resolved legally with unknown consequences at time indeterminate period in the future. So we could have saved the political agro if you like and the considerable criticism that we've encountered and the very real political difficulty – we could have saved that and it could have stayed in court. But the choice was between that or coming right up front, being entirely open with this House, with every member of this House, within the legal constraints placed upon us and the public generally and to give the States the choice between staying in court or accepting the proposed out of court settlement. We know we would be criticised but we took, following intense negotiations and they were, despite comments to the contrary, they were intense, difficult and ultimately – in my view – fruitful negotiations. I'm very very grateful to Senator Michael Vibert for the support he gave me because it was he and I that led those negotiations, participated in those negotiations, I'm very grateful to him that they were ultimately successful and we brought the original claims from Les Pas down from various sites with a value of something like £30m. or perhaps even considerably more, down to the site that is the subject of the proposition today. So having arrived at that objective my Committee took what it ultimately believed, after intense discussion it has to be said and many meetings, took what it ultimately believed was the only possible decision. That was to bring this forward to the House and let the House decide whether an out of court settlement is the right way forward or whether remaining in court and fighting the issue legally is the right way forward in the public interest. And lets be quite clear, in the opinion of my Committee we would have been in dereliction of our duty had we not brought this proposition forward- had we not negotiated as hard as we did and had we not brought this proposition forward. Members of this House would today, and the public, be blissfully unaware of the background and believing, as we had done previously, that it would stay in court and come what may we were going to win the court case. Members would be blissfully unaware that that would have been a dereliction of our duty – that would indeed have been nowhere near open government which is precisely actually what we've engaged in. We have as I've admitted made mistakes along the way and there were two, I think, principal mistakes that we've made which we've held our hands up to and accepted the criticism for and that is, despite the fact that the then three members of my Committee who held very very small shareholdings in Channel Island Traders who in turn have a small shareholding in Les Pas, despite the fact that they declared those interests right at the outset, they could and should have not participated further in the meetings and we accept the criticism that we've had of that despite the fact that the ruling from the Bailiff is that they, and we, did not breach Standing Orders as a result. Perception is important and with the benefit of hindsight

it would have been far better had they withdrawn from all subsequent meetings – it wouldn't have affected the outcome because my Committee of seven is unanimous in recommending this proposition to the House today. The second mistake we made concerned the Minutes not just continuing, uselessly as it turns out, to use the code name Atlantis, which had originally been given to it because of lawyer to lawyer confidentiality and lawyer to lawyer correspondence which is entirely common in legal issues such as this, we nevertheless should not have continued with the use of Atlantis in the Minutes. It was totally useless because the Minutes that bore the headline Atlantis also referred to Les Pas in the text so it was absolutely useless and I don't accept the criticism that it deflected members from obtaining information. There was also another issue with the Minutes which Senator Le Claire brought to the attention of the House in question time, sitting before last, and again my Committee accepts responsibility – the Minute could have been better worded. And I'm not dismissing those issues lightly – we do take them seriously and we're conscious as I've already said that we could, and should, have performed better in these instances. But all that, together with much much more, the entire history of the case is going to be the subject, should the States agree, and I'm very confident the States will agree, to set up the public inquiry. We believe this public inquiry is of real importance. The public do deserve to know the full facts – I would say the public need to know the full facts. Now, of course, sadly the public inquiry for legal reasons cannot commence until this issue is resolved one way or the other but that's not a decision of our making or our wish, that's unfortunately is a legal fact of life. But it will be held in public and it will again, if the House agrees, be chaired by an independent person of real status and stature and our recommendation is that that person should come from outside the Island so there's no question of him or her being tainted by the public debate that's been going on in recent weeks and months throughout the Island. The public inquiry will look at the actions of everyone involved, past and present, the actions of politicians, the actions of lawyers and of course the actions of Les Pas. It will look at what decisions were taken, by whom, why and when, and our intention is that it will disclose the full facts of the case and as I said the public need to know the full facts – I think this House needs to know the full facts. These are indeed as I've said twice already very important issues. But they actually do nothing, nothing at all to take away the main, the central issue which is the question that we have to address and we have to answer today. The Island is in court – we face serious risks as a result and we are whether we like it or not and clearly we don't but we are as I've said many times already in this debate, we are where we are and we can't undo the past. We can investigate the past, we can possibly allocate blame for the past or even the present but we can't undo the basic facts that we are where we are and we have to take a decision – to stay in court or to settle out of court irrespective of what may or may not have happened to bring us to this condition or to bring us to this position today. Now Sir I'd like if I may to turn to the legal advice and a little bit of history there because it is I think, as Senator Syvret said in the debate last week, it is central to the position that the States is in today and central to the choice that we have to make. Now of course I'm not in a position to give detailed legal advice to this House and I would never seek to do so. The Solicitor General is with us of course today and she will provide any detailed legal advice that members may require. Exactly as she did last week over that marathon session of a day and a half for which I have already warmly thanked her and do so again this morning. The original legal advice as everyone is well aware and I note that Senator Edward Vibert has circulated copies of the advice from – I haven't had a chance to look at it but I guess it's Mr. Kidwell and Mr. Gadney this morning. Okay, I'm sorry, fair enough – I'm glad that the Greffier has circulated it – thank you. But the early legal advice was that the Les Pas case was without merit. That advice was given in the early 90s and it was based on the advice given by Mr. Raymond Kidwell, Q.C. and Mr. George Gadney. But even then, even then, there was conflicting advice – Mr. Fysh Q.C., who was advising Les Pas advised them that they had a good claim. The current Deputy Bailiff then in private practice and then, yes advising Les Pas, said that they had a compelling case – that was in 1993. The Receiver General, the current Bailiff in 1994 wrote to the Policy and Resources Committee of the day saying that nothing is certain in litigation and he recommended the Committee to consider a compromise. So it was never clear cut stuff anyway. There were conflicting pieces of advice and very strongly contradictory pieces of advice from various lawyers of the day. But the cautionary advice was not heeded by the Policy and Resources Committee of the day and they proceeded, based upon the belief of Kidwell and Gadney that the case was without merit and a further belief that they were determined that nobody who bought the Seigneurie for a few hundred pounds would profit in an outrageous way from the development there. So

based upon the belief that the case was without merit, I have to say I think that in some cases the wish that it was without merit, and based upon this determination that nobody would make money out of this unsavoury legal position, they decided to fight the case and to fight it with vigour. And that remained the position apart from the very brief abortive attempt to discuss the settlement a number of years ago, which I've already referred to, that remained the position until last year when the new legal advice was first put to the previous Policy and Resources Committee. I think it's noteworthy that at no point – and this was referred to last week – at no point was an action proposed or put forward certainly by the States and the Crown to strike out Les Pas' claim – and that suggests in itself that their case was not as bad as some of the legal opinion had suggested. Had it been totally without merit, I have no doubt whatsoever that a case, a submission would have been made to the Court to strike out the claim totally and that would have been – if it really were without merit – that would have been an end to the matter. But it is noteworthy that there was not sufficient confidence, even at that time or at any time to go to Court with a strike out motion. Now the new advice received by the previous Policy and Resources Committee and obviously then passed on to my Committee was as the House is now fully well aware, much more cautious and much less certain than the without merit advice that had previously been made by the lawyers from the U.K. previously engaged to advise. And the new legal advice is based on two things. It's based on information gleaned during the discovery process and it is also based on Mr. Page's comments, the Judge's comments that when rejecting the application for cost security, that there is a serious issue to be tried. Now it has been suggested by some that he was referring there to the costs issue itself – and of course he wasn't – he was referring to the main case and he said that there is a serious issue to be tried. Now that is the position my Committee inherited. We were told that that put a new perspective on the situation as did certain aspects gleaned from discovery. And it's a long way, it's a very long way from advice that the case, Les Pas' case is without merit to advice that, or comment from the Judge that, there is a serious issue to be tried – it's a very long way – and of course, it's even further to go from without merit to a 60/40 chance of winning, which is the latest advice that we have and the odds that we were given when we requested an assessment, a risk assessment on stay in Court. So it's an enormous distance to travel from a case being without merit and if you like then, virtually 100 per cent chance of winning, if there's any such thing in legal terms, to only a 60/40 chance of winning – it's an enormous difference, an enormous change and that is the position, that's the advice that my Committee were faced with. Now many arguments have been put forward against accepting the out of court settlement and staying in court and I understand quite a number of them. There's the morality issue – how can these people effectively seek to rip the Island off – that we should stand up and fight them, come what may, in court and I understand that point – I have a great deal of sympathy in some respects with that point. It's been suggested that because of public policy issues the Court effectively couldn't find against the Island in such an enormous case with such unbelievable consequences. I have to tell you that's absolutely not the case – it's irrelevant – the Court will hear the evidence and decide on its verdict based entirely on the evidence put to it by both sides in Court. Matters of public policy will not influence the decision of the judge. It's been suggested that there may be precedents, that maybe there are other Seigneurs who will come out of the woodwork and make claim to other pieces of our Island's precious foreshore. That will not happen because, and again we heard this last week, because of the time bar, Les Pas were clever enough, quick enough, call it what you will, to make sure that they put their case down just before the 40 year rule would have come to apply. The 40 year rule now works against any other possible claim and therefore there are no similar claims and nor can there be similar claims in the pipeline. It's been suggested that as things get more expensive and as they heat up, that Les Pas would capitulate. Very very unlikely in my view and that of my Committee and our advisers. They have already incurred significant costs. Only relatively recently did they brief new legal representatives and to suggest that they would back off in the face of public opinion just doesn't work either because we warned them and we warned them very very clearly and strongly right at the outset of negotiations that if this came forward, as a proposed out of court settlement, when we didn't know then what the negotiated position would be, but whatever came forward, they would be the subject of public odium – we warned them of that and they were aware of that so I don't believe that anything that has happened since has come as a huge surprise and I don't believe, I could be wrong, but I don't believe it's likely to see them backing off – there's no evidence of that at all. It has also been suggested that as far as the legal advice is concerned, is oh well it's the only advice we've got and if you get, I think the quote was, if you get eight different

lawyers to give you a view of a case, they'll give you eight different opinions. Well that may well be the case and it's been suggested that we should get a second opinion and I understand where that's coming from. The problem is now a second opinion, for a new lawyer to get up to speed would take a number of months which we simply don't have – we just don't have that time. Well I think the fact that eight different lawyers could give you eight different opinions actually only serves to emphasise the uncertainty of the position that we're in because we are at the mercy of effectively one lawyer initially – Commissioner Page – and we have no idea what decision he is going to take. Absolutely no idea at all so there is real uncertainty and we're not saying and we never have said that we're going to lose the court case because that would be ridiculous – in fact we still have a strong chance of winning the court case. What we have said though, and what we maintain, is that there is a very considerable risk of losing the court case and Commissioner Page's own judgement on a serious case to be tried only serves to emphasise the risk. He's not saying he's made up his mind, of course he's not, but what he is emphasising is that there is a real case to be tried and therefore emphasising the risk that we face. I emphasise I am not saying that we will lose the court case. What I am saying is that the latest advice is that we have a 40 percent chance of losing the court case. Now those are not, when we're dealing with, gambling with almost, hundreds of millions of pounds of public money and public asset – those are not to me and my Committee attractive odds. 90/10, 80/20 quite different. 60/40 are not attractive odds and that is one of the prime drivers or was one of the prime drivers for my Committee in bringing forward this proposed settlement. And I believe on odds of 40 per cent risk of losing, with the hundreds of millions of pounds that potentially are at stake, that is a risk we simply in the public interest simply cannot afford to take. Now right now Sir if I may deal with public opinion because I'm well aware that real concern and quite correctly and naturally, real concern has been expressed by members of this House about public opinion. I really don't know what to say about last night's JEP poll. It was just the most, I have never in all my experience come across an error of that magnitude or that nature. Now Jersey Telecom has put it's hand up and said that it was they who supplied the wrong information but it's just incredible that the whole argument was put forward on such a totally incorrect basis and I here am grateful to Senator Ozouf, I don't know if it was in fact him who caused Jersey Telecom to review the figures but certainly he was one of those who phoned Jersey Telecom to say that this can't be right, these are impossible. And I have to say that I agree with him. I do think it's amazing that too many people, so many people, so willingly accepted that 25,000 people in Jersey could be motivated to pick up the phone – it just doesn't happen. And the reality is that just marginally over 1,000 people phoned in. Yes 813 I think are against the deal and a hundred and something are in favour of it but to suggest that the public have spoken, the mass of the Jersey public have spoken just isn't true – they haven't and in fact the number of people phoning in to this poll is less than the JEP have had on other telephone polls on other subjects of varying interest. But it's not surprising is it that the majority would phone in against the proposition, that's normally the case anyway but based upon the information the public have, information which is far less than we had certainly as a result of last Tuesday, based on the information the public have, I would have voted against accepting the deal – no doubt at all. But we are in possession, we are in a privileged position, that we are in possession of information the public don't, and sadly for legal reasons, can't have. Now in no way am I suggesting that the public are in favour of the deal. They're clearly not the majority, based on the information and in some cases, sadly the tremendous amount of misinformation they've had, the public generally the majority would be against the deal. But there is no where the level of concern suggested of course quite wrongly by last night's JEP. No where near and what do we have today in the Royal Square when we arrived? We had a public protest as such and there were six people there when I arrived and may be more at other times, I don't know, may be six when I arrived but even they weren't protesting against the deal – what they were saying was boycott Channel Island Traders. That's not an issue for this House – if the public and States members want to boycott Channel Island Traders, that's entirely up to them. That's got nothing to do with the decision that we're being asked to take this morning – nothing to do with it whatsoever. The public are not in possession of the 60/40 risk assessment that we are – they are not in possession of the advice my Committee's received which members have had the opportunity of seeing and which they have on their desk's today from the Solicitor General and others. And I can understand, I'm sure we can all understand, the moral outrage – I'm sure we all share the moral outrage and I certainly have said in no uncertain terms that I do and I know that my Committee does as well. But it's the moral outrage really

that is suggesting "fight on – have the courage to say no – fight on, take the risk, don't capitulate, don't give in to a gun at your head". All of those things, now these are very very brave words but they are based on incomplete information. They are not based on full possession of the facts. They could therefore turn out to be foolhardy words not just brave words.

Senator Le Claire

Sir, may I ask for a point of clarification. I'm sorry to interrupt the Senator whilst he's addressing the House on his speech and it's an admirable one so far. However may I please ask for clarification – where in the risk assessment does it point to a 60/40 per cent chance of loss or win because I've heard this banded around the Assembly and I don't see it in the risk analysis at all.

Solicitor General

The risk analysis …….. sorry, I was going to say I think it's probably most helpful if I answer that. The risk analysis from Advocate Binnington was better than evens chance of success real risk of losing. Sorry, yes, there's a real risk of losing and for doing the joint advice of the two Law Officers to the Committee we realised the Committee would like to see figures so we translated that from lawyers' speak into what a lawyer would mean in figure wise. If you say there is a real risk, you're talking something like about 40 per cent.

Senator Le Claire

In that case may we have the circulation of the document that points out the words 60/40.

Solicitor General

I think it is in the joint opinion of the 7th January 2003.

Senator Le Claire

I think it's an important point because we're being told and led to believe there's a 60/40 per cent – Senator Ozouf always advocates in his sanctimonious way the ability for us to get our facts right and I'm trying and endeavouring to get my facts right so I would like to see the words 60/40 per cent somewhere.

Solicitor General

As I say, I think it is the joint advice of the 7th January – it's the quantification which we put on Advocate Binnington's real risk – I would add to that that following the submission of that joint advice, Advocate Binnington has of course seen the joint advice and did subsequently attend on Policy and Resources so it's the figure, the sequence of the quantifications is his advice was better than evens, I mean evens obviously is 50/50 – better than evens chance of winning but real risk of losing – we assess that as 60/40 but the assessment has been, it has been seen by Advocate Binnington and Advocate Binnington has been attending on the Committee at a time when that is the, that's the basis of the figures.

Senator P. Ozouf

Sorry I just wanted to make a point, I was asking Senator Le Claire to perhaps refrain from interrupting Senator Walker in his address to the Assembly. We've had an in-Committee debate and I think Senator Walker should be able to make his exposition and then questions will arise afterwards.

Senator Walker

Sir, I needn't have given in to, made way for the Senator, I'm grateful to Senator Ozouf for his fighting support of me but I need not have given way to the Senator.

Senator Le Claire

Lapdog

Senator Walker

The – I'd like you to withdraw that remark Senator.

Senator Le Claire

What remark?

Senator Walker

Lap dog remark.

Greffier

Senator …..

Senator Walker

That is a derogatory comment to make of another member in an important States debate.

Greffier

I take your point. The Senator should be asked to withdraw that remark.

Senator Le Claire

Sir, in withdrawing a remark, which I gladly do, I would also like to point out that during any member's speech a point of clarification can be called upon by another member as a point of information and Senator Ozouf doesn't necessarily have to criticize me Sir, when I'm asking for a general point of clarification.

Greffier

Very well, Senator Walker.

Senator Walker

Sir, I will continue if I may.

Sir the fact is that the advice that the Committee has received is that the risk assessment is, the odds are 60/40. That is the fact of the matter.

Solicitor General

Sorry, while the Senator has been interrupted, Deputy Crespel has in fact drawn my attention to the passage in the joint opinion where the risk level is given as 45 per cent.

Senator Walker

Even worse. We have been conservative in accepting a figure of 60/40.

Now we have the information ….Well Senator Vibert, you can put your head in your hands but who can provide totally accurate odds of a court case? It's impossible. Absolutely impossible. The fact is that the best judgement, and that's all you can say, of our lawyers is that there is a 40 per cent, possibly 45 per cent chance of losing the court case and as I say, you may well put your head in your hands but I defy you to find even better advice or to find the certainty that presumably you think could be apparent.

Going back to public opinion we have information as I've said that the public don't and can't have because of the legal scenario. We know the risks – the public do not. And our duty of course is to act with the benefit, with the privilege of the information that we have is to act in the public interest. And I believe that it actually takes more courage in the environment surrounding this debate to say "yes" than it does to say "no" and continue to fight in court when we and only we know the facts. And of course our advisers, and I have likened it previously, and I do so again, to the Social Security debate in the 1950s when the States of the day in the face of immense public outrage, riots in the Square, burning of effigies of States members and so on, nevertheless had the courage – thank goodness they did – to take the right decision and to take the brave decision. And although I'm not suggesting even in a case of this magnitude, it's quite of the same measure if you like, as the introduction of social security – I'm nevertheless suggesting that there are parallels in terms of taking a brave decision against public opinion – although I emphasise again quite clearly public opinion not as strongly held by the majority of people throughout the Island as we have been led to believe.

So Sir, I come to the choice, I come to the nub of the proposition and the choice which faced my Committee when we took office, which is now facing the States. The choices on the one hand to say "yes" to the out of court settlement, to bring an end, virtually an immediate end, to the court proceedings, to have certainty about the ownership of the foreshore and therefore have no worries whatsoever about its future development and indeed what's already on it, in return for transferring to Les Pas a site which is valued at its highest of £10m. I make a point here again – I've made it last week, I'll make it again – they are not getting a site which is worth £40m. they are getting a site which has been professionally valued at a maximum of £10m. and if they wish to make a profit in addition to the piece of land, they will have to spend, we're advised, again professionally, something like £30m. – they will have to risk something like £30m. of their own money and that's as it should be. I'd also point out that part of the settlement is that they bear their own legal costs which are bound to be considerable. So whatever value they are receiving in terms of the site they will have to deduct from that for legal costs that they have already paid – because that would be a part of the settlement. Their legal costs are entirely their own responsibility. So the choice is certainty in return for transferring the site on the one hand against years of uncertainty about the actual ownership of the land at the end of the day – the potential to spend up to, have to, have spent up to £7m. Now it could be less, it certainly could be less, that figure is challengeable but we're talking a number of millions of pounds whatever, even if we win the court case and the potential to lose hundreds of millions of pounds of asset and or money from public funds. The potential, as some have said, to even wipe out our entire strategic reserve. But that is the very tough decision which the States is being asked to make today and which the States have to make today. Which choice is in the best public interest? That is the decision. And it is, of course, for each member to individually consider this question to assess the risks and come to their own conclusion. But I would like to just refer to one comment which I though summed it up extremely well in last week's debate and that was a comment made by the Deputy of Trinity when he said that we are in effect - States members in this issue are, in effect, trustees of public funds and we are obligated to treat those public funds with real

caution and to care for them as trustees and I think that I couldn't put it any better than that at all, I thought that was an excellent way of summing it up. Now my Committee have made our choice. We are unanimously urging the States to accept P.117 and to agree to the out of court settlement.

And Sir, finally I'd just like to refer to my Committee. We have come in for much criticism over the last few weeks. Much of it shoot the messenger stuff. I don't like the message so therefore I'll shoot the messenger but never mind. We've come in for a certain amount, in fact in some quarters a considerable amount of personal abuse which I think is totally immaterial to the issue at hand – the issue is a serious one and we don't need personal abuse to address issues of this magnitude. We have as I've said made mistakes along the way but they are not fundamental to the issue we're being asked to decide upon today. And I know that at all times, every single member of my Committee has acted with absolute integrity and acted totally as they see it in the best public interest. I have to say Sir I am proud of all six fellow members of my Committee – I'd like to thank them for their unwavering, and in my view, very courageous support. Sir I make the proposition.

Greffier

Is the proposition seconded?

Senator Syvret

Sir I'd like to ask a question. I didn't want to interrupt the Senator whilst he was speaking. Could he just inform the Assembly of the names of which supporting counsel were contracted by Advocate Binnington for the trial period and which supporting counsel will come to court in March?

Senator Walker

Sir I think that's a matter better dealt with by the Solicitor General.

Solicitor General

The name as I recall it was Simon Colton but I can check that.

Senator Le Claire

Sir, may I ask a question of the S.G. please before we continue the debate?

Greffier

Well I hesitate, I think I will allow you Senator but I must make it clear this is not another in-Committee discussion as last week. This is a debate on the proposition and you will have a …..

Senator Le Claire

I accept criticism where it is due. I have already, twice already this morning, been pointed to as raising issues that were not appropriate at the time. This is again an issue that I think is appropriate at the time. Would the S.G. please inform members as to when the deal or the out of court settlement will be finalized if we agree today that that is the case in the States – the issue I would imagine would have to be agreed and signed off by lawyers and until such time, releasing information from this debate would be not in our best interest and I would like to have a clear understanding, if the case continues in court Sir, or if it's settled today, at what time will the members be signalled and informed that it is O.K. to release information that we've received.

Greffier

Possibly a useful question to raise Madam Solicitor.

Solicitor General

It's probably best set out in the agreement which is in the appendix to the proposition and if members look at page 11, it says within three weeks of the, the word is there as "later" – it should in fact be "date". This is a verbatim transcription of an agreement that was being amended right up to the last moment. It should be "within three weeks of the [date] of the approval of the States of Jersey to a proposition recommending implementation of this Agreement and the approval of His Excellency the Lieutenant Governor on behalf of the Crown to the terms contained herein

(a) the States shall transfer on behalf of the Public" and then it sets out what they shall transfer and the transfer is in standard form and all the rest of it – I don't need to read that out – so the States have three weeks to

Deputy Dorey

Sorry Sir, sorry to interrupt but I'm trying very hard to find the particular passage she's quoting …..

Solicitor General

I'm sorry, it's proposition 117, page 11

Greffier

The very top of page 11

Solicitor General

Got it? Within three weeks of the approval of the States of Jersey or the approval of His Excellency, sorry and the approval of His Excellency, the States transfer the properties to Les Pas and then if members go right down to the bottom of the page under "Obligations of the Plaintiff: The Plaintiff shall within 7 days of the passing of the conveyance consent to the discontinuance of the litigation with no order as to costs" and then there's the further things that it has to do "confirms it won't make any future claim, withdraws the claim for compensation" and so it's in a total of four weeks really from the, from both approvals, the approval of the States and the approval of His Excellency starts the clock running, then it's three weeks to pass the conveyance, once conveyance is passed one week for the withdrawal of the action.

Senator Le Claire

So for the avoidance of doubt through the chair Sir, may I just, I'm stating the obvious, not for my own benefit but for other members that may not be cognoscent of the reality is that until such time as that has been achieved, releasing information until the out of court settlement is achieved or the case continues, it would be wrong and foolhardy of any States member to release any information in relation to this case until such time.

Solicitor General

Yes I can absolutely confirm that.

Greffier

Does any other member wish to speak?

Deputy Hill

Sir, could I – I'm sorry to have to ask her a question but it has arisen from what Senator Walker has said and also a letter that most States members may well have received from the J.E.C. and I was under the impression given the information last week and what we're getting from the J.E.C. seems to account to that and what I wanted to get, confirmation from the, clarification from the Solicitor General if she could please was that it was my understanding that, and again it's confirmed by what Senator Walker said today, if he indeed went to court and Les Pas won, they could lay claim to hundreds of millions of pounds that was on the waterfront. However the letter that we've received from J.E.C. implies they will not in fact claim, Les Pas cannot claim the properties on there, they can claim the rents that might well be due and I think that if that is the case I think it shows a different light on the values that we're talking about. Maybe I could just seek clarification ……

Solicitor General

I haven't seen the letter from the J.E.C. The law is, the Law would be – if the Law says that Les Pas own the land, then Les Pas will own anything that's been constructed upon it.

Greffier

Very well. Senator Edward Vibert.

Senator E. Vibert

Thank you Sir, before this debate begins Sir, I wish to save a lot of time to propose a reference back. I believe there are three major reasons that this should be considered. The first is that members of this House have not been given sufficient information that they have requested. We have received today – because I requested it – and I must say I congratulate the Greffe for doing this so quickly and making sure that every member had it on their desk, because I wish to refer to this legal advice that's been given. This has just been received by most members and it will be totally new to them and it's very important information. What makes it so important is the fact that Senator Walker in his speech made a claim that the early advice that was given was not 100 per cent – that there were dissenters. I think members need to read these legal opinions to make their own mind up whether that is true because on my reading of it, it is totally untrue. And it's impossible for members of this House to deal with something so critical just like that, having just received it. You wouldn't expect it anywhere. You wouldn't expect it in a court room, you wouldn't expect it in any chamber anywhere – that you'd be getting serious legal opinion on the day of the debate. Now the reason why of course it was so late in coming was because we didn't know it existed. Well with respect to the President, I'm not giving way to the President, I've no intention of giving way to you. The situation was nobody knew what this opinion was because nobody could see it. We should have got this last Tuesday when we were in camera – we didn't! We didn't get either of the opinions. All we got was that they were opinions. Now I've been having a struggle to get more information which I believe is crucial to me and I'm sure it will be crucial to other members to have. For instance, if you turn to Mr. Sowden's opinion, the one that's on the top of the whole thing, he bases much of his opinion on opinions given in the past and they are quoted as being part of this document. I've been trying to get those documents and I've been told they're not available. I've been told they're not available because there's heaps of documents we have to go and get and it's going to take a lot of work to get them. I want to see those documents and I'm sure other members of the House will feel the same. It's been put on us all the time that we are giving out misinformation to the public. Well I resent that. I resent it because it certainly hasn't come from anything that I've been involved in because I've

been scrupulous in trying to find all of this information and it's been denied to me. Now, I'd just like to read you an e-mail that I sent to the Solicitor General asking for some information. In fact…..

Greffier

Senator sorry to interrupt you - I'm just conscious that there will need to be a decision from the Chair in accordance with Standing Order 26 as to whether to allow the reference back. I'm conscious that what you're effectively doing at present is almost proposing the reference back and I wonder if you would be able to summarise very briefly the reasons for seeking it, then if I allow it ……..

Senator E. Vibert

O.K. on the basis that if you allow it Sir I can actually speak…..

Greffier

That's right, yes that's right. Just summarise …..

Senator E. Vibert

Well there are three other ……my first thing is not sufficient information. Secondly part of that information is the report on the Minquiers Ecrehous dispute which I know some members want to read. We don't have that. We were denied access to Advocate Binnington. Now Advocate Binnington is the man who is running the case on behalf of us – we're the client. We have not been able to speak to him. Now the argument was put forward that we couldn't do it because he was not a member of the States. But in view of something as important as this, there is provision for special consideration to be given and that wasn't given. We could have had him at a meeting that was at Cyril Le Marquand House where the Attorney General came – Advocate Binnington didn't come. We want, I want to talk to Advocate Binnington. I have a lot of questions I wish to ask him. So I feel as if we've been denied that. I also think that delay will give the Committee a chance to meet with Les Pas Directors and do some more negotiating – because things have changed as far as they're concerned. They're currently facing a British Press campaign about the effect this could have on their shareholdings. They're currently facing a boycott of people who are very angry about the fact that they're involved and anyone who was in King Street on Saturday morning knows that a lot of people were supporting the position that people were taking about boycotting and they need to know that. They need to know from our team negotiating with them that they are getting on the wrong side of the States and there's lots of things that could make life very difficult for them. So I believe that we need to sit down with them and give them a totally new set. Now I know the argument against this will be that this will involve court delays and I will deal with that when we come to the proposal. So there are the three major points that I make – that we don't have sufficient information – I personally don't and I know some of my colleagues don't, and also that we need to see Advocate Binnington and we need to go and talk to Les Pas so I would propose that we refer this matter back.

Deputy Dorey

On a point of order, quickly before we go too far along – while recognising that today is going to be a heated day in some respects, I do hope that members will, during the rest of the day, refrain from accusing other members of saying things which are not true.

Senator Le Maistre

May I ask for a point of clarification, the documents that we have received today, were these documents, or have these documents, been previously available to the members of the Policy and Resources Committee?

Solicitor General

Perhaps I can say a word on the availability of the documents. The first document is the advice of the Solicitor General of 21st November 1993. The second document which is page 5, the numbers are at the bottom of the pages, is the advice of the then Attorney General of 2nd December 1993. The third document is the answer of the 1st and 2nd Defendant of 1985 and the fourth document is the joint advice of 7th January 2003. As regards the 1st and 2nd documents, I read them out in their entirety at the States debate last Tuesday 16th September. They were read out in full and that includes the reference in Mr. Sowden's opinion to two opinions of the 1860s. So those were read out in full on Tuesday 16th. As regards the opinions of the 1860s, I didn't locate those and read them out to the States because Mr. Sowden's opinion is quite intelligible without them and Mr. Sowden's opinion is opinion of 1993 and the crucial thing is the opinions which are of much later – that said, if I had been asked following a debate on 16th, which was last Tuesday, to locate them I might well have had the time to do it. I got the request mid to late afternoon last Friday when I was heavily committed on another matter and I would ask States members to accept that I have a job outside this Chamber as well as in it – I have a considerable amount of work advising Committees, Departments, dealing with lawyers on behalf of the public. I have a room full of work which has accrued while I have been concentrating on this and there are many members of the public, ordinary members of the public whose lawyers are writing to me saying "why are we being held up, can we have an answer to this"? I was dealing, or trying to deal with as much as possible of accumulated material when a late request for two documents the whereabouts of which I did not know and which frankly I didn't have the time to look for. The other matter, which was the statement that Senator Walker had claimed that the earlier advice was not 100 per cent and this was not so – the President of course can speak for himself but I took that to be a reference to the advice of 2nd December 1993 in which the Attorney General of the day has said that, having set out what the advice of Mr. Kidwell and Mr. Gadney was, then referred to the advice of Mr. Fysh, went on to say that both Mr. Kidwell and Mr. Fysh are distinguished leading counsel and drew attention to the uncertainties of litigation and on page 2 of that advice, which is page 6 of the bundle, the Attorney General says that at conference in London on 25 October 1993 attended *inter alia* by you (he is writing to the President and the Chief Adviser) Mr. Kidwell apparently saw no reason to change the views expressed in the joint opinion requiring the States were substantially more likely to win than to lose, although the possibility of losing could not of course be entirely discounted. Now the President will correct me – he may have been thinking of some other piece of earlier advice but that is certainly a piece of advice given in 1993 which says it is not 100 per cent.

Senator Le Maistre

Sir, could I just make the point that I was not seeking to be critical of the Solicitor General, just trying to draw out whether this bundle of papers which I found this morning to be extremely useful, whether they were available to the Policy and Resources Committee prior to today – indeed at the time that they made the decision, and really to elucidate, to draw out also the point being made by Senator Vibert that of course we've not had the benefit of seeing the papers – I accept that the Solicitor General did read out those two opinions last Tuesday. They were difficult to absorb in fairness in their entirety when they were read out.

Solicitor General

Yes, I certainly didn't take it that Senator Le Maistre was being critical of me – what I was addressing was the statement that these papers, the papers just received are totally new and the point I was making – they were read out in full, somebody asked if written copies could be made available and that was confirmed last Tuesday so anyone who wanted to go and read them could go and dwell on them really for the last week.

Greffier

I think the issue is the ……

Senator Le Claire

Sir, may I before we move to considering the issue as to whether or not it will be accepted you did actually ..

Greffier

Well that's a matter for me Senator, I think we need to address, there are a few things I seriously need to consider here which is the Standing Order 26 provides the Bailiff should not allow a reference back if the effect of the reference back would be to negative the question. Effectively what that means, of course, would be the same as the proposition being rejected. I'm in a slight difficulty I believe and I seek advice from you Madam Solicitor if I may – on page 13 of P.117, you have already referred to this yourself, where the conditions of the Agreement Madam Solicitor, one of the conditions precedent agreed is that the approval of the States under 7(e) on page 13, the approval of the States must be obtained and that is why the debate is being held today but paragraph 9 of the Agreement states that condition in the above paragraph 7(e) must be satisfied by 30 September 2003 which is next Tuesday. I have formed a preliminary opinion that if I were to allow the reference back, I'm effectively negating the Agreement because it would become null and void after that date. Is that …

Solicitor General

It certainly will become null and void after that date. So unless a reference back could be combined with a return to the States in sufficient time for the States to debate over however many days they need and to come to a decision, the Agreement will have been defeated.

President

In practice this puts us in a difficult position because in practice the States would have to, I believe, allow – it would be foolish to pretend the debate could possibly – it would be foolish to predict entirely that the debate would finish in a day which almost means that we would need to, if the reference back were allowed, then we would need to come back next Monday, I think at the very latest and I'm not sure how realistic that is? I think in the circumstances I don't believe I can allow the reference back because it does have the direct effect of negating the question. I'm sorry Senator I must….

Senator Walker

Could I also make a point - stop me if I'm erring into debate – also make a point that I think everything Senator Vibert has referred to today was referred to last week – I don't think he's mentioned anything new at all. Certainly the Minquiers Ecrehous issue was raised last week. The access to Advocate Binnington was well known, or no access to Advocate Binnington, well known by members last week and the opinions that have been circulated today were, as the Solicitor General said, extensively referred to throughout the debate and had been available to members should they wish to receive them. Certainly the most recent advice, because some of this is now ten years out of date and the advice has changed – the most recent advice from the Solicitor General to the Committee has been available in the Greffe now for quite some time. Now knowing all that members voted overwhelmingly last week to continue with the debate today and I even offered the House the opportunity of deferring it for a week, having discussed it with the Chairman of Les Pas but ….

Senator E. Vibert

Sir, my understanding is that you've actually ruled on this matter – we're not going to have it so let's get on with it.

Senator Walker

Sir, the House voted overwhelmingly to hold the, knowing everything that the Senator's mentioned this morning, the House voted overwhelmingly to hold it today and I believe we should proceed today.

Greffier

They did, they did. I don't wish to appear, particularly in my position as an officer of the Assembly I don't wish to appear to be frustrating the will of the Assembly in any way – I would make the point that having ruled on the reference back I would nevertheless state that I think it would be open to any member at any point in the debate to propose the adjournment and propose that the States reconvene next week.

Senator Le Claire

I would like to propose that adjournment on the grounds that when Senator Vibert was making his plea for more information which other members haven't bothered to go to the Minutes do not realise there is actually a crucial piece of information in my view that is missing from our consideration. Senator Vibert was unable to put that point across in his motion for a reference back, Sir, possibly perhaps because of the fact that he tried to make his argument whilst actually proposing the proposition. I don't know if the Minutes are available for us to peruse right now Sir, I did request them a few minutes ago. They've been available for ages according to Senator Walker in front of me and I agree completely, however they have been available only in one copy, until recently duplicated on my request, in a room across the road that was not available for members to take away and study, it was available for members to write out verbatim by hand, put in their pocket and walk out of the room. On this particular issue Sir, the reason why I am on my feet is because we were asked, we asked and Senator Walker agreed that the Minutes be unblacked out, the detail of the hidden curtains be opened and we could see what was going on. In, I don't know if the Minutes are available so I can actually read them, I'd like to right now to be honest ..

Greffier

They're here, they're here.

Senator Le Claire

Right Sir. If I may just ..

Greffier

You are proposing the adjournment Senator not ..

Senator Le Claire

Sir, I'm proposing on this basis Sir and I think this basis alone is sufficient. There have been calls for more information and whilst some of them may be spurious and some of them arguable, I believe fundamentally that until we have sight of this information we cannot do justice to the debate whether or not we vote for the deal or otherwise we have to make a collective, adult, grown up, trusting, decision. So being cognisant of the fact that we're all trustees Sir in the Island's future, I believe it is fundamental that we have sight of this document. The document I refer to is the letter that has been prepared by the

Solicitor General in relation to the Minutes of 26th June 2003 which were unblacked out and which I shall read Sir "The Committee mindful that questions had been asked at the meeting on 3rd June 2003 regarding the failure of the security of costs claim, acknowledged that this issue could be raised again by members". The unblacked out Minute now appears as this "This Committee was advised that the previous Committee has been fully appraised" so the previous Committee was fully appraised of which Senator Walker was a member but on the day that it was fully appraised he was not present – he was out of the Island "of the reason for the refusal of the claim at a meeting in August 2002". It is this following sentence or sentences Sir that refer to the document I wish to see and I think that other members should see before we consider this debate. Whether we adjourn for 24 hours or 12 hours or as long as it takes to see this, I think it's important Sir. Her Majesty's Solicitor General advised that it would be highly undesirable to raise the matter whilst the litigation was still pending but that she had written a letter which would provide a starting point to pursue it once the litigation was concluded, if this was deemed appropriate. It is that letter Sir in my view, or in my belief, that points out or lays the grounds to possible litigation against our own Counsel, should we wish to do so at the end of this matter and I think it's very important to weigh that in balance of what we're arguing today. I would like to see that letter.

Greffier

Very well, the adjournment has been proposed, is that proposition seconded?

Unknown member

Yes Sir.

Greffier

Does any member wish to speak on the proposition that the States do now adjourn?

Deputy Voisin

I'd just like to speak against this proposition Sir, I think this is a ridiculous situation that we are finding ourselves in. The fact of the matter is that we are involved in litigation. I think that's agreed. We have been informed that we have a better than even chance of winning or it's been put at a 60/40 per cent chance of winning – we've been told that we have a real risk of losing. We also understand, I think we know, we understand the risks, the financial risks that this Island faces if this litigation is lost. And what we are debating here, what we should be debating, is whether or not to take advantage of the deal that is on offer, whether or not to stop this litigation and I really see that the key facts are clearly understood by members of this Assembly and I believe that we should get on and debate the proposition.

Greffier

Does any other member wish to speak on this proposition?

Senator M. Vibert

Very briefly Sir if I may, I appreciate the, Senator Le Claire wanting to see all these papers and another paper but his main argument, the adjournment is to see a paper I believe that is not germane to whether we settle the agreement or not but would be very germane to a Committee of Inquiry and post a court case and that's no reason not to get on and debate the issue.

Greffier

Deputy Ferguson?

Deputy Ferguson

Yes I'm a little confused by this call for more and more information. There is such a thing as information overload – we have this issue to deal with – we must deal with it and I think an indication of members need for more information seems to be the fact that the bundle of papers we have today, most of them were on view in the Greffe's office on Friday and on Monday and as I understand it there were two States members who turned up to read them. I was one of them.

Greffier

Senator Edward Vibert?

Senator E. Vibert

Thank you. I really have to put the position to the House in this position. This is probably the most important decision that this House is going to make for a long long time and the fact that we have long legal pieces of information in the Greffe's office for two days, when members can go and see it, seems to me to be quite wrong. We need either a reference back, which we can't have, or an adjournment because Senator Le Claire has raised a very crucial issue. And there is, I mean if the Solicitor General could guarantee to make that letter to this House whilst it's in session and in this debate, I think that would probably overcome the problems that we have. And I would have thought that would have been quite a simple issue because that is the letter that was written probably no more than a year ago – so if that was to be made available to this House, I'm sure Senator Le Claire would be satisfied with that and I certainly would be. We don't wish to delay, we want to get this debate on as fast as we can because we can't wait to get out of here.

Greffier

Does any other member wish to speak on the adjournment?

Solicitor General

On that point about making that available, this I believe is a letter that the Senator who last spoke did in fact ask me for yesterday and I sent a message back saying if he could supply me with the date of the letter I would locate it but at the moment I'm being asked for a letter the date of which I do not know. My correspondence files run to something like, well there are a very large number of correspondence files and furthermore I am actually sitting in this House and for as long as the States is sitting, I am going to be sitting here with them, not back in my office going through my files. I don't want to undertake things that I can't do. What I can do is say that it was a letter about security for costs and had absolutely nothing at all to do, nothing whatsoever to do, with the real risk of losing factor – nothing to do with it at all.

Greffier

I call on Senator Le Claire to reply.

Senator Le Claire

Sir, I'd be happy to - even though I think I'm going to lose this actual proposition – I would have been happy to withdraw my proposition had the letter been made available but the S.G. has actually

President

Would you please refer to the Solicitor General as the Solicitor General.

Senator Le Claire

Oh I beg your pardon, I do beg your pardon and I beg the Solicitor General's pardon as well.

However, in attempting to address the Assembly and the position in which I have Sir, I'm trying to make a fundamental argument here and that is we are about to make a decision that is highly controversial, probably going to get quite ugly, could probably avoid a lot of the unnecessary wayward detail but nevertheless, if nobody else is paying attention, at least the Committee of Inquiry will be paying attention to what I'm saying Sir, because I think it is fundamental, fundamental, that we realise that the position, has in my view, and this is my argument for today Sir, the position where we are, where we are, where we are, has changed because of the loss of security for costs and the implications, in my view Sir, and only in my view from what I've been able to ascertain, has changed because of the, in my view, handling of the case and the management of the case. No new documents have been discovered, no new position has been unveiled, in my view Sir, an event has occurred and the event being so catastrophic that it has warranted us being in this position today. The only event, if you follow the time line in the Minutes, that occurred, that changed our position from a case without merit, was the loss of costs and the comments by the Commissioner, who I must say Sir, I find quite unbelievable, to be honest with you and I really question the ability of somebody that can issue such a comment. To say that – no I do – to say that it would be wrong for, if I may quote it, "it would be quite wrong in a case of the complexity and sensitivity of the present one, for me, as designated trial judge to express any view whatever about the merits or demerits of the claim at this stage of the proceedings,". Now if he'd finished there Sir, I would have applauded his ability or her ability, whoever the Commissioner was but it doesn't finish there – there's a comma, quite wrong for them to - it may be outrageous but I'm saying it – quite wrong for them to express an opinion and then it goes on to say "other than to say that there appears to me that there is a serious issue to be tried. Both parties agreed that this was the correct approach". So quite wrong for him to make a comment and then he goes on and makes a comment. My comment is this Sir, is that the Solicitor General has prepared a letter as I stated earlier which has become drawn to my attention at 5.30 p.m. - 5.00 p.m.- 5.30 p.m. last night, when I was across the way with Senator Vibert, that makes three people in the building, so I don't know where Deputy Ferguson gets her two people, but three people there, I found this Minute Sir, yesterday, late in the day that stated quite categorically that the Solicitor General had written a letter which would provide a starting point to pursue it once that litigation was concluded if this was deemed appropriate. I've asked the Solicitor General Sir, during the in-camera debate if it would be possible – and it's been mentioned a couple of times - for us to understand what went wrong with the 12 month delay in not achieving the security of costs? And some people may argue Sir, as Deputy Voisin has, that this is not necessarily the point but in my view Sir, it is entirely the point – this is the point Sir. The point is that nothing changed in the chronology of this whole issue until we lost the costs and what I would like to see, is the letter that has been prepared, I'll say it again, a letter which would provide a starting point – the Solicitor General may not have the date of that letter in her correspondence in a room full of documents – none of which I care to see. <u>This one Sir I do,</u> dated 26th June 2003 the Minutes of the Policy and Resources Committee in the unblacked out version, we have, in my view, an indication that there could be – if this was deemed appropriate – a starting point to go after the mis-management or whatever or not timely approach or perhaps made a mistake or whatever you'd like to call it or perhaps he's even looking at it, perhaps he didn't, perhaps he didn't, perhaps he did – there is a letter that has been drawn up, I say again Sir, a letter that would provide a starting point to pursue it once the litigation was concluded. Why would the letter be drawn up by the Solicitor General Sir? Why would the letter be drawn up as a starting point to pursue it if it was deemed appropriate unless that letter, under the extraordinarily busy time schedule the Solicitor General has, and I know she does work extremely hard, far far harder than I ever will Sir but, none the less, she has had time, and deemed it necessary to draw up this letter. From the response I've received from the Solicitor General, Sir, I do not believe that letter will be made available to members today. I believe the only way that letter will be available is if the Committee of Inquiry picks it up and goes and searches for it – which will do us no good at all once we've debated the issue, because in my view Sir, it is the turning point of the whole case that we lost the costs and it was stated by the Commissioner at that time – there was no reason why we

couldn't have gone for them 12 months earlier. And Sir, I've read and read and read the Minutes and I've read the opinions and everything else – nothing changes until that time so if there's a letter that hinges upon this, which would inform us, then I think we should see it. And if other members are willing to go ahead and do the deal and let the Committee of Inquiry wash their hands like Pilate, fine. Let other members Sir, stand there and wash their hands, I will not.

Solicitor General

Because there has been a reference to nothing has changed except the security of the costs and the remark of the Commissioner, I think I should revert back to the advice that was given to Policy and Resources, because it was the advice of the Law Officers following the obtaining of the risk analysis, and what changed was "the risk analysis" not the fact that, it was the fact that the application for security of the costs had been lost which was the origin of the request for a further risk analysis. Certainly the fact that there is no security for the costs and therefore if the Defendants were successful and were awarded the costs they might not recover them, that is a very relevant factor, that costs will be incurred and not recoverable if the litigation continues, but I must make it absolutely clear, if in fact I didn't make it clear last week, that what has changed is the risk analysis which has moved from "totally without merit" which was the advice which the Policy and Resources Committee of the day adopted in 1993, there has been a move from that to "better than evens but a real risk of losing" and it's the real risk of losing really – the joint advice was signed by me and by the Attorney General and I find it and have consistently advised the Committee that I thought it was the right thing to pursue the negotiations because of a real risk of losing massive assets.

Senator Le Claire

Sir, in giving way to the Solicitor General Sir as I did …

Greffier

I thought you'd finished.

Senator Le Claire

No I hadn't but I gave way.

Solicitor General

I do apologise, I didn't intend to interrupt – I actually did think the Senator had finished

Greffier

I thought the Senator had finished.

Senator Le Claire

I actually gave way Sir.

Greffier

Well Senator, you had proposed the adjournment, you asked something if there are any further remarks you wish to make, please make them briefly because I think it is time for the debate on the main proposition.

Senator Le Claire

In summing up my speech Sir, I have been advised as other members have by the Solicitor General that my point in making my speech was ill advised in as much as that nothing had changed and I was quite wrong because the risk analysis had changed Sir. In the timeline of events, the argument I am making Sir, is prior to the risk analysis, once the court case – once the Commissioner had deemed that the costs were not recoverable – or were not awarded, then and only then Sir, after that time, the risk analysis was drawn up. The risk analysis is after *de facto* what I am talking about Sir. What I am talking about is the fact that I believe, the main turning point that hinged upon us being in this position today was the fact that there was in my view possibly some error in seeking the costs and I believe Sir, that until we have sight of the Solicitor General's letter we will forever more be in doubt as to whether or not that letter that the Solicitor General has drawn up, indicates to or not. If the Solicitor General would like to, I'd give way gladly, stand up and promise exactly what it was that letter was drawn up for- I mean a letter to that regard Sir, for the Solicitor General not to be able to advise us but to go on then and to advocate more of the risk analysis and to argue more for the deal than to explain the letter Sir is quite incomprehensible! Why is it not possible for Her Majesty's Solicitor General to give us the indication, which I asked for in the first in camera debate, which cannot be uncovered until there is a Committee of Inquiry and why is it not possible for Her Majesty's Solicitor General, whose advice we rely upon now, to give us an indication what this letter is about. O.K. so I've become very unpopular today. I'm doing what I think is the right thing to do. I don't mean to be offensive but I am seeking to find out what the Minute points to. I'll give way to the Solicitor General.

Greffier

I'd rather you concluded your speech Senator.

Solicitor General

I don't want the Senator to give way to me – I mean, having inadvertently interrupted him when I thought he had finished – if he wants to carry on, I'll wait till he's finished but he has asked me to say something about the content of the letter.

Greffier

Well I would like the Senator to indicate whether he has finished

Solicitor General

Does he want me to speak or not?

Senator Le Claire

Sir, on a matter of procedure, whilst giving way to somebody who may or may not be able to sway my decision or my vote in a matter in my argument Sir, is it not parliamentary that in giving way to another speaker prior to the end of my speech and the commencement of the vote, which I would ask for the appel for, is it not parliamentary procedure Sir for that giving way and for that information to be supplied prior to the fact that I am asked to complete what I have to say – otherwise it is just another argument!

Greffier

Senator, giving way means another member wishes to speak, the Solicitor General has given an indication that she does not wish to speak until you have concluded ……

Solicitor General

Yes, my position is a very simple one. I've been asked to say something about the content of a letter. I am happy to say it at whatever point those who are listening to me want to hear it. Is that point now?

Greffier

Perhaps we could conclude this part of the debate or we'll be here all day.

Senator Ozouf

Has the Senator finished Sir because I'm utterly confused as to where we're starting and where we're ending – I think the Senator should be invited to conclude his remarks …

Solicitor General

Shall I just say something, sorry, shall I say something?

Greffier

Let's hear. Madam Solicitor.

Solicitor General

Yes, my difficulty with locating the letter is that, as I said, no date was given for the date of the letter and I've got massive files and I can't read every page of the file just looking for "a letter". And a similar difficulty arises, because there's no date, I'm assuming I know the letter but I can't be precise but I'm pretty sure I know what letter it was and therefore the content of the letter as nearly as I can remember it – I should say Advocate Binnington had written as is customary for a lawyer who has lost an application – the lawyer then writes to the client advising whether to appeal or not. Advocate Binnington had written giving his advice against appealing. The letter said something along the lines – it would have said I think that I attended on the Committee – something along the lines of "unfortunate result – we've studied your advice on not appealing – it's an unfortunate result but looking at the Commissioner's reasons, they appear unanswerable and we don't think we'd have a prospect of appealing successfully, particularly given this is the exercise of a jurisdiction and the basic rule in relating to appeals against an exercise of a jurisdiction is more difficult when you're appealing against a finding, a fact, or something like that – you've got to show that the first, the person who made the first decision, got it absolutely and entirely wrong. So it would have said we, we do agree that the points made by the, we couldn't persuade a Court of Appeal that the points made by the Commissioner, the reasons given by the Commissioner for refusing the application, we couldn't persuade a Court of Appeal that those were not proper reasons" and it would have been along those lines.

Senator Le Claire

I thank the Madam Solicitor General Sir and ask for the appel.

Deputy Troy

Sir can I just, before we do that, there is just one point of clarification Sir. If this letter was

Greffier

Deputy, is this relevant to the adjournment proposition?

Deputy Troy

Absolutely, yes Sir, it's in relation to this letter which, if it was presented to the Committee, would there not be a copy within the Department as it was presented as part of the Committee papers Sir? Shouldn't there be a copy at the Greffe?

Senator Le Claire

There is absolutely no reference that the letter was presented to the Committee Sir, it's just noted within the Minutes.

Greffier

Very well.

Deputy Troy

If the Solicitor General does not have a copy Sir, is there not one within the Department? I would have thought that it would be attached to the documents that were presented to the Committee Sir.

Solicitor General

I'm sure I will have a copy in the Law Officers…, my point is that, I have to locate the copy in some very voluminous files full of paper – without a date – you know if somebody says you know you wrote a letter on the such and such date, I go to that date in the file. If somebody just says "you wrote a letter", I've got to read, you know, file after file just to see where and when this letter was written.

Greffier

Very well, I invite the Deputy Greffier to. Senator Le Claire has proposed that the States do now adjourn which then would effectively curtail the debate today – he's asked for the appel and the Greffier will call the roll.

(APPEL CALLED)

Greffier

The proposition has been rejected – 10 votes were cast in favour, 34 votes against so the debate will continue. Could I just say from the Chair, I appreciate members have very strong views, it is a very emotive subject. I appreciate there are a lot of very strongly held views – we must try to respect the courtesies and the rules of debate if we can because I know it is a difficult subject.

Senator Le Claire

May I, may I just ask a question for clarification Sir?

President

Well I think we'd better get on with the debate Senator.

Senator Le Claire

I think it's important Sir at this stage. There's a Minute that I've read in respect of Les Pas and the provisional Agreements and I realise I've upset members today. Please forgive me, I'm not trying to do it

– it comes naturally. Deputy J.J. Huet, having declared an interest, took no part in the discussion of this item in relation to the Minutes that were recorded Sir in relation to Le Fief de la Fosse and the housing issue – I just wondered from a point of clarification as to what the Deputy's position is and why that Minute was recorded as such?

Deputy Huet

I'm more than sorry to say why it is, it's because I happen to be a member of the WEB Board, that's why Sir. WEB, Waterfront Enterprise, not …

Senator Le Claire

Thank you for that clarification. Thank you.

Greffier

Senator Syvret?

Senator Syvret

Sorry, I just wanted to make an observation procedurally. Members will recollect, and I was going to make this point before Senator Le Claire proposed his adjournment – that I was concerned that this Assembly would find itself effectively with a pistol held to its head over the timing of the debate and I did have some e-mail correspondence on this point and so it has come to pass, the Assembly is, in effect, as you have ruled, in your refusal of the reference back proposal because it would negative the proposition, the Assembly has been put in the position of being obliged to make a decision on this matter now by the Policy and Resources Committee and I wish to observe for the record that I think it was quite wrong and a serious error of the Policy and Resources Committee to have come to this Assembly with an Agreement that has effectively bound the hands of the Assembly in respect of the timing of its debate and its business in this way.

Greffier

Do any other members wish to speak? Senator Edward Vibert?

Senator E. Vibert

Thank you Sir. I think that if, all the members appreciate that this debate has really been characterised with persistent pleas by Policy and Resources that we should deal with it hear and now. We are where we are and I have to say that if I hear that phrase once more I think I'm going to scream. On the basis of that one would be forgiven for thinking that history means nothing – we shouldn't look at what's happened to try and find out how come we're arrived here today. It's very important that this House understands the history of this whole case, not as given by spin doctors, not as given by people who want to ram this thing through this House but by people who have taken a dispassionate view of it, looked at the Minutes and looked at all the reports that have come up and cannot yet, even after the debate on Tuesday, have any understanding of how we could be in the position that we're in. Because if you look at where we are now and how we got here, it's actually a very unsavoury picture and it's characterized by double standards, by spin doctoring, by rushing us into a position where we have a gun at our hear and by poor judgement and also by distortion of the facts of the past and I intend to go through those facts to show this House how this House has been deliberately misled.

Greffier

That sounds worrying Senator. To suggest that the House has been deliberately misled is quite a serious accusation. I trust you will clarify exactly what you mean when you come to …

Senator E. Vibert

Oh I certainly will Sir. I don't have any doubt about that. Perhaps if I took the word "deliberately" out and make it "misled" it might be a little bit softer.

President

That would help I think.

Senator E. Vibert

That would help? Great. Happy with that?

Senator Ozouf

Sir I am disappointed – the Senator is smiling – this is an extremely serious matter and extremely serious allegations have been made ….

Senator E. Vibert

School must be out about now. Dear oh dear. So we're being told that all this is going to be the subject of a full public inquiry and that's not going to matter one jot once this decision has been made in the House and in my view it will be a waste of time and a waste of money. But I'm going to go back in time because the decisions made 10 to 12 years ago and constantly reinforced throughout the whole decade, are crucial to the decision that we are going to make today. We can't avoid history. None of it can be ignored and all of it is important. Now we're being told that this case is to be decided in Court on matters of the past pre 1066! Sir I would ask for your indulgence to let me go back 10 to 12 years. I'll start at 1986 when Mr. Richard Falle, an Advocate and President of the Société Jersiaise, purchased the rights of the Fief de la Fosse for the princely sum of £200 from Mrs. Carole Louise Chiswell, the divorced wife of Reginald Malet de Carteret, the former Seigneur of St. Ouen, who I think you all know left the Island under certain circumstances I don't have to go into. She gained those rights to that Fief, as part of a divorce settlement, as far as I understand. Now Advocate Falle proceeded to plan his vision for Havre des Pas and as the Solicitor General so romantically put it in her advice to P & R Committee on 7th May 2003, to the Les Pas promoters it was not just a development which would bring them good financial return but a vision which would embellish the area of coast line, increase the Housing stock without eroding the Green Zone and create a leisure area which would attract local and visitors alike. They saw themselves as the creators of something that would be of novel benefit to the community at no cost to the community. Are these the same people who are now acting in a morally repugnant way as Senator Walker so accurately described them last week? So, I have to deal with this rose-tinted version of the motives of Advocate Falle because it forms a part of advice given to the Policy and Resources by the Solicitor General. So Advocate Falle has forked out a vast sum of £200, he's engaged the services of an architect from England, the Huttons Nichols Partnership of Chippenham and an engineering firm from Holland, F.C. de Weighier International of Rotterdam and they prepare a set of plans for the vision to take shape. By March of '97, Mrs. Carole Malet de Carteret, Mr. G.F. Carter, a Jersey resident and property developer and Advocate Falle produced a set of proposals and some of you will have that set somewhere – I thought I had some somewhere – what have you done with them Philip – you've pinched them.

Senator Ozouf

It's outside Senator – I'll go and get them for you if you wish.

Senator E. Vibert

Ah thank you. Sir, these are the original set of proposals of this Havre des Pas development and I'll leave a copy of them on the top here for members to see during the lunch break and you will see that there are some nice drawings and there are some pretty pictures and there's some history and there's a description of what the development plan is going to be and the proposals for reclaiming the site. And they are going to reclaim 52 acres of land at Havre des Pas and 53 acres of water and they are going to provide 1,200 boats, they're going to build homes, they're going to make beaches along Havre des Pas and they are going to provide footpaths in public areas, boat accesses and mooring, landscaping, houses, nearly 600 houses etc. etc. And it is a very impressive plan. (Thanks for that.) It's a very impressive plan and a lot of members of the States who were approached privately were obviously very impressed by it when you look at the records. So to pursue this plan, Advocate Falle formed a company called Les Pas Holdings and they purchased the Fief rights for £500. He, Mrs. de Carteret and Mr. Carter all became shareholders together in Ann Street Brewery who owned the White Horse Inn at the Dicq and saw some potential in such a development for their hotel. All of the other shareholders are trust companies so no one knows who they are. Now in November of 1986, Advocate Falle was interviewed by the JEP and they quizzed him at some length about the vision which he described as "it came to me over a glass of wine" with his friend George Carter. He was asked about the legal situation relative to ownership of the land and his answer was recorded as follows "I do not see any legal obstacles, which will mean that as Seigneur of the Fief, which incorporates this area I would have to come to an agreement with the Crown over the rights to the Foreshore and the rights to reclaim it. The scheme is so attractive one would expect to be able to come to some amicable arrangement with the Crown. The development is perceived to be for the benefit of the Island generally and we hope that the Crown will see it in that light". Now clearly, what Advocate Falle has said in this interview is that he recognises that he has to go and do a deal with the Crown. I can't read that in any other way. He also knows that the Crown only will ever grant leases on the Foreshore, they won't sell the Foreshore, will only ever grant leases on the Foreshore if the scheme has the approval of the people of Jersey and that's how the Ronez quarry deal finally ended. And because it was seen to be a benefit to the people of Jersey, they were prepared to lease the land to Ronez. So I must say I was disappointed that the Solicitor General didn't think that that quote could be used in any way to help our case. I accept the fact that this is going to be decided on documents, obviously, and historical precedent but as far as this House is concerned, I would like to put to this House that that is a very important quotation to show really what was in Advocate Falle's mind at the time and you'll see it links in with the legal opinion a little bit later. Now in order to get the approval of his scheme, he had to get planning permission and he had to have that approved by the States and this is where I first draw issue with the advice that's been given. That matter was never debated by the States, it was never refused by the States, it was never debated by Planning as a final application – it was never disapproved by Planning and it is still an application sitting there current in the Planning Office so the statements that have been made that Advocate Falle got cross with the people of Jersey because he didn't get his scheme through and that politicians welshed on things that he said in the past is simply not proven by the Minutes at the Planning Department or by the files at the Planning Department. Now one of the first difficulties that Advocate Falle had with Planning was the matter of who was the owner of the land? He's making an application to Planning to do this job and they want to know who owns the land. He was asked in 1998 at a Committee meeting, that until he could provide a letter from the Receiver General or get the Receiver General to co-sign his application, they were not prepared to continue to process the application. And it took him until 19, this started in 1986 when he and George Carter met with Planning Officers and that stayed in that situation until 1992 and in 1992 the Planning Department themselves wrote to the Receiver General and asked them, asked him, whether he would counter sign the application. The Receiver General, who's our current Bailiff, who is now our current Bailiff, wrote a letter back to Planning, saying that he was not prepared to accept that Advocate Falle had any rights to the claim on the land and he felt sure that Advocate Falle wouldn't accept his signature because he

would think that he didn't have any right on the land, so it was left in limbo and they then sought an opinion from the Attorney General as to whether they could deal with the application or not and they were told – and it surprised me, I'm sure that this will surprise many of you – that you don't have to be the owner of the land to make an application to Planning to do a development, which rather surprised me but apparently that's the law and they were instructed that was the case and they had to deal with the application. Now in the meantime they hadn't stopped dealing with the application because the Minutes clearly show that they were preparing a traffic report, they were preparing a maritime report, they were preparing an environmental report and they continued to do this. Now by the end of 1992, the States had formulated their plans for the reclamation of the development of the Waterfront. And they were fully approved in November of 1992. Now the, there's a suggestion that the Company Les Pas only began to pursue litigation when their proposals to the Havre des Pas development were not accepted. That's just not accepted, not supported by the facts. What happened was the States of Jersey decided to develop the Waterfront and put on the Waterfront many of the things that Advocate Falle wanted to put at Havre des Pas. And one of the major reasons for that was that their application to Planning raised a whole host of difficulties that were almost intractable. I'd like you to consider them because there is this view that we should have gone ahead and let Les Pas do this deal and do the building there and everything would have been fine and we wouldn't be in the pickle that we're in today. But in fact they were dealing with some intractable problems. The first is you're talking about a marina with 1,200 boats and 600 houses, offices, a sports and leisure centre with swimming pool, with indoor facilities for judo - similar to the Fort Regent project – all located at Havre des Pas. The tunnel hadn't been built yet. This was pre tunnel days. So the amount of road traffic that was likely to result from this whole project was almost intractable – it was just impossible to comprehend. Those of you who know Havre des Pas well, and I'm sure you all do, could imagine the kind of problems that the States were going to have to face to provide the infrastructure to support this private development.

Senator Le Maistre

On a point of correction, if I may be permitted to interrupt, the tunnel was built by 1992 the problem was that there was no light at the end of the tunnel.

Senator E. Vibert

Was it the underpass that hadn't been build? You see I was out of the Island at the time – was it the underpass that hadn't been built? Ah, take it back, the underpass hadn't been built. I should rely on the Evening Post for my facts shouldn't I.

Now there's no doubt that on the surface, the scheme looked the answer to many of the pressing needs of the Island. Right, there was going to be a marina which we didn't have, there was housing which wasn't going to go on the green zone, there was the sports centre, there were shops and the offices. And everything was pitched to appeal to the Island to support this project. One of the things I've learnt in my life is to beware of lawyers bearing gifts. So initially a number of senior politicians supported the plan but when these problems began to arise, which only began to arise when things were being investigated, their support began to evaporate. There was a problem with the hoteliers along that area and that was a very big guest house and hotel area back in those days because they feared that a lot of their seafront properties, for which they'd paid a lot of money, were suddenly going to end up in back streets three blocks away – they wouldn't be on the sea – they're going to be away from the sea. There was an opposition led by a Mr. Chris Savva who owned the Carlton Hotel which is right on that front, who made a representation to the IDC, through his lawyers ironically enough Bailhache and Bailhache, and Mr. Savva argued on behalf of a number of hoteliers in that area that as the scheme was likely to take 10 years to complete, their businesses would be severely interrupted by the fact that the area would look like a building site for that time. And any of you who want to go down to the Reclamation Site at La Collette now and have a look at a reclamation site – you just imagine what it would have looked like for nearly 10 years. Now they also had a problem with the environmental concerns and that surfaced when an organisation emerged called SOS - Save Our Shore Line – and amongst their members was Dr. Mike

Romeril, the former States Environmental Adviser and he presented the material to the Committee to show that the marine life in the area would suffer as well as bird life and the change of the configuration of the shoreline would cause a serious change in the sand levels of the area and deposit them elsewhere. Now we know that that would be a fact because we're seen it happen at West Park. Now it is significant today that this area is now a protected site through Ramsar and Advocate Falle's marine project would be rejected totally as being completely out of keeping with the Ramsar edicts. Now I have to say that I was surprised to hear the Solicitor General opine last week that the fact that the area was now a Ramsar site would not necessarily rule out the project that was reactivated – I really found that quite hard to understand. Now a further problem faced by the scheme as it went through this planning process was that 10,000 people signed a petition opposing it – so that's another thing that Planning had to face. Now in addition, officers of the Department, and a number of politicians, who had previously supported this, had grave reservations about the financial viability of it all. Advocate Falle had agreed "that the cost would be astronomic" was his quote in the JEP and estimated that it would cost over £30m. They, the officers of the Committee, felt that it would have cost well in advance of that – up to possibly £100m. And what they feared more than anything, was a company going broke, halfway through a project and leaving Havre des Pas looking like a dump, with a half built seawall across the place – which had happened in a lot of European marinas and a couple of British marinas at about the same time. They were, in fact, one of the worse banking risks you could actually put the money into it. So, I don't believe that anyone in this House should think that, the fact that, this plan was – first of all has to accept that this plan was never refused – it was simply before Planning and all of these problems were arising. Now the reason that I've spent a bit of time on that is because I know that Senator Walker's view is that Advocate Falle really is set on revenge and it has been quoted, it's not just Senator Walker's view – I think it's a number of other members of this House's – and if that is the case, then he certainly shouldn't feel that way because on all the information that is there, it would have been refused on planning grounds and on Island grounds anyway. So, I'd like to take you now – I've taken you up to 1992 when this whole marina business became a big public issue – there were letters in the Evening Post, there was the petition and then of course we come up with, we came up with our plan. However the legal team had not been idle whilst this was all going on and in fact they had, the legal team had called for an opinion from England and the legal team then was Solicitor General, Terry Sowden, assisted by the Solicitor General designate, which was Miss Nicolle, and they put together the necessary team to provide a legal opinion to the States. Now that team, there were three members of an advisory group and they were, I now have the information, which I've got elsewhere, Mr. Paul Matthew, who was a London Solicitor and a distinguished academic who wrote with Advocate Sowden the Jersey Law of Trusts. Doctor David Yates, who was a specialist in Norman history, and Doctor G. Marsden who was a specialist in law of the sea. And we engaged also a Q.C., Mr. Kidwell and Mr. Gadney and they were both, they both were from the British Bar and extremely, particularly Mr. Kidwell, extremely eminent in their field. So what they did, with the help of the Jersey team, because they put together this 1992 legal opinion and I have heard it quoted, and it has been quoted this morning, that Mr. Kidwell said that this case was without merit. He never said that at all. That was a phrase he never once used. What Mr. Kidwell actually said was this. And I'm just going to, I mean the judgement is that thick and there's lots of appendices but at the end, there's a one page judgement – it's an opinion, not a judgement – a one page opinion, and what he said is "before and after 1066, the soil on the Foreshore between high water and low water was owned by the Duke of Normandy, later by the Kings and Queens of England and still is, except for grants and leases to the States. The Foreshore of Jersey is owned by the Crown on behalf of the people of Jersey. 3. The only benefit Advocate Falle is entitled to is the wreck, flotsam and lagan on the seashore". Lagan being goods on the bottom of the sea – that's my note – I had to find out what that meant and when you only, as I've said, when you've only paid 200 quid for it, what more would you expect? Now that legal team summed up their arguments as follows –

"(a) The claims of Mr. Falle must surely fail.

(b) The Crown and the States with their respective interests may safely continue their current reclamation work and use the reclaimed land.

(c) Continue with plans to build a marina at Havre des Pas and make such executive and legislative arrangements between the Crown and the States as will result in an unequivocal agreement.

(d) Contest the claims of Mr. Falle with the Attorney General representing the Crown and the Solicitor General representing the States and the people of Jersey".

So there's the opinion – backed up by this team, backed up by our Solicitor General Terry Sowden, who was no mean lawyer, backed up by our Solicitor General designate, who is no mean lawyer

Solicitor General

Sorry, on a point of order, I was not Solicitor General designate in 1992.

Senator E. Vibert

I beg your pardon – I'm going on what I have in my notes – was it 1993? Through the Chair?

Solicitor General

It would have been the Autumn of 1993.

Senator E. Vibert

Right. Could I just ask, through the Chair, that you were actually in that team with Advocate Sowden?

Solicitor General

The word team has been used as if there were a litigation team such as there are in private sector but it was not a team in the sense of a team assembled in one place. These were people whom Mr. Sowden called upon for assistance and they assisted in their different ways at different times. I was one of the legal advisers in the Law Officers' Department and from time to time I assisted on various points relating to Les Pas, for example, on one occasion when it was necessary to read through the records of the feudal courts of the lower Fiefs, I can recall actually spending a Bank Holiday weekend reading them, so I had, as it were, sporadic input.

Senator E. Vibert

Fine, thank you for making that clear Madam ..

Senator Le Maistre

Sir, as we've come to a kind of break at the end of that intervention, may I suggest the, propose the adjournment now Sir and remind members that there is a CPA presentation in the Old Library?

Greffier

Very well, the adjournment's been proposed. I'm just concerned, before we adjourn, about the documents that have been distributed and the security of the Chamber over lunchtime. I wonder if members could perhaps place them on the Greffier's desk before they leave and we can make sure they are held securely over lunch and redistributed before we come back.

Senator M. Vibert

Sir, on that point, sorry for standing up – I hope to come back early and read through the documents again. Will that be possible?

Greffier

Yes, we'll make sure they're here.

Senator Syvret

Before we adjourn Sir, could I just reiterate my request to the Solicitor General that she perhaps is able to inform the House of the contracted, supporting counsel, supporting Q.C.s and what their contract term was and that kind of thing.

I asked earlier for the details of the supporting Q.C.s – the names of, and the contract period and things of that nature.

Solicitor General

I'm sorry, I don't think I have previously been asked for the contract period and that is something which really I doubt I can find out in the lunch hour. The litigation is in the hands of Advocate Binnington and he instructs counsel as and when – I can certainly find out the name of the Barrister who is assisting.

Senator Syvret

If one is able to make contact with Advocate Binnington, you would presumably know something ……

Solicitor General

Advocate Binnington is out of the Island this week.

Greffier

Very well, the States will adjourn and reconvene at half past two.

23rd September 2003 – afternoon

Continuation of Senator E. Vibert from morning

Thank you Sir. Before I was dealing with the legal opinions that had been given by Mr. Kidwell to the States and had referred extensively to that and what he had said and I did miss out one piece in his report that I thought worth mentioning here. He said this "we can't resist adding as a passing note a sentence from Balleine" a highly respected local historian an authority on Jersey history, that's my definition of Balleine not his, he just said Balleine, and the quote was "every Norman was a born sailor and a born lawyer taking delight in legal forms and subtleties hence perhaps the well known litigiousness of the Jerseyman". So basically that was their view of the case that Advocate Falle and Les Pas had.

Now we move on to having received that opinion to the Solicitor General's opinion and I'd ask you if you'd pick that up from your file because I'm not going to read it all, obviously, but I want to point out a number of paragraphs in it with your permission, Sir.

In the first paragraph he says that the claims are entirely without merit, that is where the phrase came from, it was Advocate, then Solicitor General, Sowden's opinion and it was entirely without merit. The fact that they'd been made is no more than a nuisance all being an expensive and time consuming nuisance.

In paragraph 2 he goes on to say "My unreserved advice to the Crown and to the States is that the claim be rejected and if persisted then resisted to the uttermost in the same was as earlier spurious claims to ownership of the whole of and to parts of Jersey foreshore have over the centuries been rejected and successfully resisted by our distinguished predecessor Law Officers", etc., etc.

Now we're not here dealing with a man who's only just come into the job, we're dealing with a man who's steeped in the history of Jersey law, enormously respected and who ultimately then became Magistrate when he retired from the position.

I'd like you to turn to paragraph 6 which is on page 2 where he goes on to explain that in a case, although the action was served, the case had never been brought to court because there was a disagreement between the Crown and Advocate Birt who was representing the plaintiff at the time. It is important that one understands that this was an agreement between the two parties not to bring it to court for the time being whilst they obtained legal opinion.

Now I'd like you to look at paragraph 7 and it's the last part of that paragraph which starts "Counsel were selected on the footing that the litigating would be hard fought and would conclude when the Judicial Committee of the Privy Council had finally determined the issues". Mr. Kidwell and Mr. Gadney both practised at the bar of the Privy Council. Now Solicitor General Sowden is making it very clear back in those days that this was going to be a very hard fought case and we needed to put a team together that could take it all the way to the Privy Council. So Jersey knew this, the Committee knew this, so people who say today "Ah but it might have to go up all the way up to the Privy Council", this was known back in 1992 and it's clearly stated.

Now in paragraph 10 he reports that the opinion of Mr. Michael Fysh, Q.C. who was engaged by Advocate Falle, was considered by Mr. Kidwell and Mr. Gadney and himself, and I do believe that the then Solicitor General was present at that as well, and their views jointly advised nothing in Mr. Fysh's opinion changes their view or their advice. So the lawyers have had our position, they've come back with their position, our people have said as far as we're concerned nothing changes our view at all.

Now I'd like to point out in paragraph 11 about Mr. J.W. Dupré who was then the Attorney General who delivered a considered and researched opinion on the foreshore, and it goes on as to who he delivered that to, and he says Mr. Dupré's letter containing the opinion was dated 20th June 1862 and has been

located for me in the public records office in London and it goes on amongst archived Home Office papers, etc., etc. and he says rather than be repetitive a typed script of Mr. Dupré's opinion will accompany this opinion. That's the opinion that I've been seeking, that's the opinion I can't get.

On 2nd August 1985 paragraph 12 it goes on about the Attorney General and Solicitor General of England, with a joint written opinion to the Lords of the Treasury on the matter then is issue namely, the foreshores of Jersey and this goes on to describe this particular action, that's in paragraph 12 and it says again a typed script of that opinion which agreed with the advice delivered by the Jersey Law Officers will accompany this opinion. I've asked for that opinion, again I can't get it.

Now he goes on to point out who the Attorney General of England and the Solicitor General were. If you look at paragraph 12 the Attorney General of England was then Roundell Palmer who later became Lord Chancellor as the First Baron and the First Earl of Selbourne. The Solicitor General of England was then Robert Porrit Collier who was appointed Attorney General in 1868. He was made a judge of the Common Pleas and appointed to the Judicial Committee of the Privy Council and became a Peer as Lord Monkswell Now whilst I haven't been able to talk to the former Solicitor General I would suspect that he put that in there to give an indication of the fact that the people who were giving these opinions were very weighty legal people. They weren't lightweights in the law profession they were very, very heavyweight lawyers. It goes on to say in paragraph 13 that the opinion of Mr. Dupré, which is the one I can't get, was referred to and relied upon by a number of his successor Attorney Generals and Receiver Generals when resisting foreshore claims. So you can see how important in my view it is for members to have access to that opinion because it's been used on a number of other occasions which means it's considered to be a weighty document well worth considering by the law.

So if we go to paragraph 14 we see that another legal giant of Jersey, Lord Coutanche, in 1933 and 34 advised the Treasury Solicitor on 2nd June 1934, where he condensed all the information relative to fiefs and foreshores and everything and put this view to the Crown, and in fact what he was saying to the Crown was we thought we owned the foreshore and we've had these disputes about it but the starting, he says the starting point is that the foreshore in Jersey belongs to the Crown. This fact was for years the subject of dispute between the Crown's representatives and the States of Jersey but it is now admitted by the latter that the foreshore always belonged to the Crown subject only to such private rights therein as any person may be able to establish by Royal Grant or otherwise.

Now Lord Coutanche also was a legal heavyweight. I'll take you down to the last paragraph, I'm sorry I'll take you down to paragraph 16, take members down to the 16th paragraph, "there is moreover not a shred of evidence that the many Seigneurs of the Fief de la Fosse ever took or exercised rights of proprietary possession as known to Jersey law of any part of the riparian foreshore. The reverse is true successive Seigneurs of the Fief de la Fosse have stood by quite idly whilst the Crown openly exercised proprietary possession of the foreshore at issue, granting by concession and otherwise to third parties all manner of licences over parts of it and receiving the resultant revenue".

And then finally in paragraph 17 he says "there is nothing which I have read or to which my attention has been drawn which could remotely allow me to differ from the learned opinions to which I have referred in this opinion. However I advise that any future conveyances of foreshore by the Crown within the curtilage of these claims can and should, contain the customary guarantee of title to the land conveyed".

So that is, the encapsulating the views of the legal team of that time, of very solid heavyweight people. It includes that group of three that I told you about who were the advisory group. It includes the Solicitor General. It includes all those people who were Attorney Generals of England who went on to very high legal positions. So we knew in 1992 that we were, in the view of that legal team, on extremely safe ground, extremely safe ground.

So I'm going to put an analogy to you of the position at that particular time, and I want you to imagine that, unfortunately he's not here but I'm sure he won't mind me using his name, I want you to imagine. I would like to put this analogy to members. Imagine that Deputy Rondel has challenged Paula Radcliffe to a marathon race. Now Honest Nev has given 1,000-1 on the result. Now Deputy Rondel only got the 1 because the only thing that could happen was that Paula Radcliffe might get hit by a bolt of lightening, she might get knocked over by a car, she might fall over and break her leg. So there's always a chance that Deputy Rondel could win. I'm going to ask you to hold that analogy in your mind and think if that is at all remotely possible and I'll move on, leave that thought with you and now move on to the various meetings that deal with Les Pas so that you can, we can track the history of the way of all this went. A legal advice that was given after 1992 and how it all evolved.

On 30th June 1992 the legal advice that had been given by Kidwell and Gadney was reviewed and the Committee considered that the Crown opinion represents a strong case against Falle. In the light of counsel's opinion Advocate Falle's claims should be strenuously resisted. Now the Crown Officers present were the Attorney General P.M. Bailhache and Mr. T. Sowden Solicitor General. Now what I'd like to do now is to go through the legal advice that was given by the then Attorney, our current Bailiff, Bailiff Bailhache and thats on, after the litigation, advice by the Solicitor General so you'll find it immediately after that.

Now you see in the first paragraph, in the last two lines, he states that the opinion that's been given is unequivocal in terms of his opinion the claim of Les Pas Holdings Limited is without merit. Then he goes on to talk about the Gadney opinion, the claim of Mr. Falle must surely fail. Then he goes on to describe in the last paragraph on that page that Mr. Kidwell and Mr. Fysh are distinguished leading counsel. Mr. Kidwell who's our Counsel has been a Deputy High Court Judge for a decade and Mr. Fysh is the editor of legal journals and the author of text books. Mr. Fysh's opinion, he goes on, as being studied by our legal team. He goes on to say that, but they see no reason to change their view.

And I'd like you to read the phrase where it says "the Crown and the States were substantially more likely to win than to lose. Although the possibility of losing could not of course be entirely discounted". Now it's very important that the point is made by people who oppose this to the people who support it that nobody is saying there isn't a risk, because that would be foolish. It's like Paula Radcliffe not, it's possible she could get hit by a bolt of lightning, it's possible she could fall over and break a leg. All of those things are possible and that's why lawyers will always say whatever case you're going to be involved in. You have to accept the fact that there is a risk that you could lose, but if you notice words are used like "entirely", "not entirely without risk". So in fact what what the, our current Bailiff was saying back in those days was that every lawyer basically would be saying.

Now this is where I want to part company with Senator Walker because he could correct me on this, and I'll stand correcting, but I did take him to say that the Bailiff giving his opinion gave, suggested that there should be a compromise. That's not what he said. That's quite false, if you read the letter he said three things, he gave three options. He said you can wait and see, you can litigate or you can seek to compromise. That's not the same thing as saying we were told to compromise. And how anybody could come to this House and make that kind of statement on such a matter that's so important really floors me, I have to say. And he goes on to say I shall examine each of these options in turn, and we go through the whole of what the options are, and he says it's unlikely in paragraph 1 of page 2, it's unlikely that the claims will go …….

Senator Walker

I think the Senator has just made a sort of fairly serious allegation. What he is referring to is a letter of 2nd December 1993. There is however another letter from the then Receiver General dated 1994 where he does say nothing certain, there is nothing certain and this is then to the Policy and Resources Committee, there is nothing certain in litigation and he advised that the Policy and Resources Committee

that they should consider compromising, did not say they should compromise it they should consider compromising, it's a different matter.

Senator E. Vibert

Well it may well be another letter that we haven't got but that's not surprising. We're not aware of that, I'm not aware of that letter I'm quoting from the record. The point is, in the major letter that was discussed by the Committee, this compromise went into great detail, the Bailiff went into great detail about these three versions that we could do. And that's what important. He goes on to say "it's unlikely that the claim will go away. There's been considerable investment in the whole thing and I doubt that the investment be quietly abandoned. As soon as the company senses there's no will to compromise, it's likely that notice will be given", etc., etc. and then he says "if there is to be litigation there is in my opinion some tactical advantage for the Crown and the States in being the activator of it". In other words if we're going to litigate we do it, we don't wait for them to litigate, if we litigate there will be an advantage in doing this.

Now he goes on to say in paragraph 2 "the Committee has been advised that it's substantially more likely to win than to lose". Again that's, you know that's a very solid piece of advice. "If the case proceeds to a satisfactory conclusion a victory in court would of course be the most conclusion" he says. "The possibility of losing however, cannot be, cannot however be entirely discounted" which again is commonsense. It can't be entirely discounted. It can be discounted, but can't be entirely discounted. So it goes on about how many funds have been expended and he continues in the same vein giving this advice and leading into the options.

And then on page 5, on page 5 he gives this little plan to answer the questions and if you agree to do a particular thing we should compromise, if you don't agree we should litigate. Which again is sound advice that he's given, giving to the Committee. Now what's significant about that advice is that nowhere in the minutes is that advice recorded. Minutes of the Policy and Resources Committee, is there any record of that advice being given. The only record is, was the letter was tabled. Now when we come, when the public inquiry comes to apportioning blame, the public will have to ask, the Inquiry will have to ask the question, why when such an important piece of advice was given, before a brick was really laid down on the Waterfront, was it ignored. One would have thought that they would have called a meeting of Committee Presidents to say we've been given a very important piece of advice as to how we should go. Nothing of that happened and I actually wrote to the Bailiff asking him, telling him I could not find anything in the Minutes, could there possibly have been a meeting which he attended that wasn't minuted. And he responded kindly to me saying that really it was a long time ago, he did remember giving some advice that you know, all's not black and white in the legal profession which is really what he's saying. But he couldn't remember any meeting that had been called that could not have been minuted. So one has to assume, and I'm sure this would be right, that that advice was never taken even though if that advice had been taken and a deal had been done with Les Pas on the basis of, you know, you drop the action, you take the foreshore subject to planning proposals you can get on and do the job, which is really what the Bailiff was advising them to do.

So that is not a matter for this debate obviously, but it's just all part of the background that I think we need to have in understanding how we've reached where we've reached.

So I'll continue to go through the minutes. In 1993 in August, Mr. Sowden again confirmed that the Les Pas claim could be strenuously resisted. He told the Committee he was still satisfied that the claim of Les Pas was entirely without merit and would be strenuously resisted. Then the Committee noted the opinion given by Mr. Falle's lawyers, in the event of the matter going to court the feudal claims of the foreshore would prevail over the Crown, they saw no reason to change their views. The Committee accepted the legal advice that the Les Pas claim had no merit. On 21st December 1993, the Solicitor General again at a meeting of the Policy and Resources, reconfirmed the position that the Les Pas claim was without merit.

On 11th January 1994, the Committee accepted an offer made by the Solicitor General that when he became Magistrate later in the year, he would be prepared to continue to work with the Solicitor General designate who had worked with him on the case. His great concern was that Falle would bring an action when the Crown Law Office was at its lowest staffing level and they would only have three months to file the defence. He already had filled three filing cabinets with documents and felt there was need to be for continuity in this preparation. That was in January 1994.

In September of 1994 the Committee met with members of WEB including Deputy Norman and Walker, and confirmed the opinion that the claim was totally without merit and would be vigorously contested if the matter should become the subject of litigation.

On 25th October 1994 Senator Stuart Syvret asked a question in the States and the question was "will the President of Policy and Resources inform the States of the current position of the claim of Les Pas Holdings to that part of the foreshore that forms part of the Fief de la Fosse?" Senator Horsfall, in part, answered as follows "the States had been advised that the claim is without merit and it notified the company accordingly".

Now in May 1995, the Policy and Resources Committee were informed that Mr. Bailhache, who was our Attorney General, had been unsuccessful in his action before the Royal Court where he had taken, fought an application by Les Pas Holdings, and they had asked the Court to make an order stopping him from acting on behalf of the States in any action that Les Pas might bring, because of his previous close relationship with various elements involved in the Les Pas structure and with their businesses, and it was at that point that the Island knew that our Attorney General, who should have been in Court fighting this case, was not going to be able to be there.

Greffier

Just to clarify Senator, Mr. Bailhache was not then the Attorney General, he was an advocate in private practice.

Senator E. Vibert

No Sir.

Senator P. Ozouf

Mr. Bailhache was the current Attorney General.

I'm sorry, Mr. William Bailhache.

Greffier

Mr. William Bailhache became Attorney General in

Solicitor General

2000.

Senator E. Vibert

I stand to be corrected. I thought he at the time was going to represent us. Was he going to represent us as a private advocate.

Greffier

Yes.

Senator E. Vibert

I beg your pardon Sir. Well he was not able to represent us, and it was agreed that Advocate Binnington at Mourant, du Feu and Jeune would act for the States. Now there was also a discussion in September on to what portion of the costs the litigation, of the litigation that the Crown would bear. The Committee wanted the Crown to pay half but settled for a two-third, one-third split.

On 28th November 1995, the Committee received the Solicitor General and Advocate Binnington. Advocate Binnington advised the Committee that having now had the opportunity to consider the relevant documents he shared the view that the case, as presented by Les Pas Holdings, was without merit. Now there was no activity between 28th November, according to the minutes, on Les Pas until April, from 1995 to April of 1997. And in April of 1997, Les Pas approached the President, Senator Horsfall to have discussions with him in relation to the claim on the foreshore, in other words to see if they could not come to some agreement. The Committee decided that Les Pas should be asked to put a request of talks in writing and this would be referred to the States legal advisers for advice on the way forward and what ground rules should be followed by the Committee to protect the public interest. There's no evidence in the subsequent minutes that this was ever done.

But the first meeting took place on 12th June, a second one in July. Apparently Les Pas' directors were asking for up to £25 million to settle. On 29th July the Committee decided to end the negotiations as it was obvious there was no chance of a settlement being reached.

So in July of 1997 the Solicitor General and Advocate Binnington attended a meeting and Advocate Binnington explained that the Judicial Greffier had made the usual order of discovery of documents. To date the process has yielded no surprises and there was no reason to part from the view previously expressed by counsel acting for the States that the ownership claimed by Les Pas Holdings was without merit. At that meeting Advocate Binnington referred to the lack of evidence of Seigneurs claiming ownership of the foreshore over the last two centuries with particular regard to the claim by Les Pas that they owned the Havre des Pas area, Advocate Binnington informed the Committee that in his view it was reasonable to assume that if there were any seigneural rights relating to the ownership of the foreshore on which the Havre des Pool had been constructed, this would have been referred to at the time the area was leased by the Crown and the pool built. So he's making again, quite a strong statement, really, questioning whether Les Pas had any ownership of the foreshore.

And the Committee went on to discuss the difficulty that WEB were experiencing with developers who were concerned about the title of the land. It was agreed that the States would acquire the land by compulsory purchase leaving aside the question of compensation to be paid until the case was determined.

Then from January to July the land was compulsorily purchased and most of the minutes to do with Les Pas are to with that compulsory purchase.

Now in July of 2000, Advocate Binnington met the Policy and Resources Committee and set out the current position in relation to the company's claim and noted that there had been a period of inactivity on the part of the company which led him to the conclusion that it would be appropriate for the States to apply for security of costs and it explains in that minute what security of costs are. The Committee noted that the States costs in this matter were considerable and likely to be much higher than those of Les Pas Holdings. Extensive research has been undertaken including the position of the Island pre-Norman Conquest, it was estimated at 20,000 documents in addition to the 12 files of documents already

exchanged were to be disclosed soon. The Committee felt it would be desirable in all the circumstances to seek security of costs.

So that brings us up to the security of costs decision. Important I think for the House to realise that that decision was made by Advocate Binnington advising the Committee that we should go for security of costs and the Committee, really wouldn't have much thought to do anything else but accept that situation, because that's the advice that we're being given by our Crown lawyer.

Now I made the point in asking questions of the Solicitor General last Tuesday about the fact that she attended that Committee, along with Advocate Binnington at that meeting, and discussed the situation of the security of costs and discussed the fact that the Commissioner commented in his judgement that no satisfactory explanation was given as to why the application could not have been made at least 12 months ago. Now in fact he came up with four reasons, from reading the judgement, as to why he felt that this judgement had to go against Jersey, but that was certainly one of them. And the question that I posed was that at that particular time there had been no concern expressed about the fact that the judge had made a comment about serious issues to be tried, and I found it and I said to the Solicitor General and I know it upset her, but I found it incomprehensible that would not have been discussed at that meeting, bearing in mind it was one of the planks that Advocate Binnington has constructed to persuade this House that we should not continue the legal action and yet that was never discussed at that particular meeting.

Now there are a number of other matters that I want to go through which is, and I did ask this question also, as to the fact that the size of the fief and the extent of this fief that Advocate Falle claims is not in agreement with a lot of local historians who feel that they got it wrong and in fact that that the line of the fief comes down Conway Street straight out to sea, and not down Payn Street and straight out to sea, and I can't see anything in the documentation or the minutes where that situation is ever been considered or investigated and it does take into account a fair chunk of the Waterfront. If the fact is that he doesn't own that particular, he shouldn't have that in his fief at all, other than for wreck and flotsam and all the rest of it.

Now I'd like to deal with the legal opinion that was given by Crown Advocate Binnington in his risk assessment, if I can find it, I can't. It seems to be missing from here. Can I borrow yours? I'm not going to spend too much time on this. Now we've told that this risk assessment was done immediately after or after the decision went against us relative to costs, and the Committee called for this risk assessment. Now as I go through this assessment I find very little in it that indicates to me that we have a bad case or anything has changed in the legal advice that's been given and in fact that we haven't heard at all in this debate, is what specific advice have we've been given, other than to tell us that our chances are not as good as they were because all the way through, and particularly in the crucial area that he says was where the case was going to be decided upon and would appear to be on reading it that in fact our case is as strong as it's ever been. So one thing, question that I'm asking and I've been asking it for a nearly a month is what's changed, what has changed. The risk assessment has changed, no it hasn't. What the Crown Advocate has said is that they now have a 40-60 chance of winning. That's not a legal opinion that's changed. That's, what has led him to make that opinion and who's challenged it? Now this opinion was done in, I think it was in , what's the date of this, about 2003, wasn't it 2002.

Greffier

In 2000. Page 43 Senator, 5th November 2002.

Senator E. Vibert

In November 2002. The question that members surely are going to ask, and I'm going to ask it, is this what was such a shattering piece of news which the Senator has already said shocked them out of their boots, I would suspect, not one person appears in all the speeches that we've heard to have queried, well

tell us why. Come before us and tell us what has changed. What legal opinion do you now have that's different from the legal opinion that you had that has caused you to jump from here to here. Well I'd like to do is to come back to the analogy. Remember the analogy that I gave you. Well imagine the race again. We've got, everything's the same. The only difference is Phil Rondel's had a bit of training, Deputy Rondel has done a bit of training. Stop interrupting please – you're not here to adjudicate.

Senator Ozouf

Senator E. Vibert

Deputy of St. John. Sir, will you please call the man to order.

Senator E. Vibert

So what's changed in this situation? The only change has been that the Deputy of St. John now has been on a diet he's done a bit of training and he has been on steroids. The distance is exactly the same. Paula Radcliffe is still Paula Radcliffe. The only difference is today is that our legal advisers are now telling us that he's got a 40 per cent chance of winning. He's got a 40 per cent chance of winning. How ludicrous is this? How ludicrous is it? Because that's the position. And until Policy and Resources and the Solicitor General can tell us where the change has taken place I'm left with one very uncomfortable conclusion which is that our Crown Advocate is fed up of this case, he doesn't really want it, he's been rapped over the knuckles for making some mistakes and he'd rather get on and go and do something else and not spend seven years in Court. Because I can find no other reason than to come to that conclusion. Tough though it may be. I'm sorry to put it that bluntly but this is a crucial issue that we're dealing with here and until members of this House are told what has changed the opinion of the lawyer, I can only have that conclusion.

So what members really must do is to think about the advice that they've been given in 1992 because if you remember Senator Walker has told us, and he told Dick Shenton opposite "Well you're going back to opinion in 2002 the legal opinion has changed". All the way through those Minutes I've read to you, there's no change in the opinion at all. Right up to the year 2002 confirming that they've got no case, they're going to fight it tooth and nail, we're not going to give in, we'll fight them on the beaches, we'll never surrender it's all there and then suddenly we collapse like a pack of cards. So I've been asked how do I intend to sort this out in my mind when I come to voting. I'm going to put my faith in the people of 1992, people who were real legal people who knew what life was about. I'm not going to put my faith in the legal advice that we have today, without explanation as to why it has so radically changed. It's important that that this House understands that it has radically changed. It isn't just a slight shift of direction, it's a radical change. It's gone from practically, let's say five per cent which is what the Bailiff, former Attorney General was talking about, to 40 per cent. I'm using it as an illustration. He didn't say five per cent, but that's what he saying there's slight chances, that what was said. Of course there's a risk as I've said before I go and walk out in the street and someone knocks me over. It doesn't stop me doing it, but we have been given a figure of 40 per cent with no backing, with no reason for the change and I blame the Policy and Resources Committee for failing totally the people of Jersey when this matter was first given to them that they didn't get the man in, make him explain why this position was, and then if they were not satisfied with the answer, get some people from the U.K. to advise a lawyer here to run the case. And the best thing that could be done I believe is to get rid of the lawyers we've got and get some people in who do know and understand what this is about.

I know that some of you may think that's hard and you may think that it's tough but it happens to be the way I feel. I've taken you through the facts. I haven't exaggerated any of the legal opinions, I've given it to you as it is.

So the situation is, as far as this House is concerned, think in terms of that legal opinion given in 1992 and continued all the way till 2001 and ask the question please, all ask the question, what has changed?

Deputy of Trinity

Sir, I think that was really a great shame, because we are being asked to make a judgement on legal opinions given over a period of 10 years, and that is extremely difficult to do, and what the Senator has omitted to tell us is on the last page of this pack of papers that we have here, and I think I should read out Sir, that Advocate Binnington was asked to comment to the Solicitor General on the position as really as queried by Senator Vibert. What he's saying is that, as further research has been done and at that time in 1997 he did not, as his initial reaction to the advice given, he didn't find a problem with that. That's a very honest blunt assessment.

Unknown speaker

Sorry, can the Deputy advise which page he's looking at.

Deputy of Trinity

Yes it's the very last page of the pack.

Greffier

The very back page, the very back of the bundles.

Deputy of Trinity

However he then goes on, and I think this is extremely important. Since that date that was in 1997 on his initial reaction a significant amount of work has been carried out on behalf of the defendants, that's ourselves and the Crown in relation to discovery. This is this wonderful system that the Solicitor General referred to and now I understand amounts to something like 20,000 documents. Can you actually imagine 20,000 documents in your office at home and you're trying to sort out the wheat from the chaff of that lot. Whilst this did not reveal of any documents which were wholly detrimental to our defence, there was certainly documents which revealed that when an opportunity had arisen in the past for the same issue to be decided, that, one, a final determination had been avoided. In other words the courts, when given an opportunity to actually sort of say, well, this is how it works, refrained from doing so.

This has the potential for creating an element of uncertainty in relation to the question of ownership of the foreshore which could be of some limited assistance to the plaintiffs, that's Les Pas, and may cause the judge to take the view that the reason the issue was avoided was because the Crown was not as certain of its ground as it might have been. Then he refers to the Clerk, Shipyard and Ronez cases as examples of this. He goes on once discovery was complete the documents were analysed in greater detail, and a considerable amount of further legal research was carried out. Furthermore detailed skeleton arguments were prepared for trial and it was only at this stage that the real shape of both of sides' cases and the authorities upon which they were to rely, became clear. In other words they had second thoughts, and I'm not in the slightest bit surprised, if you have something as complicated as this, and there really isn't any doubt that it is extremely complex, that they've had another look and now they're not so sure, and the paper work quietly and clearly indicates not a 40-60 but 45-55 split and Senator Vibert is suggesting that somehow we as non lawyers and there is no-one, apart from the Solicitor General, but there is no member here who's legally qualified, that somehow should second guess these opinions, this is what legal cases are all about, we can't we're in the gambling mood, and frankly I, for one, am not prepared to gamble.

I'm not prepared to gamble with money which is not really mine to gamble with and I really urge members to throw away this idea that somehow we've got the luxury of being able to sort of say, ah well it's only £100 million, £200 million, it doesn't matter, against the risk of losing. I think for £10 million

we are talking about petty cash. Let's be honest about it, absolute petty cash in comparison with the total liability we are potentially talking about. It is enormous and stupid in my view Sir, to run that sort of a risk. We can't afford it. Now where some how there's been a mistake and the inference of the some of the suggestions that are being made some how Alan Binnington might be watching his back, I doubt that very much indeed. I think that Advocate Binnington is fully insured professionally, he's going to do a professional job. He's a very, very, experienced advocate and they don't play the fool, and I think to suggest that I find it totally reprehensible indeed, and if that's all we're worrying about well then it's a pretty poor show. I think we've got a very simple decision, it is totally commercial. It's nothing to do with politics whatsoever. We have got a commercial decision to make and we are facing potential for huge losses. That is a risk, that in my view, we cannot afford to take and I urge the House to reject any sort of idea whatsoever that we're going to not compromise a situation like this. It would be ridiculous. Thank you Sir.

Deputy Ryan

When you want to invest large sums of money on a piece of land, you firstly you have to be sure that you own it. Normally you can rely Sir on your advocate to have established reliable title to the land when he researched the history of it at time of your purchase. In this case in 1950 the Crown and the States of Jersey decided to enter into a lease of 40 years. The Crown as owner, the States as lessee. Why did they do that? We're told by legal advice that this was to establish with certainty through a device known as prescription that indeed the Crown did own the land in question because they had acted as an owner through this lease, the lease itself being the proof, and that for 40 years which is the accepted legal time span, nobody else had challenged the lease, thus …….

Solicitor General

I'm terribly sorry to interrupt I think I should make something completely clear on the effect of the 40 years. The Deputy is absolutely right to say that the 40 years from the date of the lease creates a prescription against any other title but that wasn't the purpose of the lease. That's the effect of the lease. The purpose of the lease was to allow the Tourism Committee to administer things like deck chair franchises and so on.

Deputy Ryan

Thank you for that correction from Madam Solicitor General. I'm slightly wrong but nevertheless the essence is there. If nobody else had challenged the lease it would demonstrably show to all concerned that the Crown were indeed the owner of the land but what I've asked myself, if the ownership of the foreshore is unquestionably in the Crown, then why was this device necessary. Also why throughout history both in the Island and elsewhere, when challenges to the Crown's ownership of various foreshores have come up, rather like Deputy Crespel has said, why does the Crown invariably settle out of court or has it's been explained in one or two cases other people's claims to ownership, have been, shall we say, have been seen off by the Crown through legal technicalities in some cases rather than as a result of a direct legal judgement actually finding that indeed the Crown owned the foreshore and had always done so. The prescriptive device through the lease in 1950 worked in all cases as we now know, except for the one involving the *droit de seigneur* of the Fief de la Fosse and in 39 years and 11 months after the start of the lease a court application was received from the Seigneur of the Fief de la Fosse claiming ownership of the foreshore. So in December 1989 we knew that the Crown's ownership of the foreshore in the case of St. Helier Waterfront was not prescriptive and was subject to a challenge. If the Crown's ownership was not 100 per cent then our, the States, ownership through subsequent to the lease and purchase from the Crown of those parts of the foreshore upon we wish to invest large sums of money, must also have been compromised to some extent. Bear with me Sir.

As I've already said before investing large sums of money in the development of a piece of land any owner must surely be satisfied to his or her ownership of the land in question. Mistake was made

therefore, either by the States, the Policy and Resources Committee of the day or their advisers, and I'm not sure which, to continue to reclaim land or develop land and invest large sums of public money in it while this cloud of ownership existed, however small that cloud was thought to be at the time. You know hurricanes starts with small clouds and perhaps we're finding that out to our cost some 10 years later.

Compulsory purchase was not really the answer because it simply leaved the, left the question of compensation open to new litigation. The three choices put forward by the Attorney General in 1993 now our Bailiff, were –

1. wait and see;

2. litigate;

3. compromise;

or settle out of court. In Sir Philip's opinion, Senator Vibert please note here, only two or three

Senator M. Vibert

Sorry to interrupt, if you don't mind. On a point of order because the ideal is, and this has been agreed that this will be broadcast after, could I ask members if they could differentiate which Senator Vibert they're referring to please.

Deputy Ryan

I apologise, Senator Edward Vibert please note. Only two or three of these choices in his opinion were wise. That is litigate or compromise. In the event the States chose the worst possible option, wait and see. Even though his advice said, again please Senator Edward Vibert please note, and I'm quoting from the pack in front of us, "it would not in my opinion be prudent or sensible to continue with land reclamation schemes without taking a decision on one or other of two and three, i.e. litigate or compromise.

Senator E. Vibert

Unheard interjection (off microphone)

Deputy Ryan

I didn't understand it that way Senator Edward Vibert, if that is what you said, then I do in fact take that back. When mistakes are made, it's important to fully investigate the background, if only so that the same mistakes are not repeated. The right procedure for this is not in the political forum of the States with its myriad of political agendas but a public inquiry and I hope that in due course this will indeed happen. The fact is that if we proceed to court in this case we will be establishing legal history and precedent. If we win all very well, but is it 60-40, is it 45-55 as per the latest legal advice, is it 70-30, is it 80-20 whatever it is it is still a substantial gamble and is this the kind of gamble that we should be taking for the Island of Jersey? The Crown would not do it. They've proved their unwillingness in the past to take the risk of litigation and final legal judgement. If only the law were perfect, if only the law could be trusted to consistently fall in line with ultimate morality but it is not and as all lawyers will tell you it is not and indeed exactly what or where lies ultimate morality. God knows literally. So should we take the gamble over the ownership of hundreds of millions of pounds of public assets versus a piece of land worth £10 million. My heart says yes, my head says no. I believe I was elected to use my head. I will be supporting the proposition and I would urge other members to do likewise. Thank you.

Deputy Scott Warren

I believe that the stakes are too high for us to continue with this litigation and just to hope, trust and pray that we'll be successful and not lose hundreds of millions of pounds. We have to consider the future finances and well being of this Island Sir. I therefore sincerely believe that we should accept this out of court settlement. Thank you Sir.

Solicitor General

Before any other member speaks I was asked before lunch a question as to the identity of the Counsel used by Advocate Binnington and perhaps this is a convenient moment for me to give the answer. The answer is that the barrister is Simon Coulton of Lord Grabener's Chambers. He had worked with Advocate Binnington previously in major litigation. One reason for selecting him was that he had previously assisted in researching old customary law, also he had a French legal qualification as well as being a member of the English bar and given the quantity of French authority that was obviously a desirable point, and there is perhaps one other thing. Some member asked about the Minquiers and Ecréhous case and I was asked for a resumé and perhaps again this would be a convenient point. That case is relied upon by Les Pas. Les Pas think that the Minquiers and the Ecréhous case supports them. It wasn't a case about ownership of actual land. It was a case about sovereignty, that is to say it was a case about whether the French sovereign, not the sovereign, the French State or the British sovereign had sovereignty over the Minquiers. Evidence relied upon by the United Kingdom in arguing the British case all referred to old documents in which it was said that the Minquiers are part of the Fief of Noirmont and Les Pas argue that that shows that the fief which included the rocks of the Minquiers and the Ecréhous and the foreshore, the argument by Les Pas is that shows it's part of the fief and therefore owned, and the response by the defendants is the same as to all the other arguments about stuff that lands on the foreshore being referred to as part of the fief. The answer is that's jurisdiction not possession. So it's a case which is relied on by Les Pas. There is an answer, or at any rate the defendants have put forward an answer, but again it's one of these things which hasn't yet been determined by the judge.

Deputy Duhamel

Thank you Sir. Now like other members I was particularly interested to hear the other day, although it wasn't forthcoming, as to why Mr. Binnington had actually changed his mind or appeared to have changed his mind and I'm grateful for the last page, page 44 which actually sheds a little bit of light on those reasons. I'm unhappy though that the Deputy of Trinity took it upon himself to actually place certain relevance and importance which doesn't appear in the same way I'd wish to read it. The sentences referred to must be read out and properly in context. We were told that whilst, I should start at the beginning or otherwise I'd be committing the same error. Since that date a significant amount of work has been carried out on behalf of the defendants in relation to discovery. Whilst this did not reveal any documents which were wholly detrimental, words chosen as important wholly detrimental means exactly that to our defence. There were certain documents which revealed that when an opportunity had arisen in the past for the same issue to be decided, a final determination had been avoided.

Now if you actually look into the reasons behind the court not actually making a final determination there are other issues. This has the potential for creating an element of an uncertainty, so not a 60-40 or 40-60 or whatever but an element of uncertainty and certainly using those words, the indication is that it is small in relation, to the question of ownership of the foreshore which could be of some limited assistance. Again the words chosen are "limited" meaning small assistance and not huge assistance, which 40 per cent would seem to indicate to the plaintiff, and may cause the judge to take the view that the reason the issue was avoided was because the Crown was not as certain of its ground as it might have been. Well that's just an opinion, and I think on that particular issue, that's probably one of the reasons why the judgement came forward, that there were technical legal issues to be looked at. I was a little bit annoyed when the Deputy of Trinity failed to read out the last paragraph, which reads "we were then asked to produce a risk analysis that made clear that we still regarded the defence as a good one, but emphasised that as we were dealing with customary law, which is in a continuous state of development

and is susceptible to policy considerations, the outcome could not be guaranteed". So all we're saying is that the outcome can't be guaranteed and that's fair enough. But it goes on and says that "for that reason a compromise was a sensible option to consider in order to achieve certainty as to the outcome".

Now the question is in my mind if we want to achieve certainty as to an outcome it's quite clear, as Mr. Binnington points out, that a compromise is a sensible option. But what it doesn't say, is that from the documents that Mr. Binnington's researched that there's been a massive change of opinion, or indeed documents that have been found on discovery, that have caused a shift away from the suggestion that the case was without merit at the outset by Mr. Sowden and other parties, to this situation where we've told it's just above evens and 55-45 or whatever it is, is a world of difference from away what's been said in that outline. So broadly Sir, I'm unhappy, I don't think, I don't think that States members have actually been put completely in the picture as to the legal reasons which some members are actually propounding as being overriding and overwhelming in that we must settle out of court, and I think the only fair thing is to actually put it to the next stage and to actually take the issue to court and see if we can get a sensible judgement on the matter, certainly from reading the bits and pieces I'm happy to go along with that, I think that to make a decision in the other direction wouldn't be on a firm basis, I don't think States members have actually got enough to go on here, and the only way to go forward, seeing as the reference back was unsuccessful this morning, is to vote against the proposed settlement.

Deputy Dorey

The only thing to do, the only possible course of action is to go to court. It's certainly a view and it's a valid view, and the closest I've heard so far to a view which was directly related to the debate that we've got in front of us. Because I don't think I can ever remember a debate where there was such a marked contrast between the essential simplicity of the question in front of us and the number of words being expended on it. The vast majority of them, I have to say, very relevant to a subsequent inquiry into the history of this affair but almost totally irrelevant to the very basic question in front of us, because surely the decision that we've got in front of us today is all about risk management, I'm assuming that we can all take as a given that States members accept that the advice given by people who are paid to know about these things and to come to judgements about these things is that there is an appreciable, it doesn't matter how you quantify that in numerical percentage terms, an appreciable risk of losing.

A risk which has to be faced, confronted, that doesn't mean to say one has to go to court, one has to actually consider that risk as the serious issue. Because after all it's very easy to take the high moral ground to take a principle stand without anything personal to lose, but most of us when we're dealing with risk are dealing with risk in a very personal way. Just as an example anybody, anyone of us who has ever been out and bought a child's car seat isn't expecting to have a crash but knows that the consequences of that crash would be too horrendous to contemplate. It's not an investment in the sense that after you paid for it you want to have a crash so that's worthwhile, but it's a sensible precaution to take and you weigh up the expense of that equipment against the horrors of the worst case scenario. Or in my own personal experience when I had an argument with Planning I felt strongly, I still feel that I was right. But the consequences of going all the way through the courts and then losing would have meant that I would have been permanently ruined and therefore I had to swallow my pride and accept the situation. I didn't like it but I had to do it.

Certainly in response to those who have tried to convince us that the legal advice that we've received is fundamentally wrong and that Les Pas have a weak case, all I can say is that I prefer to take my legal advice from the lawyers. All of us can have opinions, we're entitled to those opinions and I'm not belittling who spoke, but really if I want to know about health I go to a doctor. If I want to know about the law, I go to a lawyer rather than taking the opinion of the first person who comes along and happens to have one.

There's been an awful lot of talk in the lead up to all this about questions of supposed or actual conflict of interest, but I would actually appeal to States members today in considering the decision which they

have to make, to consider what choice they would make if, in fact, they and their family were in this situation on their own, if this was their fight. If they were the defendant or second defendant instead of the Receiver General and the Greffier. Would they, on principle then, having everything to lose, fight that to death, which is an arguable view, or would they say, the consequences of losing are too horrible, too awful to contemplate for the whole of the rest of the future of myself and my family I'm going to have to take a commonsense, pragmatic sense of view and settle, while settlement is available. I would appeal to members to consider the good of the people of the Island in the same way that they would consider their own good if they were involved in a case of this type on their own.

Deputy Breckon

Thank you Sir. I would like to refer to some comments that other members have made and get this back, I'll come to that in a minute. Somebody said it's not political it's legal but it's in here, so I would say it's a political decision we're making. Senator Walker mentioned earlier about successful negotiations and an out of court settlement being desirable, and at the risk of Senator Edward Vibert screaming, he actually said we are where we are. What I would ask, through the chair, is, what did Les Pas bring to the negotiating table, what did they have to lose? Because what is negotiable seems to be ours in the public name, they've brought nothing to the table, in fact they've been fairly skilful in camouflaging what they had and minimising any risk they had, so if you're going to negotiate then you need to be negotiating with somebody that's got something to negotiate with. And where is their downside. Their downside seems to be very minimal. Now that's the position they've come to the table with, so I would suggest if we're going to go back to the negotiating table then we need a bit more clout to do it rather than just go and hold their hands up and say well O.K. this is a reduction and it's very desirable because it's a lot less than what you're asking originally. And I don't think that's acceptable.

He also mentioned a boycott of C.I. Traders not being an issue for this House but it is because they are visible and they're involved whether they like it or not, if they don't like it they can get out. So I think it is an issue for the people and for this House and it could become indeed, I think, a bargaining tool.

Senator Walker mentioned about sharing more outrage. We have a fight on, take a risk he said, these were brave words. But they are brave words, but if you've got to use them, then you've got to be prepared to take some sort of action to back them up and he talked about acting in the public interest, and I think we could take some action in the public interest. He likened this situation to Social Security and the debate at the time and I don't think it's got anything to do with Social Security this is commercial blackmail. This has got nothing to do with benefits for the people, it's about us being put in a situation by some people who are taking opportunity from this situation which wasn't the case with Social Security whatsoever. And he mentioned the Deputy of Trinity's comparison that we are trustees with public funds and the Deputy of Trinity he stood up not long ago and to me he saying to, he seemed to be waving the white flag and saying we're here, we are being asked to make a purely commercial decision, not a political one. And I would argue that if we're going to do that then we need a bit more armoury to do it than we've had to date. We need to be negotiating from a stronger position and let the other side know that we mean action and will take action on a number of quarters.

Deputy Dorey has just mentioned the high moral ground and about having things to lose. But to some extent that's true but to another extent who is the other side and what are they prepared to lose? So we must I think take them on, and he mentioned some of their legal advice from ordinary individuals being fundamentally flawed. But where I have a real problem for 10 years I've been told that the case was not there to answer, was not well founded, was without merit and with 'in camera' debates, papers I've read and whatever else I haven't seen anything that changes my view of that. If somebody had said well in 1642 there was a particular case which they're holding up and they saying as their key points and there's another seven or eight things that they can say precedent and their going to quote them and we're on very dodgy ground then I could say well O.K. then perhaps we need to concede, and we don't need to negotiate, but I haven't seen that. I haven't seen that in any of the papers.

I think some members may have prejudged this debate and I would ask them to keep listening because there may be something that may make them change their minds. We have public support on this issue and if we have the public support then we should use it and I believe the public would vote with their feet because they don't like what they're seeing and what they're hearing. In the proposition it refers to the agreement made on 27th May 2003 and I would just like to go through some of the points in the report. At paragraph 17 it talks about Crown Advocate Binnington, in his opinion the claim of Les Pas was not well founded and as you go through that is generally the theme. Where it changes in paragraph 22, following the refusal of the application for security for costs the legal advisers, the defendants gave further advice to the Policy and Resources Committee on the question whether it would be in the public interest to revive the possibility of settling the action which had previously been under consideration.

And at 23 it says the Committee decided that it would wish to explore the possibility of settlement. Now there's no problem with that. The problem then lies in what that settlement may be. And the end of paragraph 32 on page 6, the Committee do recognise that it could not bind the States to approving the settlement proposals. Having said that, there's some significant things taking place in the meantime, if you look at paragraph 33, it says the agreement can change a number of conditions precedent, which had to be satisfied by various dates specified in the agreement. The last of the conditions precedent has to be satisfied by 31st August 2003, and if the debate takes place in September 2003 it would because conditions Precedent have been satisfied. Now when you look at that and page 10 some of the conditions refer to 100 three-bedroomed apartments, 90 per cent of which will be (a)–(j), 10 per cent of which will be (k), it talks about planning matters, it talks about no capital or income taxes and some of those things the people find totally disgusting because they don't have the opportunity to negotiate with the States on the same terms.

And I remember having debates in this House where an individual member has brought a planning matter and all you can do is request the Planning Committee to consider or reconsider a particular issue and members will be told in no uncertain terms, that the House is not a forum for debating planning matters, although you can, you can't decide you can only request. And some of these things seemed to have happened outside the Chamber, and it really concerns me, because it looks like the government, and committees of the government, have been undue pressure to say yes because they knew the significance of saying no or dilly dallying because the timetable was laid down, and I think people outside find that particularly unacceptable especially if we as we said when income tax demands have just dropped on peoples mats and it says here that it's noted and agreed that no capital or income taxes shall be payable by the plaintiff or its nominees. That's been agreed as part of the deal and people I think find that unacceptable.

"Why settle" it says at the top of page seven. It says the litigation could last for another seven or eight years. Well let's turn that round a little bit. Supposing we would, to put some pressure on a company we could identify, whoever with a 12½ per cent shareholding over seven or eight years, commercially and from the public as a government to put pressure on them, how would they feel about that? And then would they come, then we would walk away from the negotiating table, no we don't want to negotiate now, we're walking away and saying that's what we're going to do, we're going to take action which reflects how we feel about it and how the public feel about it and I think the public would support that and to some extent they're starting to do it. And that's, it also mentions there, the balance of the cost of settling versus the cost of proceeding. Now if you take that in the view of C.I. Traders they, behind the scenes probably at this stage would rather not be involved in this, because you're talking about companies with a long history, you bring together Ann Street and Le Riche with a long history in the Island, they've made money out of the Island but they've been part of the community and in the main there's been no problems. But this is a different ball game, this is opportunism and this is a different ball game, and people in general terms I don't think will like that, and if you look at the implications of not settling, and Policy and Resources have put in this report in the context of the States, but let's just reverse some of that. There are very considerable costs even if the States win. Now let's put it another way and say, there's very considerable costs for C.I. Traders even if Les Pas win. How do they like it. Let's lay it on for them. Their standing in the community, their commercial concerns. If that's what it's

about, no doubt some fly by night organisation has come from somewhere else, it's about people living and working providing goods and services.

So I think we need to put some pressure on there, and we can do that as a government and with the support of the people. The legal case could last many years creating very disruptive uncertainty. I would suggest it could create some commercial uncertainty for them if we done that there will be a considerable loss of goodwill then maybe a casino in the future, we maybe looking at a preferred operator, we're not doing business with people who are doing down to us. We can walk away from some of these deals. There's lots of things we could do to put pressure on negotiations. The lawyers and the courts can do what they have, but we'll them to get on with it and we can do other things to put pressure on in other places to bring the negotiations to a head, and I believe that's the way we should be doing things. We should reject this and let things take their course. And it's the cost of winning, even if the States win, or if Les Pas win, it's going to eight to ten years down the road. There could be a lot of damage to business in the community within that time.

Talk about cost to the public first. But that's down the road. They'll have to suffer the consequences in the meantime, and I say these are the sort of things that we should be doing, and that's the message that we should send out. That will maybe bring people back to the table with demands that, perhaps are not quite as considerable as what they are. As its never an exact science to forecast what the costs of an action are likely to be. But what could be the costs of their involvement? They don't know and if they stick with it they might find out and it could be very severe and it could affect their trading businesses and I think this would have an effect. At this stage of the legal proceedings it is not possible to predict the cost of defending the action. What would be the costs to them? There is other things in that report and if you substitute the Les Pas, who are mainly anonymous, but C.I. Traders are visible, so let's feel, you know they're, and they're up for it. So let's target them.

There's a hidden cost, it says in paragraph 39, in continuing litigation and I would say there's a hidden cost to them as well. Sorry, it's not just down to us, they're involved in that. Unquantifiable costs it refers to in 40. Again there's an unquantifiable cost, because if people vote with their feet it'll take a long time before they'll go back again and people are doing that now, believe you me I've spoken to a lot of people on this issue and they're absolutely disgusted but they are not the only people involved in Les Pas but they're identifiable and they can be targeted.

Says protractive, 41 protractive litigation is very substantial. Again the costs to them could be significant and I think we must call their bluff. Call their bluff in negotiations you don't get settlements by conceding too far too quickly and I think you know some within Les Pas are rubbing their hands already by the position that we've taken. And again, with security of costs I think there've been very fortunate in some of this, to get this far with very little and their downside appears to be minimal.

But I think what we should do is, we should take a stand, we should make a fight. That's what people want. They're disgusted by this whole business and they're looking for some leadership in here. Yes there's a risk, somebody says there's a risk when you walk out of a door, and of course nobody wants to bankrupt the Island. But it's not us who are seeking to bankrupt the Island. It's other people seeking an opportunity to do that and there is a risk, but having said that, if we take actions elsewhere, I think we can minimise the risk, we can minimise the cost and it's just possible that at some stage somebody might walk away from this deal and if the 12½ per cent shareholder wants no more part of it and that the they're providing backing, the few million pounds they might make out of it looks very sick if their share price starts going down and their future sales and predictions start going down. That will look like peanuts and I believe that that's the sort of action we should take, we shouldn't be rolling over and having our tummies tickled and feeling we've done a good deal. We should fight the fight until the end.

Deputy of Trinity

Sir may I ask what point of clarification the Solicitor General can help, but the Deputy is referred to no capital or income taxes should be payable by the plaintiff or its nominee but it goes on to say, in respect of the compromise of these proceedings or upon the transfer of the site to the plaintiff, am I right in thinking that that purely refers to the value of £10 million would not be taxable, and that there is no indication whatsoever that I can see in here that development profit or rental profit in the future or whatever else happens would not be taxable.

Solicitor General

Yes, that is quite right. While I'm on my feet I wonder if I could ask for clarification because I thought that there was something in the speech which might require some legal advice from me but I'm not quite sure whether it does or not. The Deputy said on more than one occasion we could put, one of my notes is we could put pressure on the company as a government and there were references to the States putting pressure on the company. I'm not exactly clear. I follow the references to the public not buying from C.I. Traders but I'm not sure what pressure it is envisaged that the States as a government can put and the reason why this may need legal advice is that the States, the Committees of the States cannot use statutory powers or cognate powers to pressurise someone with whom they are in dispute in litigation. That would be an abuse of powers and it could not be done. So I would like clarification of quite what governmental pressure it's envisaged could be given, so that I can say whether I think it would be proper or not.

Deputy Breckon

Can I just give an example of that Sir. If we had for example petrol accounts with garages and for supplies of services and goods and whatever else. We can go to somebody else it wouldn't make a price difference, we have a choice of doing that and we would choose to go somewhere else.

Solicitor General

Well I think that might well open to challenge, because the citizens are supposed to be treated equally and if the citizen, you know the citizen being C.I. Traders or Les Pas or any related company, found that there was a discrimination based only on the basis that they had shares in a company that was litigating the States, I think might well look forward to challenges.

Senator Syvret

Sir, may I just ask a point of clarification. My apologies I was out of the Chamber, I think the Solicitor General announced the name of the supporting counsel.

Greffier

She did.

Solicitor General

Yes, shall I give, what, well repeat effectively what I said before. If members will bear with me while I locate it.

Greffier

Unless you pass it on a note to the Senator possibly, as the information has been given rather than taking the time of the Assembly.

Solicitor General

Yes. Perhaps I can do that.

Senator Syvret

Could the Solicitor General say whether the person or persons concerned is a Q.C. and which firm where they're based and the contract.

Deputy Taylor

Yes Sir, I disagree strongly with Deputy Alan Breckon and Deputy Duhamel especially on Deputy Duhamel's interpretation of Alan Binnington 's reply to the Solicitor General, page 44 of your pack, and the single sentence that jumps out to me the most is at the end of the second paragraph and it says "furthermore detailed skeleton arguments were prepared for trial and was only at that stage that the final shape of both sides' cases, and the authorities upon which they were to rely, became clear". To me I think that answers many of Senator Edward Vibert's questions about where this change took place. It was only when detailed legal arguments were rehearsed that serious things came to light and the odds changed, and perhaps 10-90 to 40-60, 45-55 and I think that, myself, is probably the key. I completely endorse Deputy Dorey's views that we are the custodians of taxpayers' money, we are not in the business of risk assessment, we are in the business of risk assessment but not on the business of risk, and we are certainly not running a casino. This is, the risks here are far too great, and I think the taxpayer would not thank us if, in five or six years' time, we have bills of hundreds of millions of pounds adding up. Thank you.

Deputy of St. Mary

A couple of weeks ago I sold a joint holding of C.I. Traders shares which I had with my wife. We bought some Ann Street shares many years ago, because I felt it was important to be a part of this decision making process. In a way we're between a rock and a hard place. I'm very angry that we're presented with this sort of decision to make and that doesn't help. We've got to make it anyway. I spent 30 years as a professional trustee, and as has been mentioned already more than once in this debate I believe that I understand the fiduciary responsibilities of trustees and that's in fact what we are. We are trustees and we are here to protect the property that belongs to this Island. Of course we have two choices. We could continue with the case and we've discussed that a lot. It involves costs and risks, and although we have better than evens chance of winning, there is a real risk of losing. We can settle and we can shut this issue down. We can stop the costs running, we won't have to pay compensation for the 1998 compulsory purchase of the land, and we will get a very clear settlement of the whole of the title issue. It hurts to have to do this, but I think with the risks, the costs and the length of time that it will take, these are quite unacceptable and I think the only sensible to do is to support this proposition.

Deputy Le Main

Yes Sir. I have to say that I very much applaud the comments made by Deputies Crespel and Dorey and it really puts it in a nutshell. The issue is that I couldn't believe myself, couldn't believe listening to Deputy Breckon, call their bluff he said, call their bluff. The people want us to fight, call their bluff. Well I'm not prepared to call anybody's bluff with what's on the table today. We write a little story about how unpalatable things can be. More fear - the lady who called me said to me that she was in tears, a very elderly lady, she had some work supposedly done by a contractor and the work was £50 and the work hadn't been done and she got eventually a lawyer's letter. This lady had never been to Court in her life. As unpalatable as it was I had to advise the lady that her best way of dealing with this was actually to pay the £50. It's a very, very sad state of affairs, because had she gone to a lawyer to fight this £50 case in the Petty Debts Court she could have ended with a bill of several hundreds of pounds. And I have

to say this is the basis. We are trustees and we have to look after what we believe is the future of our future generations.

Chatting to a very well known lawyer only three of four weeks ago on the Albert Quay one morning, who said to me that they dealt and acted on behalf of many of the insurance companies in this Island on litigation, and every insurance company in the Island through the lawyers attempt to settle on the kind of basis that we're being asked to do today. It is absolutely commonsense in a business world, even though they won't accept liability but they will attempt, because the dangers of legal costs and the dangers of losing, no matter how minor, it is absolutely dramatic. I would not, in any way shape or fashion, like to put my head on the block and, as Deputy Breckon said, call their bluff. I think that the people will want us to fight. Well of course the people have got principles and we all have principles. But I think that's one of the most irresponsible statements I've ever heard in this House on the basis of what's at stake. I urge the House to seriously think of the issues and what was said by Deputies Dorey, Crespel and in particular Deputy Scott Warren, I am not prepared on behalf of my children, their children, your children to continue litigating on this issue. The issue, is yes, we are giving this piece of land purportedly valued at £10 million, I've got my doubts. Several people have told me they don't believe in this day and age and this market is currently it's worth anywhere near the £10 million. Yes, the Les Pas eventually, if that's what the States decided they want to do, they will construct, they will put a huge outlay out. £30-£40 million perhaps to construct the whatever. They will have to sell those flats. They will pay income tax, they will pay 20 per cent. The people working on the flats and the apartments and the suppliers will all be earning money, they'll all be paying taxes and the money will be recycled.

I urge the members of this House to seriously think if this was their money, and if you had £500 million in the bank, and you were in this position and that was your trusts and all your money and all your family assets over generations, over hundreds of years, would you take the chance on this basis by either settling with a piece of land and I would say I don't believe you would. To do so you would not, and you could not, call yourself a trustee of those funds for your family. You not be a fit and proper person. I urge the House to accept what I consider as being most, well I think the Solicitor General has been an utter credit to the States of Jersey, not only on this case, on many of the cases and the advice she gives. I am more than confident that we listen to the advice, and I've heard all the arguments done by Senator Edward Vibert, but this still doesn't make me want to take a chance on what is a huge States public asset and a very great danger because we try to call their bluff. The people want us to fight. The people, members here today do not understand the true facts, they do not understand the facts, they haven't got the facts before them. I urge the House today that, use this, support this proposition, because I am sure that everyone of you, if it was your own money, this is the kind of decision you'll be making. We are the trustees of out families, monies and also of the public of this Island. That's what we're elected for.

Deputy Troy

Sir, I have a point of order actually. Can I ask the Deputy of St. Mary at the beginning of his speech said that he had some shares which he'd sold. I'm a bit concerned at 4 o'clock in the afternoon after we started the debate that we've only just heard that he had some shares in C.I. Traders which were then sold, and when I came back from holiday in August I had a letter from your offices asking if I had a conflict of interest which I said no, of course, as I held no shares. We've had members who have declared interests, but I think when it comes to an Inquiry I think that the Inquiry should take on board the number of States members who have had shares in C.I. Traders and then sold them so that they can participate in this debate, and I think it's quite an important point for the Inquiry to undertake, especially since we all received letters asking if we had a conflict. It didn't say if you had a conflict sell your shares so that you don't have a conflict, it said if you had a conflict then you should not participate in the debate.

Greffier

I think just to clarify from the Chair, Deputy, the letter was an attempt to clarify how many members on the day of the debate when the issue was important would be likely to withdraw. It's not my position to defend any individual members but I can say from the Chair that the Deputy of St. Mary made it very clear to me at that stage that he was considering his position with his shares and he was very open about it. There's nothing untoward

Deputy Troy

I just wanted to make the point Sir, that there are a number of members and I think that to half way through the debate to find out is incorrect in my opinion.

Connétable of St. Helier

Thank you Sir. Sir, I have a particular problem with this proposal which I'm going to come on to in a minute, but before I do I just wanted to pick up some of the references that are being thrown around the Chamber this afternoon We've been told that people who oppose this proposition by P & R are foolhardy, it's foolhardy to fight, I think Senator Walker said that. Deputy of Trinity went further and said that it was stupid for members to oppose it, and I think we've recently been told that it's irresponsible, and various other words have been flying around. Senator Walker in his introduction, I think, suggested that the, the easy option was to, was to fight and the difficult thing was to do what the Committee is trying to do. Well I certainly, listening to the Assembly and the way the debate appears to be going, I would suggest that the opposite is true and that anybody who believes that they must stand up against this hugely sensible compromise is going to get an absolutely roasting, certainly from P & R and I know from my experience last week it is not actually easy to go up against P & R.

Now the phrase has been used quite often today that we are trustees of public funds, and that immediately raises the question with me, we are responsible for public land, why have so few members of the public been urging me to go for this compromise. Why has the vast majority, including people I was talking to when I went to buy my paper at lunchtime, saying to me, fight it. Why is that my parents who are sensible people, retired people, in the autumn of their lives are saying to me I hope you're not going to give in to this. It's not just the people that you normally expect to call you and say, this is terrible, what the establishment are doing. These are people who I would describe as Telegraph reading, pretty right wing conservative people that I know, and they're telling me to fight it. And Sir, I do have a problem when I'm being told that as a trustee of a business community, I think the word fiduciary was used recently, which was really taking us up a peg in terms of the language of this debate. I'm beginning to think this really is a board meeting and we're discussing a business proposition and quite clearly if this was a business, and interestingly we, at the breakfast meeting of St. Helier Deputies, we heard from one of our procureurs who runs a very large business and he was in no doubt the business case is clear, you settle. No question. Let's move on to the next item of business.

But unfortunately we're not just trustees of public funds, are we? We are also leaders of the community and we weren't elected just to be quasi bankers, we were elected to lead the community and I feel that it's actually a little bit sad that the debate has gone so much on to the compelling business case, but of course the business case is there we're all aware of it. I don't believe the public is so stupid to think, I think the public know what the odds are and it doesn't take a few rogue e-mails to leak that out to the minder. The public know that there is a risk that this will be lost and yet it seems to me that they're saying that we should fight it, or are they just uninformed as some members are suggesting.

The other problem I have, before I come onto the major problem I have with this proposal, is that Senator Walker in his introduction was so positive about the openness of the process. He said we're right up front, we are entirely open. He said this is open government, well I struggle to think of a less open process in recent months than we've had here, I really do. Particularly in that several members have been

relying on the e-mail on the back of the pack from Alan Binnington, and I know that there are members here who would dearly like to have quizzed that Advocate about his views, and they have been prevented for one reason or another from quizzing him about the problem, and that I think is very sad. How can we describe a process as entirely open which has been dealt with by behind closed doors by P & R for so many months. Surely an inclusive President of P & R, as soon as he took on this particular job, which as he rightly says is deplorable and he wasn't pleased to be able to give it to his Committee on the first they met. Surely the first thing to have done would be to say let's get all the States members up to the Howard Davis Farm. Let's tell them what the problem is. Let's tell them what the problem is, let's share this problem with the rest of the States. But to give it to us a matter of weeks before the gun goes off at our heads, and I don't myself that that is fair on the States members at all, or on the public they represent. I don't believe that is open government at all.

Of course the issue of interest has been gone over a lot and Senator Walker in his introduction admitted mistakes, sort of. I mean he said that the shareholdings were very, very small and indeed a couple of weeks ago we heard that it was sort of lost at .01 per cent or something, I think, and then again was repeated the same argument we had before from the Senator when he was facing that long and rigorous process of scrutiny during question time. It was quite unparalleled in the history of this States as far as I'm aware. He said that it didn't really matter that they hadn't withdrawn from the meetings, because the Committee was unanimous and therefore and if they hadn't been there the decision would still have been made. Well doesn't the President remember that the purpose of withdrawing from the meeting is so that you don't influence its outcome, and really I think that those mistakes were admitted and then, it was as if to say well they weren't actually very important. Now the planning decision is, of course, crucial and I remember when we had that meeting up at Howard David Farm, and there was this desire to get the planning approval in place. Immediately alarm bells started ringing I was at that stage Vice-President of the Committee and I was chairing the Planning Sub-Committee, and I was concerned straight away that we were going to have problems.

Now I was at that Planning meeting where the main decision was taken on 17th July. The application, let's be straight, was against policy. I believe that the Housing Committee have also gone against policy in respect of their, well I'll carry on, and then perhaps someone can correct me afterwards. Perhaps someone can clarify me afterwards, but certainly the planning decision was against policy in respect of the underground parking requirement. Any other developer or individual submitting an application with this requirement would have been told to go away. We were told that it was a deal breaker. We had to give that parking over. So the question was obviously asked by Committee members anxious to help P & R, is there any way we can make an exception to policy? Yes, we were told, there is. You can if it's in the public interest, you can depart from policy in respect of the strict restriction on parking standards, and so far so good. But who chaired the meeting? Was it an elected member with shares in C.I. Traders which has a shareholding in Les Pas? It was. And who gave the advice to us, the crucial advice at that meeting that a departure from policy could be in the public interest. Was it a Crown Officer with shares in the same company? It was. Did those persons declare their interest, no they didn't. Did they withdraw, no they didn't. Now these persons, I have no doubt and I don't wish in any sense to say that that was something done deliberately, but it is to me a problem from a planning viewpoint that that influence was decisively influenced by people there who should not have been in the room. Now some members may call this political correctness, but I think in terms of a Planning process, remember Planning are almost quasi judicial in the way they operate, they're certainly have many different powers than the average Committee does. I feel that the decision Planning made that day, was seriously tainted by the fact that those interests were not declared and I ask members how will a developer feel whose plan is turned down by the Planning Committee when Project Atlantis was approved even though the two sets were identical. How much damage will that do in future to the planning process?

The issue of tipping charges being paid by the public has been explained to me by a member of P & R as being required by the other side to prevent us finding a loophole after the deal is struck. Obviously we could impose swingeing tipping charges on the Project Atlantis lorries and get our own back, and that was apparently the reason for putting the tipping charges. But again that arrangement snaps at double

standards, it raises a real problem, I think, for the perception of government, how will the average local builder feel when he or she goes to the weighbridge at La Collette and receives their invoice for tipping while the lorries of Project Atlantis just sail past to tip what may prove to be toxic ash in the pits created at the taxpayers expense. So losing the legal battle over the ownership of the Fief de la Fosse would cost the Island dearly if we lost every single round of the battle. We know that the first round 60-40, the odds are not good enough for many members. I would suggest that if that side were to be lost, we would take it another stage further. We would take it as far as we had to go if we believed that it's the correct course of action.

Capitulation, now on the other hand, I believe will cost a lot more than the money that is being bandied round the Chamber. It's not just a matter of money of £10 million. How much will capitulation cost in terms of the lost respect, in terms of the further erosion of public confidence in us as a government. It isn't just about money. The Waterfront development created on such terms, I believe, would be a blight, a blight on St. Helier, a blight on Jersey itself. If I can quote from a historian David Starkey writing about Elizabeth I, he said speaking of bloody Mary I think, Her sister's entire reign is destroyed by the loss of Callais. Elizabeth in front of parliament and her people solemnly pledges that she will not disgrace herself or her country in a similar loss of territory. That threat is one that she will do anything to avoid and she is right. You cannot hold respect and sacrifice territory.

Now, I'm sure I'm going to be savaged by members of P & R later today, it's becoming a bit of routine, for what I'm saying but I believe that what this is about, is about an attack on our territory. And Islanders in the past have fought, sometimes paying with their lives, to avoid giving up territory to people who want to take it off us. Now this is not a usual attack on our territory, it's been conducted with e-mails, legal letters, court cases, mobile phone conversations even, rather than through raids on the harbour or ships coming into La Rocque. But I do believe our Island is under threat, and we 50 or so men and women have been elected by the people to defend it.

Deputy Le Main

May I just refute the comments made by the Constable over the allocation of (j), (k) licences. Some previous Committees ago which I was a member, probably when I was President, the Committee agreed that it wished to see a curtailment on commercial sites of the continued number of (j) and (k)s. and there was a policy in place, which is still in place, that only (a)-(h) is agreed on commercial sites and sites. But the Committee also had a policy that when, on this prime development on the Waterfront, that when these were going to come to the Committee they would have the policy, because it was such a prime site, and because the Waterfront Enterprise Board were intending to put those on the market to recover the monies expended, that there would be (k)s, (j)s included on the reclamation site west of Albert. That is the case, the case is, yes the Committee have granted some (j)s and (k)s but previous to that decision they also granted a new harbour reach development, a similar basis of (k)s and (j)s. So it wasn't any decision to be as alleged by the Connétable.

Greffier

Before I call the next speaker, Connétable I think I must for the record just ask you clarify that something you said in your speech. You referred to a meeting of the Environment and Public Services Committee at which the President and Her Majesty's Attorney General were present, I think it could have been misunderstood by some members that you were implying that the fact that these members have notified us that they have shares in C.I. Traders, some were influenced their decision. I don't think that's what you were trying to say I think it could have come over like that. Could you just clarify that?

Connétable of St. Helier

And so, it was merely that a lot has been made in the public about the non withdrawal of members at certain meetings but the Planning, that crucial Planning meeting was never discussed as far as I'm aware. I thought it was important to say that that was the case at that meeting.

Deputy Le Main

I was a member of that Committee

Greffier

You're not in any implying that they used that position

Connétable of St. Helier

No I'm not, no I think I can say that there was no impugning of motive intended. Thank you.

Senator Ozouf

May I ask a question of the Connétable because he's expressed a very strong view as a member of the Planning Committee. Did he raise, did he register his dissent in relation to this application?

Deputy Le Main

None at all.

Connétable of St. Helier

Sir, if I'm going to be cross examined by P & R at this stage I'm quite happy to rise again. I think as I said in my speech, the decision by the Planning Committee was unanimous because we were assured it was in the public interest to grant permission. It was only relatively recently that it occurred to me that the person who gave us that advice was himself a shareholder, and therefore I felt that the advice I'd received, I was uncomfortable about that now I'm not imputing any wrong motive, I'm simply saying that the process, I believe, was flawed.

Solicitor General

I have been and I still am intending, immediately before the President replies, to refer to a few points which have arisen in members speeches which apply to legal matters, but since this is as much fact as law I think possibly it's right that I should say something now. The meeting which took place at which the Planning and Environment Committee considered this particular application was attended by me, in fact I was there on time, I was there before the meeting began. The Attorney General was not, he was somewhere else doing something else. He did come in at a later stage. I had been advising the Committee and continued advising the Committee. The question of the relevance of public interest as a planning factor was raised by someone. The Attorney General gave a first, I hesitate to say off the cuff, response. He gave his, he said he believed it would be justifiable. I then myself intervened and said that yes, public interest was a planning issue and actually referred to the Fairview Farm case. So that the, the, while it was true that the Attorney General voiced a view, the Committee was then given the advice which actually referred to the relevant case, came from me. The only other thing, members who were at the meeting will obviously all have their own things to say about it if they like, the only other thing which I would refer to about the departure from policy in the planning issues, is that as each member spoke in turn, each member in turn said that they thought it was a ridiculous policy. And I also advised that if members really thought a policy was absolutely ridiculous there could be a planning problem with

imposing it. Any member that didn't say that can obviously identify themselves but I certainly in my recollection is that member after member of the Planning Committee said that they thought this was a silly policy.

Deputy Bridge

Sir. During the lunch recess I asked the Greffe to produce copies of the minutes of 17th July just in case this issue came up and if somebody else didn't bring it I was going to bring it up Sir. I wonder if those minutes are available, might be helpful for members to see those and in particular the fact that there's no mention of public interest in those.

Greffier

I think they are available.

Senator Le Claire

May I speak while they're being circulated?

Greffier

Do you wish to speak now Deputy

Deputy Bridge

I've no intention of repeating what the Connétable said, he got in there first and just simply to say that the minutes are available, if they could be handed out so that members can read it all for themselves.

Greffier

Can I ask for these to be distributed.

Senator Le Claire

Thank you Sir. I think the position that we find ourselves in Sir, has been identified as being a very unpleasant one and I'm quite certain that the Policy and Resources Committee, and the President of that Committee, would far rather not be bringing the proposition to the States if they were able to avoid doing so, but I feel that they've been left in that position through a catalogue of time, and we've been saying we are where we are but we only are where we are because we've come from where we've come from. And if the question now in my mind, where do we go and, where we are is where we are, but where do we stay. In my view, excuse me, I don't believe that I can just look at this as a purely trustee issue. I do see the sense in what P & R are suggesting and I do see the very large risk at stake should we lose. But to do this deal in my view, because somebody has purchased a title for £50 when it was done, it wasn't £200 according to the paper work I've seen from Senator Le Maistre, £50, then to be holding a gun against heads, £10 million on the back of the fact that you know then they won't push us for the £240 million. That's just disgusting. The only people that are going to lose in the interim, the States members can hold their head up high at election time and say "well I voted for the sensible thing" and the other ones can say "well I didn't give in". It's fantastic.

I think there are issues though Sir, in relation to some of the things that I think we could be doing. I really would like for the Committee of Inquiry to be furnished with the information of the beneficiaries of these trusts. And I would like, if possible, for the Policy and Resources Committee to instruct whichever department it is necessary to instruct, to seek the information from the Jersey Financial Services Commission as to who these people are that stand to benefit from these hidden trusts within

these groups, because if we were dealing with a case of international fraud the FBI, etc. could ask us and request us as an international jurisdiction to furnish us with that information. Now we don't know as States members who these trustees are. They could be absolutely anybody and I mean absolutely anybody. I'm not going to give any daft examples but they could be anybody. And we're being asked to make a deal with the public's land as trustees with absolutely possibly anybody. It's just not sensible. We're going to do this today but I do think it's very, very important that the Policy and Resources Committee get that information before anybody else sells their shares and moves on, closes down the trusts, burns the books and runs in the other direction. Because that information I think is going to be telling when it comes to a Committee of Inquiry because if he a Committee of Inquiry cannot get down to the bottom of all of this and down to the facts then it's just going to be a paper exercise, it's going to cost lots of money, it's going to trump at and trump at and trump at and be absolutely useful. We had a Committee of Inquiry into the building of the marina. What has that done? Deputy Dorey, I imagine, spent hours and hours and hours researching things on that, and I doubt very much that any member here has got it by their bedside to read at night. It's just gathering dust and it cost a lot of money. The same will happen with this Committee of Inquiry but what it will do Sir, it will do one thing, is it will, I'm sure exonerate the participation of certain members who had not declared interest and not withdrawn because of the basis that their shareholdings were so small that they were negligible.

Nevertheless in my view Sir, that conflict in itself has rightly been acknowledged by the President of Policy and Resources as something that was on reflection a mistake, it's also been acknowledged by the Bailiff that although he ruled that there had not been a conflict, he strongly advised them not to take part, and I actually did find out yesterday Sir, across the road, that what I thought the process was was that we were going to get the document on the last day of the States to avoid asking questions. We identified that, and then I thought after that time Sir, I thought that it was going to go to the Committees after the States members themselves had read the proposed deal. And then the members would see that in the proposed deal, it was cognisant upon, ah sorry, it was reliant upon the fact that there would be pre conditions met by various Committees, and very telling for the Committee of Inquiry when I supply them with the e-mail that I circulated to all States members querying whether or not we could have, what was I asking for at the time, a referendum or Committee of Inquiry, both of those were just annulled and I did make it quite clear in my e-mail Sir, that I was asking for members to identify whether or not they'd taken part in the decision making process. Nobody replied to me except for Deputy Dorey and Senator Lakeman, Sir and there may have been one other but the people that we later found out through a revelation in the public domain did not make any comments. So it struck me quite strange yesterday when I was across the road getting a copy of the minutes of the pre conditional meetings that the Committees had, that I identified strangely, I thought there's Deputy J.J. Huet's item, and then she explained this morning.

Deputy Huet

I don't have e-mail Sir, so if that's any, so I never received the Senator's e-mail.

Senator Le Claire

No, no, I didn't on clarification, I didn't send you an e-mail, sorry through the chair, through the chair. I'm normally quite quick at correcting myself Sir, but if I'd have had a friend like Senator Ozouf at school I probably would have got through all my exams because of the corrections that he's able to make before I can actually do them myself and I would now be probably very wealthy, or shall I correct myself. It really does throw one Sir, when one's trying to respond to a concern of a member when another member is able to do that, and I think that that is becoming quite tiresome. I was trying to reply Sir, to Deputy Huet in respect of the fact that I'd been looking at the minutes across the road, and I'd noticed her name in it, and it struck me as unusual that Deputy Huet had not withdrawn but declared an interest, and then today's explanation showed quite rightly, that you know even possibly over the top that as a WEB member that was the right thing to do. No question in my mind Sir, there's not a problem there.

But I did notice that the Minutes of the, actually we've been circulated them whilst I've been reading them, I'd got them yesterday, did you just get the same ones as me? I didn't have this much yesterday, I had another minute circulated to me Sir, which noted that the issue had been discussed by the Committee in the presence of the President of the Policy and Resources Committee, Her Majesty's Attorney General, Her Majesty's Solicitor General together with the Chief Executive Officer of the Waterfront Enterprise Board and the Chief Executive and head of the Public Service designate. That's what I had. Then on making a telephone call to a member of the Planning Committee, I did identify that actually the President of Planning and Environment hadn't declared an interest when he chaired the meeting, and apparently later onwards apologised although I haven't seen that in a written minute. The whole issue of the conflict Sir, really revolves around how we're perceived and the issue about doing this deal today is because it's the best thing for us to do.

Well surely it may be the best thing for us to do, on reflection, may even be worth voting for. But you can't in my opinion Sir, get over the fact that people with these obvious conflicts, on reflection who have admitted that they possibly shouldn't have been involved. Sir, all the way back to the origin of this document which persuaded the Committee in the first place that the legal opinion had changed in such a way that it was now time to make a deal. And the chronology of it all was, I can't believe I went and copied all that out, because it got put on our desks this morning, but the chronology of it all was stated on the front page of the, in the first two paragraphs of the papers everybody has in front of them, the opinion of 21st November 1993 by the S.G. It goes on to say forever and a day no, no, no, no, no, and then the only thing that sort of comes up in my mind Sir, that's actually of note is the present Bailiff's comments you know that we should really not be continuing to develop on this whilst this is being decided and it was actually something I mentioned in the lease of the Waterfront properties when the big lease debate was going on, and I said we haven't even settled this and I was ridiculed, but no it just doesn't sit right Sir. It doesn't sit right that the A.G., I'm sure he's acting in the best interests of the public, but the A.G. with an interest in the company, draws up the heads of agreement, draws up this paper that we're reading today, well not this paper, I beg your pardon, draws up one of the paper that was put to the P & R Committee, yes Sir, I'm getting to them, with the Solicitor General and then members who were in that Committee meeting who've got shares stay in the meeting and then go ahead and make the decision. It's, I've got no doubt Sir, no doubt at all that nobody was in this for their own money. I do believe that every single person has been identified to have a conflict, and everything else, was doing something in the best public interests and there's no question in my mind about that, but it's not just, in my mind, what the Standing Orders require us to do and what the lead Committee of the States should be setting down as an example for the rest of us to follow. In the future Sir, under ministerial government these minutes will probably be unavailable for us to peruse and issues such as this and the conduct, etc. of our government and our elite government must be held in trust, we must have the feeling of security knowing that whilst we still know nothing, we know that we can trust them. And that's bad Sir, I don't like that Sir.

The tipping charges are £640,000 before we find out whether or not they're highly toxic. If they are highly toxic, which is kind of strange, but this has got sort or, borders on a contradiction, if they're highly toxic it was suggested, somewhere in the minutes I think, that they had to be removed off Island, but I know for a fact that under new conventions coming through and the head officer of the Public Services has told us Sir, when I was on the Committee that we'd have to deal with that on Island, so we'll have to lay down protective measures if this stuff is highly toxic, so it's a loss of £640,000 in proposed tipping revenue if it was done this year, if the tipping charges go up next year it's going to be even more, but this £640,000 out of the public's purse, and if it's highly toxic it's probably going to be more. So that was a really, was a really hard part of the deal to actually, to get over and in getting over this deal you've got to get through it all, you've got to get through the fact that there were, you've got to get through that the facts Sir, that it was badly put to, it was badly put to the States members, it was done in such a way that States members started to lose confidence. To be told by a member of the Committee in a public meeting that there were members that had shares and for that member to be embarrassed by that position

Deputy Farnham

Sir, May I raise a point of order, well I don't know I think this is, I think it's getting a bit personal, hasn't the Bailiff ruled on this issue. The Senator's going on and on about it. The members have withdrawn of their own accord, the Bailiff has made a ruling.

Greffier

The Bailiff has ruled Deputy I think there

Deputy Farnham

And therefore Senator if he's expressing an opinion well that's fine, but if he is actually the House how, the Assembly, how he sees it then he is misleading the House, because the Bailiff has made a ruling on this.

Greffier

I did consider this matter but I think the Senator is giving his own opinion on events and his view of them.

Senator Le Claire

Yes Sir, and I was about to go on to say thank you Sir, that I have the utmost high regard for Senator Le Sueur as a politician and as an individual Sir, and the inference by some of the resulting opinion was unpalatable at best. I was attributed it as having been the one that asked, had asked the question. I hadn't asked a question at all, I just didn't hear the answer so I asked for it to be asked again at the end. I wasn't on any kind of witch hunt and I think it's being totally the wrong idea of some members that, you know, that I'm enjoying this or getting a kick out of it, because I find it all very unpleasant and in no way, as I said before do I think that anybody in the Assembly or any of the Law Officers or anybody else is trying to do anything but the best thing for the Island. But I'm just talking about Sir, how it was put together, how the deal was put together, and how the deal was put to the public, and how the deal was put to States members and I'm just saying Sir, that in the presentation of the deal being put to members, it was pretty poor. A pretty poor deal, best intentions, best thing we can get out of it, but it's been managed pretty badly.

As I said Sir, I really do think it's important, I really do think it's very, very important that we identify who the beneficiaries of these trusts are, and that information is passed over and handed to the Committee of Inquiry so at the end of this whole nasty mess we can get to the bottom of who stands to benefit, why they put their money behind somebody that bought a title for £50, and why we're being held with a gun against our head to do the right thing. I'm not going to vote for the proposition Sir, I'm voting against it because I think, personally, that if we actually did say no today, we would send out a signal to the people and to the courts and to the other side that we have a strong belief in the fact that we can win, and if all it is in a court of law Sir, is opinion upon opinion then so be it. It doesn't look like we're going to get to go to Court but if I was, if I was actually trying to lead the charge Sir, I'd be taking it to Court and if you have to establish whether or not the Crown has a right over something then you have to have, you have to establish also Sir, the moral perspective if the Crown has a wrong to something too. Now if it's right, it's right and if it's not right then it's got to be sorted out. Why do we keep on avoiding the issue by not going to Court. I'm not, We avoid it Sir, that's the evidence why we should keep on avoiding it. If something's wrong Sir, and has been wrong maybe it's perhaps wrong in many, many jurisdictions around the world if the Crown is exercising rights it does not have, we're going to back off.

Senator Routier

Thank you Sir. Connétable Crowcroft was critical of P & R for being secretive about the process so far but I think members will recall that back in May P & R invited members to a meeting at the RJA and HS and at that meeting they discussed with us very openly with the, our legal advisers present, the latest position and at that meeting they sounded out members' opinion of the possible option of settling out of court. My recollection of that meeting was that, and I do recognise that it wasn't a formal meeting in any way of the decision making process, but they actually did get support at that meeting and they were sort of congratulated in certain circumstances and from certain quarters at that time, where actually since then people have changed their minds about encouraging the P & R Committee to go ahead with progressing the settlement so I do find that, you know, I think what people were expressing a view on that day which was, you know, quite sensible and logical but now it has come in to the public domain, that people are sort of turning, turning the, turning their views whether it be, I don't know, whether it be just to have a pot shot at P & R just for the fun of it, or whether it's really at assessing the situation and feeling that they are making the right decision from the facts that they're aware of.

Senator Syvret

Sir, could I just ask the Senator to explain which members were present at that meeting, who at that meeting expressed support for the P & R Committee proposal and have now changed their mind. Because my recollection of that meeting and I was present was that most people present didn't express an opinion. It being an entirely new matter to them.

Senator Routier

I am unable to give the full detail of all the members who were present at that meeting, I do recall the impression, as I said it can only be, it wasn't a formal meeting, I can only give an impression of how I felt the meeting went and that is what I felt that certainly was the tone of the meeting. Moving on from there, the since the proposition has been lodged, and that's been eight weeks ago now, it's been a time which I'm sure we've got a lot of we've all given a lot of serious thought to this proposition and it's been, it's a tremendous weight on our shoulders, you know today and no doubt the Island expects us to face up to the challenge of this decision in a courageous way. Our electorate will as usual expect us to make a decision which is best for the whole of Island community, and not to weak kneed and to bow to what are totally unfounded, unreasonable demands. As I much as I feel aggrieved and angry about this deal, I hope members will look at what P & R are proposing in a dispassionate and dare I say business like manner - I know that it'll be criticised - but I think that's really what we have to do. Last week we heard the legal advice from the Solicitor General, which I believe the majority of us accepted as sound and accurate advice. I do not share Senator Edward Vibert's view of the quality of the legal advice we received and I really wanted to disassociate myself from those comments.

It has been said that we've not heard directly from Advocate Binnington, so we do not have all the information. I accept that the advice that we've been given by our Solicitor General and her reporting to us of the advice from Advocate Binnington. That enables me to understand the decision we're being asked to make today. As was any major decisions I have to make, I always weigh up the pros and cons before reaching my final decision. There are so many issues which do have to be weighed up, and I believe all of us here as States members we are aware of them and so I'm sure that you'll be pleased that I'm not going to go over the history of all the decisions that have been made over the years and I will not repeat any of them again today. It's quite clear to me that, clear to me and it really sticks in my throat, and it's probably why I stumbled then, that to safeguard the interests of the Island that there is only one decision that can be made, and that this offer to agree to that, sorry, and that is to offer to agree to the out of court settlement, and I make that distinction because the reason I say offer to agree out of court settlement is really because I would like P & R to go back to Les Pas with the agreement to settle. But to ask them if they really want to take the Island community to task and to take this piece of land away from us, in the knowledge that they and their associates will have to face up to the public reaction.

Putting aside the demonstration outside of one of the stores owned by C.I. Traders last Saturday, I am sure that there are many people who were quietly making choices about the way, where they put their trade. We've also seen in the last week or so the price of the shares going down by 10 per cent. That can't be going unnoticed. People will always have the freedom to shop wherever they want but I would urge caution on actively campaigning on a boycott because there are many jobs at stake within the outlets. I'm sure no member wants to endanger the livelihoods of the employees, but I do understand the desire to get the message through to the owners. It has been suggested to me by someone opposed to the settlement, that if the States agree to a settlement, that there will be a stain on the integrity of the States. I responded by saying that I believe that if any stain on the integrity is to be the outcome, it would be undoubtedly be on those who are making the claim. When I think about the time States members, departmental officers and legal advisers have spent up to day on this claim, it fills me with horror, and then if we consider if it is decided to continue with the Court case then the focus of everybody's minds and time will continue to be taken away from the real social issues that are affecting this Island. There are many of us who are working and calling for many social and environmental and other issues to be progressed through the States, but whilst the Les Pas claim is hanging around, we and our advisers cannot give then our full attention. We've already heard today from the Solicitor General about her department's inability to fulfil the needs of our Committee requests. There has to be a benefit for us, both financially and in other ways in clearing the desks of everyone involved in this sorry affair, that will free all of us to get on with our standing, the outstanding issues facing us.

There has been much discussion about the value of the parcel of land being offered, £10 million, and there have been some who have even thought that Les Pas will make £40 million out of the deal. But we all know that this is not the case because they will have to develop the site at a significant cost, and eventually they may make a profit. There is another thought that we should not even be struggling with the thought that we could be handing over a site value of £10 million because if the States decided to continue with the Court proceedings at a cost of £7 million, we should probably be only considering the balance outstanding, perhaps £3 million, as something that we're actually making a loss because to fight it we're going to have to pay out £7 million any how.

As I said earlier, I do wonder about the process that we're going through with this debate and whether it's just an opportunity to have a pot shot at the people who've been involved over the years. We really need to look at what the proposition says today, and not what is the history of what's gone on in the past. The Inquiry will do that. I believe that I can put my faith in the F and E Committee and also my faith in the Solicitor General, and I want to express my gratitude to both the P & R Committee and to the Solicitor General for their due diligence and guidance.

As I mentioned earlier, looking at this unfortunate and distasteful situation in a dispassionate manner it can only lead to one conclusion, and that is to offer the proposed settlement and to re-emphasise the downside to Les Pas and their associates of the public reaction they will have had to taste in recent times if the beneficiaries of Les Pas accept the settlement. What they will have to weigh up in their minds is whether they want to be part of our Island community or not. It is with a heavy heart that I will vote in favour of the proposition.

Connétable of St. Peter

Thank you Sir. I'm rather curious why it is not possible to obtain the opinion from the late Attorney General J.W. Dupré when the question was asked earlier in the day, but nevertheless moving on. Today's sitting undoubtedly will form part of history which will be enshrined for generations to come. It will be referred to in years to come. The part played by certain individuals is most unfortunate from many parties in this case. Why are we in this position? Because members of previous States Committees of the past, simply have put us into this position aided by the advice given by a number of legal professions and they have chosen obviously to go along with various advices at the time. Senator Edward Vibert this morning referred to the decisions made during the eighties, it just happens that

during that time I was on the Island Development Committee and later when it came to this House to decide on the development of the reclamation site I along with a number of members on the day, not too many of us I would add, suggested that we should resolve the problem of ownership prior to spending public funds and monies on that site. It was just as well that I was probably sitting on that side in the back row because if looks could have killed I wouldn't be here today and I was firmly rounded upon as were the other few in number, that we didn't know what we were talking about and we were backward looking and I don't know what, we had no vision and all the rest of it. But nevertheless, I still do not depart from that view that if you are going to develop something, make sure that you own it in the first place and don't be so naive as to put money, and when we talk of money we are talking not of hundreds of pounds, we are talking of millions of pounds as to a possible consequential problem but made before the taxpayer and the Island at large for many generations to come.

The warnings are very clear, we cannot, and here we have to apply a balanced mind in my view, we cannot afford to take the risk of this problem, or the costs associated with it, to give additional problems on top of the many that we have at this moment in the future years. That is, I don't think it even bears, it's not even a contest in my book. But surely we have to learn, and we must learn, and for goodness sake, learn loud and clear once and for all. The parts played by P & R, by Planning and Housing in my view do not show consistency on policies that we expect to be carried out. The same body or same Committees are very quick to point the finger if a private member comes along with a particular motion which suggests doing certain things, they get the policies thrown at them and they're rammed well and truly down their throats consistently time and time again. They must learn from this and if you want any proof of it all you have to do is refer to the minutes of 17th July, when in one particular vote of the minutes, that Mr. Thorne advised that whilst it could create a precedent it would be unlikely to be requested as sufficient extra value would not be derived on other residential developments in less prestigious locations. Now that, the message there in my view is very clear. There is a law in certain areas, a law for certain, a certain body or lobby of opinion whilst others have to conform to the mundane day by day law and regulations. That cannot be right. We must make sure that this fiasco, quite frankly, that we've been saddled with and I don't, I'm not certainly one of the ones queuing up to throw bricks at P & R, they, the current P & R Committee have had a very untidy and a very messy state to sort out and to try and compromise a position which will be a reasoned, and acceptable one. And the reference made by Senator Syvret earlier when he took up a point that was made on that June meeting at the RJ buildings clearly my recollection of that there were no indications given whatsoever by members. They were, I think appreciative of the meeting being called firstly by P & R to acquaint them of the facts, that goes without saying, but certainly there was no indication given, as was suggested by Senator Routier, but surely once and for all as I've said previously, let us ensure that we do not ever get into this sorry state again and make sure that today's decision will give us a clean slate to work for in the future and we hope that it will be for the benefit of the Island. It is not a decision we take lightly, it is not a decision that any of us would like to agree with this proposition brought by P & R, but I think in good sound, good reason and good judgement I honestly believe we have to take it for the good of the Island in the future.

Senator Ozouf

Thank you Sir, I'm sure that some people, certainly in the back of the Senatorial benches, won't want me to speak on this matter and frankly I don't actually think I'm going to stand here and persuade anybody, because I think certain minds have been made up. But I do feel as though, that as a member of the Policy and Resources Committee, I do feel that I should speak if nothing else because I know this debate is being recorded and I would like to have my views on this matter recorded because I think it's an important issue. I don't like being criticised in this Assembly, and I don't particularly like criticising other people. But I have to say to Senator Le Claire, through the chair, I don't particularly like criticising him but I do have to say that I don't think that he has done this Assembly and the standing of this Assembly any justice by his contributions. I have found his contributions rambling, incoherent and I have simply not understood what he has been saying. If nothing else to suggest that this message, this Assembly should be sending a message to the Courts, and I think that anybody that understands, because I think that the Senator did say that, that just that element of his contribution of his remarks shows the

lack of understanding that he has in relation to the democratic process and the rule of law. And I'm sorry, I don't like criticising but I think that's a serious element which, a serious misjudgement.

The Connétable of St. Helier has made, as usual now, a fairly scathing attack on P & R, and I think he stopped short of him suggesting improper motives by the President of Planning and the Attorney General. I think he did, but I'm not absolutely sure, I see him nodding, so I assume that's the case. I know as a member of Policy and Resources how difficult members of P & R, and particularly Deputy Dubras, had been in relation to the planning issue and I regret any, any suggestion whatsoever of, of any kind of negative inference on the activities of certainly Deputy Dubras, because I know how difficult a time he gave Policy and Resources and the advisers, and rightly so.

Deputy Breckon and a number of other members have raised this issue concerning C.I. Traders. All I would say to Deputy Breckon and the other members that have made contributions about boycotting C.I. Traders, etc. is that I understand the legal position and I think that this matters. The shareholders of Les Pas could sell their interest tomorrow to some other individual who had no connection to Jersey whatsoever. In a former life I used to work for a large American company who used to invest, in I think they used to call it, distressed assets, purely financial decisions based upon risk of potentially litigation or winning or losing issues. Their shares in Les Pas Holdings could be transferred to other individuals without us having any say so whatsoever and any suggestions of boycotting Le Riches or Ann Street pubs would have absolutely no factoring in the decision makers of outside Island investors. And I think it's something that we should factor into the consideration. We're not entitled to block the, as far as I understand, the shareholding of Les Pas Holdings and this could be sold on, and so I think it's interesting to discuss boycotts, but I think that we should understand the risk that perhaps we would be taking in perhaps saying no to the deal today and simply allowing the shareholders in Les Pas to transfer it to somebody who would absolutely no compulsion whatsoever in using the judicial system and the court system to take a risk.

The President of P & R, Senator Walker has said numerous time how difficult he has felt as President of that Committee and how difficult it has been for members of Policy and Resources and I want to say I agree with that because I've been there, I've been part and parcel of the discussions. It has been enormously difficult and we have spent, the Committee spent many hours thinking and debating this issue and I think that I should pay tribute to my colleagues on P & R for their work in this matter. It has been difficult and I think courage has been taken and I congratulate both Senators Walker and Senator Mike Vibert in their negotiations with Les Pas Holdings because it has been difficult.

The original claims for that the Committee was placed with were outrageous, were absolutely and totally outrageous, but I think with skilful negotiation they were, they were reduced and I think the Assembly owes a debt of gratitude to Senator Walker and Senator Mike Vibert for the work that they have done. I also believe, and other members have said, that we owe a debt of gratitude to the S.G. and for the advice that he has given, sorry Sir the Solicitor General, sorry Sir, and to the Attorney General. One member said to me in the corridor, that it was, my support for the Solicitor General was some sort of, some sort of subservient loyalty. Well I have to say to the member who I won't name, who suggested it was out of some subservient loyalty that I actually agree. I think that the S.G. and the A.G., the Solicitor General and the Attorney General have advised us well in this matter. I am not a lawyer, I have no detailed knowledge of land of property, of law of Jersey or anything to do with Seigneural rights and as a member I have to accept the advice that I've been given and I do accept, and I am making my decision in relation to this proposition upon the advice that I am given.

Before actually coming to make some concluding remarks, I do actually want to say a couple of other issues about this general issue. I do remember, and I was reminded from Senator Ted Vibert with his proposals for the marina at Havre des Pas. When I was, I'm covering a number of my late mother's affairs, I actually found the video that Les Pas Holdings actually created when they were actually putting forward their proposition, and I looked at the video and I have to say, and I still harbour somewhere deep inside my brain an ambition to perhaps have seen, have seen the development that was on that marina

development and I do think the public Inquiry has a number of serious questions to ask in the handling of the way in which that proposition was dealt with. And I actually went down at the weekend, and I walked over the area that is shown in Senator Ted Vibert's document that he made. I walked all around the area that, at that time unreclaimed, has now been reclaimed, and I have to say if members haven't been down I urge them to go down and my conclusion, was what a mess, what an absolute mess in relation to the reclamation down on that area. Mistakes have been made in the decision making concerning the reclamation of that particular area and I was struck when I saw the plan this morning, and when I compare what I saw at the weekend, there isn't actually that much difference I don't think in the reclamation that the proposers and the promoters of Les Pas were making in relation to the housing development that they did. I know that they suggested a big wall and maybe that was wrong, but in terms of the actual scale of the reclamation that they propose I prefer the plan that I saw there than what I saw at the weekend. And I think the public Inquiry has a number, a number of issues to deal with.

As a member of WEB, I am concerned about the financial situations that will arrive because WEB will be deprived of an income stream if the States do approve this proposition going forward. Certainly there are, there is one member debate earlier on this week that there were no financial consequences, well there are financial consequences for this we are being asked to give over a piece of land worth £10 million and that have consequences for WEB and of which I'm a member. No pecuniary interest but I make that observation.

I was not happy with the proposal as a member of P & R when I was put to it. I was deeply concerned by this. I do consider the advice and have considered the advice of Advocate Binnington, of Advocate Binnington, of the Solicitor General and the A.G. I understand and I do respect the robust stance that was taken by previous Law Officers particularly, I'm certainly, and I've read and I've heard again repeated in the last few days, the robust advice that was given by the former Solicitor General, Mr. Sowden. And there has been much play about this whole issue, about the fact that the advice has changed, but if one reads the actual documents, if one reads the letters that were submitted by the then Receiver General, the Attorney General, our current Bailiff, in relation to the matter. It was stated quite clearly there is no certainty in litigation. I am concerned for the States financial position if this matter went to Court.

I am concerned that there a number of extremely eminent and extremely powerful individuals, powerful legal brains that have suggested that the case for the Les Pas Holdings is stronger than was originally suggested, and I'm not going to repeat all the legal advice because we've been well served with it. But I certainly accept the fact that there is a serious risk of losing. Yes the States case is strong, I believe that ultimately perhaps if this, if this matter did go to Court there is a strong likelihood of the States winning the case. But there is a risk. And a number of members have spoken of this issue of the odds and the risk, and I think it was Deputy Le Main that actually raised the, for the first time in this debate the word "insurance" because I think that that was an interesting word in the context of what we're being asked to decide today. We insure for valuable assets, I think we're all, we all insure our car, we've got a legal obligation to do so, we take insurance out for our house because they are significant and valuable assets. I regard, and no doubt I'm going to be shot down in flames by people who believe that there are, that one shouldn't be taking business issues, I wouldn't say that it's so much a business decision as a financial decision of the States, I think there's a difference between business and financial decisions. And I think there is a financial risk decision to be taken in relation to this matter. The consequences I don't know a great deal about compulsory purchase, I don't know, I'm not an expert in determination of value but I was on the working party for compulsory purchase and I've read a number of articles about it and I am concerned that even if the States were to, were to lose the proposition, and we were faced with then an opportunity of having to go down the compulsory purchase route which we could do. We would be faced with very serious compensation in relation to compulsory purchase, and I don't think that it's any exaggeration to count that risk in terms of tens of millions of pounds, and of course it's not absolutely certain that we would have to pay it but there is a risk and just as all of us in our day to day household accounting don't take the risk of not insuring our houses against the one in whatever chance of something happening, I believe that the States must today decide to buy the insurance premium in the

event of losing and in the event of the Les Pas issue going wrong. And I say that because I don't think that actually the decision to accept the proposition today is necessarily the end of the matter. I do believe that States members can, on the one side, decide to accept P & R's proposition as the insurance policy because I think it deals with the issue of risk, but on the other hand they can still, in future, support and I hope that P & R will bring forward the proposition and before, for consideration quickly, the issue of the public Inquiry, because I think the public Inquiry is an extremely important element of closure of future closure, of this matter for the people of Jersey in their understanding of the whole sorry mess that we've got ourselves into. I think there're a number of questions that remain unanswered in this whole Les Pas story. There are a number of I think issues which have been put into the public domain in recent weeks which certainly need correcting in terms of the accuracy of advice given and people's involvement, and there are a whole series of other issues in my view, in my personal view, which also need to be uncovered in relation to the whole Les Pas Holdings issue. So I am as a member of P & R, I and, if the Connétable of St. Helier and others want to suggest that it is wrong that it somehow improper to factor in to financial decisions as a member of this Assembly but I do. Because I do understand the consequences of losing the case and simply pursuing and hurling millions of pounds of taxpayers money and knowing that the risk. And I accept the risk, and if people think that I'm being subservient to legal advice so be it. But I do accept the legal advice that I'm given, I do accept the fact that there is a significant chance of losing, and I understand that the costs of losing are significant, therefore I believe that it's right for the States to buy that insurance premium, but I also say that I will be enthusiastically supporting a full belt and braces Committee of Inquiry so that the truth can come out about the Les Pas Holdings issue. I will be supporting the proposition.

Senator Le Claire

On a point of clarification did the Senator say that my speech was rambling.

Deputy Fox

Yes Sir. This is probably one of the, if not the most important day and, maybe on tomorrow as well, that the States have had for many a year. At the meeting in May at RJ and HS I was one of those that definitely was not supporting the proposition that came forward, in fact I think I was shouted down on several occasions to keep quiet. The basic reasons were that I understand the predicament that Policy and Resources are in, or have been forced to negotiate. I also understand the clear and concise information, and thank you to Her Majesty's Solicitor General given to us, not only then but subsequently. But I'm afraid that I cannot support a proposition that is morally wrong. The natural justice is morally wrong. I used the word in May of "blackmail". It might be wrong to use the term blackmail, although that's what I feel. We're certainly being held to ransom and I think that's being recognised. Nobody likes, including me, members of P & R, at what the proposals are, but it is morally wrong to be given an ultimatum to say that unless you do this, and this and this which is against natural justice, against planning policies, against the wishes of the people, then I'm afraid I cannot support it. Having said that, I recognise there is a risk, when I first read and heard Her Majesty's Solicitor General giving out the advice on 15th May, and then subsequently last week to have the 'in camera', it didn't surprise me in the least. I've been listening to legal advice for years, and it is a natural thing for me that there are going fors and againsts and the interpretation from one point of view to the other. I would like to say yes to the settlement of this proposition. I cannot do so. I think that we must be strong. We must go back to Les Pas Holdings or rather, the States must send a message for P & R to go back to Les Pas Holdings, and say the States do not find this particular proposal that you put forward to be acceptable. And to see if, within the remaining time or an extension can be given, to having another deal put forward to bring back to the States. If that is not possible then to go to the next stage. That is what I would recommend.

Everyone's been talking about business. Senator Ozouf has just been talking about financial I talk about morals. I understand business, I used to run a business when I was 18 years old for international schools. I understand marketing, I understand selling. But for years I've been specifically interested in designing out crime which is planning policies, and I know having spent three years on the Planning Committee,

that if you break or bend the policies without a very good reason that you are constantly going to be threatened, usually with the Royal Court, for breaking those policies. And that is the danger. I'm not saying it's going to happen, but there'll be a lot of temptation there. Likewise currently being Vice-President of Education, Sport and Culture I believe in moral fibre in values and we are telling families, we're telling our children, we're, about what a wonderful Island we have. We have moral values. We must not just look at the financial side. Yes, we've talked about insurance and risk assessment. I've got news for Senator Ozouf, I, after retiring from the Force, was temporarily, for a short while, involved in Jersey Mutual and not everybody has appropriate cover, do they the Connétable of St. Peter.

The States don't have appropriate cover, they cover a lot of their own risks and that is also a fact. It is a question of degree, it is a question of assessing the risk and a lot of advice has been given correctly, a lot of advice is being taken. Each individual in this Assembly today is going to make up their own mind of what the risk is. They've had a deluge of information, they've had more information than they actually need for this particular, as Deputy Dorey said, this is probably the easiest straight forward question that they need to say. Do I vote that way or do I not vote that way. But that is the easiest thing to say. If you are going to make exceptions to policies and everything else, why can't we have it without the blackmail, why can't we have it and that's what I'm seeking to, that's what I would like the States to stand firm, be firm, be upstanding, be positive, and say no to this, but to ask and in fact demand, that Policy and Resources and the officers to go back to Les Pas. They will have recognised by now that people are not happy, both in this Assembly and outside the Assembly. There is a solution to this that is a lot better than what's on the table at the moment. All I ask is that we have the opportunity to find it and get on with it. Thank you.

Deputy de Faye

Thank you Sir.

In my electoral campaigning I was asked questions about the economy, and the first thing I said was that all members of the States really have a duty to act in a statesmanlike way when we're dealing with the Island's economy. And I would suggest to all members that this is precisely the sort of situation where we should act in a statesmanlike way, and put a lid on the emotions, because over the last week or so I've been accosted by many of my constituents who are quite literally hopping mad. They're vibrating with frustration, that sadly has been created by a climate of no information, disinformation, elements of populist rabble rousing, and I'm sorry to say, that with a hint on an eye on the ballot box at the end of the day. This is no time for that sort of behaviour. I find it quite useful, when faced by a difficult problem, to take a lateral view, think out of the box because there are always two sides to every coin, and I was working for Channel Television when I was asked to go down and report on the press conference being held by Advocate Richard Falle for his new marina plan. Something at the time we knew nothing about and indeed we have before us an example of the papers that were issued that day, I believe, in the year was 1986. There were models available, there were videos and anyone who has looked through these papers will have seen what an attractive idea the marina plans for Havre des Pas were, and I remember Advocate Falle coming up to me at the end of the press conference and asking me what my opinion was. And having seen these very attractive village style houses on the quayside with mooring pontoons just below. I said quite simply where can I put my name down for one of these. It really was very inspiring at a time when we had no marinas, we had no reclamation sites and this looked like the way forward for Jersey, and many people, and I'm sorry to say this, really weren't worried as the Save our Shores campaigns as later were, about the colonies of limpets and razor fish down on the beach at Havre des Pas and Fort d'Auvergne area, although clearly, thousands of petitioners later got to grips with some of the environmental problems. But I think there was, at that time, quite justified enthusiasm of the project and that enthusiasm was obviously held by those behind it, and I'm a little disturbed that there was this idea that Advocate Falle and his colleagues are some sort of insidious team of carpet baggers who have used this sneaky trick of acquiring for a pittance amount of money the fief. I would suggest to you that their motives for acquiring the fief are quite different. In the same way as journalists, artist painters want to protect their copyright in material, musicians, international musicians are a very good example. But how

were, how were these particular team of developers, who had, at the time, what was a very bright and revolutionary idea, going to protect it from the one outfit that could really mess it up, and that was the States of Jersey. And the one thing that they might have up their sleeve, and might suspect they thought they had up their sleeve, was the ownership of the Fief, so if they suddenly found they were prevented from pushing their particular plans forward and that some other private developer or more likely the States of Jersey would suddenly turn round and say thank you very much, that was a very good idea and we intend to carry it forward, they at least had something up their sleeves to protect their original interest. So I urge members, don't think necessarily that this was some evil plan got up. It was actually ordinary business people trying to find a mechanism to protect an idea that they had thought of.

Now we've seen how elements have developed since 1986 when the idea first launched and I don't want to dwell on the history of it, other than to say quite frankly, matters should clearly have been sorted out some ten years ago.

Poor decisions were undoubtedly made, and I thought it was actually deeply ironic that network television showed last night a very well known film called "the Usual Suspects" and quite certainly if we do go to an Inquiry, the main start coming out, there will be plenty of the usual suspects featuring over what happened over those 10 years. But I'd like to bring us slightly up to date, because the whole Les Pas issue has remained dormant for some time until of course the emergence of Channel Island Traders. Now, I have to emphasise that I do not have a great deal of time for the way Channel Island Traders operate. They are an outfit I would describe frankly, at best, as asset strippers although I understand that the trendy terminology these days are that Channel Island Traders' operations are to maximise shareholder value. Well, maybe I haven't got them quite right, perhaps their asset enhancers.

Nevertheless we have to imagine the situation where Mr. Scott is shuffling through all his bits of paper and has discovered that, in his enthusiasm to doubtless sell off profitable pubs and spruce up various areas of his portfolios, there is this rather bizarre one eighth holding in something called Les Pas Holdings. Now we know Mr. Scott has not been an enthusiast of the Channel Islands until quite recent years, so I'm fairly certain that he wouldn't have had the slightest clue what Les Pas Holdings were, or what they represent, so imagine his enthusiasm when he suddenly sees this extraordinary little company, he owns the entire foreshore, and all the WEB site. So quite rightly, as any keen businessman with the odd £10 million in his wallet to spare, he dips in and pulls £2½ million or so, I assume that figure from the fact we hear that the value of Les Pas has risen from £100,000 estimated to £3 million, so he digs in his wallet and says "let's throw this at it and see how it runs". Now let's not make any mistakes about the calibre of businessman we're dealing with here. Mr. Scott is the sort of chap who in fairly colloquial parlance, takes no prisoners. And when he's taken his £2½ million out of his pocket to see if it's going to run, he's going to make sure it's going to run, so the idea I'm afraid, that if he sees the tills in Le Riches take a dive by 10 and 20 per cent for a month or two that he's suddenly going to capitulate. No forget it, this is a man who deals at a much sharper level than that, and that will be small, that will be small coinage as far as he's concerned because he can have his eye here on the big prize, and my goodness it's such a big prize. I don't think we've yet managed to calculate what it's worth. The value keeps going up week by week. But here we are. It's called litigation and that's what we're confront. But make no mistake if we pursue the litigation course it is the only possible way we can lose. I repeat that as I've learnt a trick or two from Deputy Le Hérissier.

Taking the path of litigation is the only way we can possibly lose. Now I would like to see us go for I can best describe as a win, win situation, and let me tell you why I don't want to play the litigation game, because it is a game of very high stakes poker, with lawyers handling your hand. Here we are at the table. Mr. Scott and his compadres are sitting on the other side of the table with a very weenie little pot of about £3 million so that's what we have our eye on. Unfortunately, we also have been told by Commissioner Page, we can't get our hands on at the money, if we want to any way. So that's £3 million profit sitting over there is just stake money that the States will never get its hands on. We on the other hand, are sitting on the other side of the table with an enormous pile of money represented by how will the cost of losing the ownership of the WEB site. This is huge stash could well be £500 millions worth

after we've had to replace La Collette power station, build a new fuel farm, or do all sorts of horrendous deals to try and reinstate our position. Thanks to the decision on security of costs, even if we want to decide to play the next hand, we'll be effectively paying to play the game. But I ask you, in all seriousness, if you find yourself sitting at a table with £300 million on one side but you know you can't win and £500 million on your side that you know that you could secure through a settlement, would you actually bother to play the next hand?, or would you pick up your £500 million and say, thanks but I'm walking.

Now that's why I urge upon this Assembly the very bright way forward offered and indicated to us by Senator Philip Ozouf. You know, all of us who drive cars take out an insurance policy. It may be £150, or £300 for most of you with your big limousines, members will be paying I'm sure in excess of £1,000 a year. But that's not money you begrudge, because it covers your back for all sorts of horrendous eventualities on the road over a year. It's money you spend, and you spend it happily because it will allow you to do things with your car. What I suggest to you is that this settlement should be regarded quite exactly as Senator Ozouf has described it. It's an insurance policy. It's quite an expensive insurance policy, but nevertheless it's not just any old insurance policy, it's a gold plated copper bottomed insurance policy that lasts forever in perpetuity. And that is one of the critical elements of paying, what I believe was earlier described as, pretty small change, by comparison to what we've got to lose. But how expensive is the settlement really going to be. We've had £10 million put on the notional value at what right now is a pile of potentially toxic rubble in the reclamation site. £10 million, well that really is a notional value in my opinion. But let's look at it as they say from the other side of the coin. What we have at the moment, and those on WEB may correct me, but it is a personal opinion, I believe we have a WEB site that's basically stalled in its development process. We're really hoping that someone will spend a lot of money to build a prestige hotel on one of the prime sites, but I rather get the feeling that the financiers aren't that keen at this stage to follow that up, why? Because they look at the site and go, hang on we're surrounded by other building sites, and I really don't like the idea of having a five star hotel that will end up like the hotel in Tenerife surrounded by building sites. It's not really going to cut it with my high spending American clients when we start flying them in. Now what a much more pleasant prospect it is to have Les Pas Holdings, with the settlement concluded, spending £30 million or so to build what I suspect will turn out to be probably the most prestigious accommodation residential block in the whole of the WEB site, 100 new units of accommodation that currently don't exist with possibly the added value of ten 1(1)(k)s in their penthouses paying tax back to us, and then the people behind the rest of the developments and the hotel site in particular are much more likely to go, ah a prestigious new residential block, well we've got no problem building a prestigious new hotel next to that. All of a sudden, this £10m. begins to look rather small change when we get the WEB up and running again, when we can get our economy moving again in the direction we want to go. Which is why I think, and may I say that what a sensible decision it is to allow a sensible amount of underground car parking, you know whilst I'm on my feet what a ludicrous policy we have and the sooner that gets changed the better. Did it really take, you know, one of our leading architects to appear in quotes of the week "this is the most daft thing I've ever seen passed in living memory". And still nothing's happened about it. I really hope Planning will look up on that one. But here we have a situation where, don't look at this settlement as some sort of capitulation, World War II has finished and we are aren't fighting on the beaches even though it's a dispute over a foreshore. Look upon this settlement as it will provide an opportunity for a company to develop an area that's currently not being developed with a prestigious building that will ultimately pay tax and rates to our Exchequer, and if you really have trouble about parting with your cash, look upon it as seed capital that any major city would be only too happy to pay out a relatively trivial amount of a few million pounds to regenerate, to regenerate an area that wasn't working, an industrial or wherever, a docks area-classic example. So I say this, we have the opportunity to conclude all the worry to get the information to get our debate out into the public arena as soon as possible, to make a sensible decision and to take out a gold plated insurance policy that means, quite simply, we cannot lose, and I urge members, please let's not have to come back and do all this again tomorrow, let's wrap this up to day.

Greffier

Perhaps an opportune comment Deputy as the time is 5.45 and the Assembly needs to take a decision as to whether we are going to adjourn or whether we're going to carry on.

Senator Le Maistre

Sir, I'd like to test the mood of the House, I believe that a number of meetings tomorrow that will be disrupted if we carry on tomorrow and therefore my inclination is to propose that we continue up till 7 o'clock if necessary, I believe it won't be necessary because I believe it can be concluded tonight. I think the danger of coming back tomorrow is it'll carry on the whole of tomorrow. So I propose Sir

Greffier

Are members content to continue till 7 o'clock?

Deputy Hill

We've heard already that this is one of the most important days for the States and if we are to rush it I think we're not doing ourselves a service. If it means coming back tomorrow then so be it. Now I think I'd rather rather we've got to wrap this up in an hour and a quarter just isn't justice.

Deputy Farnham

Sir, there are still approximately 14 members who haven't spoken yet and I tend to agree with the previous comment.

Greffier

It's a matter for the Assembly as always. Senator Le Maistre has proposed we continue, those members in favour of continuing. Very well, those against. Clearly a majority of members who wish to adjourn. Is it appropriate that we adjourn immediately?

Senator Le Maistre

If we are to return I think it's best to adjourn immediately.

Greffier

Very well, the Assembly stands adjourned until 9.30 tomorrow morning.

24th September 2003 – morning

Greffier

Very well, the Assembly is considering the proposition of the Policy and Resources Committee and as previously agreed, this debate will be held in camera and we will therefore ask the media and others to withdraw so that the debate can continue.

Deputy Hill

Sir, I don't know how members felt when they received their report and proposition but I was amazed because I always thought that the Crown owned the Foreshore and that Les Pas' claim was without merit and having read that report, and seen the conditions of the settlement, I was left with a nasty smell – a nasty smell about the whole business – in fact appeasement always leaves a nasty smell. The report left me feeling that there are certainly more questions than answers and I have spent a considerable amount of time seeking answers to many questions that have arisen from the report and proposition. The addendum to the proposition is a result of my quest for further and accurate information. The more time I spent on Les Pas reinforced my opinion that the sooner we have Scrutiny Panels the better. Although I did receive cooperation from various departments, I was always left with the impression that I was a nuisance and who was I to question what P&R had decided was best for us. Whilst P&R Minutes did eventually become available – and I put no blame at all down to the Greffier, because again, that was part of the problems that P&R created – Sir, what I do deplore, is the obstacles that have been put in our way to read them. It seems a nonsense to be denied copies yet to be able to take notes. I had to make five separate visits to the Greffe to read the documents and we've only been drip fed with the papers and one has been left to ask actually, is it only P&R members that can be trusted? There's one thing I'm going to agree with P&R and I agree that they found themselves in a hole. However, I'm afraid, that they've dug a bigger hole for us and they have emerged with little credit. It's all very well for the President to apologise for the mess and support an inquiry but the inquiry will do nothing to help this decision that we've got to make today. And also, the inquiry will only show what an incompetent lot we are but yet we know that already. Among many of P&R's shortcomings was the lack of preparedness and underestimation of the reaction from the public and States members. The timing of the lodging of the proposition was appalling. It should have been clear that there would be a backlash and those who were conveniently out of the Island had gained certainly no brownie points. I ask, where was that leadership? I tell you where they were – they were outside the Island washing their white flags. In early August, I arranged a public meeting to be held in St. Martin's at the end of the month. I felt that the public should be made aware of what was being proposed because I genuinely believe that they and States members had been badly let down. I also thought that, during that month, P&R would take some steps to appraise members but again that was just wishful thinking. Mr. Shenton, or Dick Shenton as we know him, had been in touch with me at the outset of the proposition and I invited him to attend. I also invited Advocate Falle and Senator Walker. Unfortunately, both were out of the Island but Senator Le Sueur did agree to attend. Now to enable the public to hear answers to questions that I thought were very relevant, I included them in my speech and forwarded them to Senator Le Sueur so that he could give the answers in his speech. One of the very relevant questions I asked was "what changed circumstances have led to the proposed settlement"? It was no trick question – and because Senator Le Sueur had been given it beforehand – he did not require to give a snap or off the cuff answer. Senator Le Sueur's reply was – and I quote from the JEP which I have here – "he'd been asked earlier by Deputy Hill what has now changed to make the proposal seem favourable?" "Very little" he said "the facts remain as they were. What has changed, however, is that Les Pas Holdings Limited have become much more moderate in their demands". I believe that Senator Le Sueur was partly right. Certainly partly right in part of his answer because the facts do remain as they were. But it's the "very little" that he mentioned that has changed and I shall return to that "very little" later but I want to address what has not changed. Now the P&R Minutes of 23rd August 2002 state that Advocate Binnington was asked to give a risk analysis. This was after the States had failed to get security of costs. We're told that between 23rd August and mid November, Advocate Binnington was able to read the hundreds of documents that he'd previously been

able to read and form an opinion that the case for Les Pas was without any merit. However, within a matter of weeks, he came back with an opinion which we're now told is varied but is probably the latest one is 55/45 in our favour. I submit that the Advocate has shuffled the pack because the cards are not in the same position, he's now got cold feet. He's been paid hundreds of thousands of pounds and has stuck with that opinion until he's now about to go into the ring. Frankly to come up with such an opinion at this late stage is just not acceptable. It was also unacceptable for P&R to have the benefit of meeting with Advocate Binnington but the rest of the States members have been denied that opportunity. I ask, what has Advocate Binnington got to hide and also why has he been hidden from States members? I would like to ask him, why was a risk analysis not carried out before seeking security of costs? And why did he need to be asked for a risk analysis? Presumably P&R have asked that question so when the President sums up, I'd ask that maybe we've be given the answer to those two questions. Now after considerable lobbying, States members have been supplied with some documents that were supplied to P&R and one has to look at the one dated 7th January and look to the support that the Crown Officers would have relied upon – now if members want to look at paragraph 4.3 – I'll read it out for you because it says

Greffier

Can you say what page you're on?

Deputy Hill

Yes, it's on page 3. It's perhaps worth mentioning that the present Bailiff, while Receiver General, in 1994, wrote to the President of P&R to express the view that nothing was certain in litigation. The Committee should consider a compromise. Well we know that's not exactly true is it, because there were three things he mentioned. It's also perhaps worthy of note that the current Deputy Bailiff, was in 1993, in private practice and expressed the view at that time, admittedly as an adviser to Les Pas Holdings, that he considered the Les Pas claim to be a compelling one. Now all I want to know is that, ……. I'll tell you, in 1994, the States agreed to purchase parts of the Foreshore – that was from the Crown and they paid £265,000 for that money. Now the Receiver General acted for the Crown and the AG acted for the States – of course we know that it was the same person. Now there was a report and proposition – in fact there wasn't a proposition – it was a blue, I couldn't find, it but thanks to the Greffe, we eventually found that it went on a blue and on that blue there is absolutely no advice, or no reference to that advice or the view made by Mr. Birt – nothing at all in that report or in the blue that accompanied the proposition. Now in 1997, there was a confidential letter sent out in respect of Les Pas, that was sent out by the former President of P&R, Senator Pierre Horsfall and I'll read – I'll read something from here "The Policy and Resources Committee having heard of the outcome of the meeting and having had it reconfirmed by the Legal Advisers to the States and to the Crown, that in their opinion, the claim Les Pas Holdings Limited to ownership of the Waterfront is without merit – decided that there seemed to be little point in continuing with discussions for the time being at least". Now again, no mention of the advice given by the former Bailiff, or by the Bailiff, and the Deputy Bailiff – none at all. Then when we look again to 1998, one goes over the report and proposition that was accompanying the Les Pas debate, the compulsory purchase – and this is P.2 – and one looks at paragraph 15 and one reads it out "The legal advice that has been given to the Crown and to the public is that the claim is without merit. The proceedings have been, have been strenuously defended. It is now inevitable that legal proceedings will be protracted - in allowing for all possible appeal, it could last for a matter of years". Again, where is the mention of the advice by the Bailiff or the views of Mr. Birt? Now we've got to ask ourselves why has this advice suddenly emerged? It was certainly not new. And if it was of so little significance, in all the years leading up to 2003, we've got to ask ourselves, what value can we put on it now? So I think it could be seen that Senator Le Sueur was correct to say that the facts remain as they were. Now let us look at that "very little" that he mentioned. Because in my opinion, it's that "very little" which is an important factor and I think the very little is a composition of the P&R Committee and the Les Pas Board. In football terms, we heard the marathon mentioned yesterday by Senator Ted Vibert – in football terms, I'd say Les Pas' case could be best described as Wimbledon Football Club and the States as

Arsenal – being an Arsenal supporter. However, what Les Pas have done – they've signed Alex Ferguson to manage their affairs, where P&R have signed Glen Hoddle – I was being kind – I thought of Graham Taylor, I didn't really think of turnips and things like that – but they've signed Glen Hoddle. Now the Clubs haven't changed. Neither has the pitch or ball. Now when a club is in trouble, it changes its manager in the hope that it will give its team confidence. Now unless this new manager can sign new players, other than giving the players confidence – there's not much a manager can do. Now we have been told that the States have not discovered anything new so how can our chances have been reduced? I don't know but they have. Now is it because Les Pas have signed Tom Scott? Senator Walker yesterday said it takes courage to support P&R. I say what rubbish. Appeasement is always the easy way out. It was a good thing that we left at 7 o'clock last night otherwise I felt I was going to be drowned in the crocodile tears that had been flown – shed here from all the P&R supporters. I submit that it takes courage to stand up for what you know to be right and I cannot understand how so many members can pour out their hearts over this proposition, yet state that they will be supporting it. It appears that P&R wants to concede just because Les Pas has a new leader who is a big payer or a big player, with a big wallet. Les Pas must be laughing all the way to the bank. If we think our changes are only 55/45, don't we think Les Pas know that? We should be asking ourselves "why are they accepting such a small slice of the cake when for a few million more, they could take the whole lot of it?" The answer is that Les Pas is biting at that bit to take this deal because they'll never find an easier way of making what £40m. or £50m. profit. Such an easy way. Now I might be old fashioned and may have too many principles but actually we have a moral obligation to see that justice prevails. Now I've always believed that there's been a suspicion that the big boys always get their way with planning permissions because if they don't, they'll go to appeal but now it appears that P&R are going down that same road. Jersey is an international finance centre – if we concede in this case – what sort of signal are we sending out? Are we going to be seen as a soft touch to any would be litigant who knows of course that Jersey is more concerned with court cost than it is with justice. Les Pas is being led by a big boy used to getting his own way. Now are we to back down just because he comes across as a bully? Now a great many speakers yesterday have claimed that Les Pas' actions are unpalatable but they are prepared to give way. I say, if you really believe in what you're claiming, then you should stand up and fight your corner. The cause is just and we have a duty to defend what we know and we believe to be just. To do anything else is a betrayal of the electorate we're here to support. As mentioned earlier, P&R have dug a deeper hole but it's not only thrown in the towel by agreeing to a settlement but the terms of the settlement themselves, I believe, are unacceptable. Now there are a number of members – myself included – who would agree to a settlement if it was thought to be an honourable one. However it's <u>not</u> an honourable one. What Les Pas is proposing – I'm going to be very careful here – is just extracting the Michael. I could put it a lot stronger but I think you know what I'm getting at. Senator Walker was asked last week – in fact it was me that asked – if he'd go back to Les Pas with a view to a compromise but he's refused. Now I believe if we vote against the proposition, I have no doubt that Les Pas will seek to renegotiate – I've no doubt about that at all – they know the risks. Now when I say the taxpayer, at a huge cost, has reclaimed a considerable part of the Foreshore now to allow a group of businessmen to come in, and not only to take a sizable chunk of it, but also to be given a bag of goodies to my mind is not acceptable. Now one of the first e-mails I sent off, was to the Public Services, requesting the cost of tipping charges. After some time, I was told that the figure would be in the region of £100,000 depending on the amount of toxic found. Now if you read the P&R Minutes, you'll see that they've mentioned £180,000 and following questions from Senator Le Claire, we were told that it could be in the region of £320,000. But following a supplementary question from me, we were told of course that figure could now be doubled! But of course we've also got to add in the unknown – and that's the toxic ash. So can I ask how could P&R agree to such an open cheque? We don't know how much on top of that we're going to have to give. There's also the issue of permissions which were given by the three Committees and they were touched on yesterday by Deputies Fox and Breckon. I ask, what's the purpose of Committee policies if they can be overturned at the behest of P&R and Les Pas? It was most disappointing yesterday to hear member after member justifying their support in the public interest. Now would I ask, will they be so generous with consents to Joe Public when he comes along asking for a similar favour? Now I would hope that on reflection, those members will reconsider the merits of surrendering to Les Pas and P&R and on a free vote, will vote in accordance with their Committee policies. Now much emphasis was being placed on

the Crown and the States' costs. Presumably P&R will also incur similar costs. We are told that the projected cost at the end of the trial in the Royal Court will bring the total to about £3m. and again, Les Pas were going to have similar costs. Hearings to the Court of Appeal etc.. could double and so too will they be for Les Pas but do we know whether Les Pas will really want to go that far down the road? Now I'm beginning to believe that the Court costs are really a red herring and there's something being hidden from us because really, the Court costs just don't add up and what I really would have liked to have found out is what the truth is and I've not been able to find out is what the truth is. And I've not been able to find out, is it the perceived costs or is there really some claim now to Les Pas that we've not been told about? And there's one thing we've not been told about and that's whether P&R would have sought a settlement if it had succeeded in getting its security of costs. And if the answer is in the affirmative, then why are we looking for a settlement? And again, I would look for the answer when the President sums up. Sir, it's been clear that there's no killer punch has been found – and this was mentioned by Deputy de Faye last week – but I'm not convinced that the odds are as portrayed by the Crown Officers. Neither am I convinced that there's legal justification to concede and I certainly can find no moral grounds for doing so either. Thank you.

Senator Norman

Sir, may I propose that the défaut on Senators Kinnard and Ozouf be raised?

Greffier

Yes. It is proposed that the défaut on Senators Kinnard and Ozouf be raised. Those in favour – those against – the défauts are raised.

Deputy Ferguson?

Deputy Ferguson

Thank you. As with several other speakers, I feel that, you know, we are in danger of losing sight of the real issue. It's very tempting with 20/20 hindsight for all of us to indulge in a moanfest of mutual recrimination blaming our ancestors, blaming retired members of the Assembly or present members of the Assembly, or even, no doubt, the phases of the moon. I think we must keep our eyes firmly on the ball and leave such indulgences for the Commission of Inquiry. I agree – I hear a lot of fighting talk – well – quotes from Churchill – you know "we must fight on the beaches" – I would remind members that Churchill also said "jaw jaw is better than war war". I agree with Deputy de Faye that this must be viewed without the emotional baggage which has been brought into the arena – yes I do feel as if I'm being blackmailed – I loathe being pushed into a corner. I'd like to think that it was somebody else's corner but I've always voted in elections so I must take responsibility for my contribution to this brouhaha. As I said, I don't like being pushed into a corner but this – and I apologise to Senator Edward Vibert – this is the here and now and we must make a decision. Compromise is not capitulation. As a simple engineer, I looked at the problem from the basis of the facts. I had too many queries before the debate came up Sir, one, the question of the movable land, which did confuse me – I hadn't quite come to terms with it – it's somewhat character intuitive but the Solicitor General explained it very clearly and no doubt, eventually, I will come to it. And the other thing – and this is the one that my electors come to me with – is why the advice changed. I went to see the risk assessment by Advocate Binnington held at the Greffe on Monday – it took me sometime to get through it, a couple of hours or so, but having read the papers I <u>do</u> understand the reasoning behind the recommendations made and the apparent changes in the legal advice - these are all very clearly set out in the risk assessment. I also looked at the individuals who will be taking part in the case, you know perhaps is a secondary matter but these are all things that you look at. You look at the quality of the management, as well as the facts that underline the case. We have an experienced, able litigation Advocate and a highly competent Solicitor General representing the States. On the other side, we have a bright young Advocate, who because he is new and young, will want to make his mark. We also have a wily old campaigner, who is apparently known for his persistence. But

the real complication comes when we consider we also have a Judge who has commented that there are issues to be resolved. These are all matters which have to be taken into consideration, and in the vernacular, "this ain't going to be no walkover". I also looked at the figures involved. I don't have perhaps all the details but one has to make assessments, usually in life, based on incomplete information. If you've got certainty and complete information, then you are dealing with 20/20 hindsight. So I made some estimates and looked at the expected costs of the settlement, compared with the expected costs of the various outcomes and the sums just don't stack up. The settlement gives us the luxury of certainty rather than the uncertain progress of a prolonged court case. Yes, there is pressure from some of the electorate for us not to settle – indeed it would be simpler and a great deal easier for us as we would merely abrogating our responsibilities and transferring them to the next generation of States members. By the time the results from the Privy Council appeals are known, we could all just sit back and blame everyone else, just as the previous generation have been doing. But this is not why we were elected. We were elected to take decisions in the best interests of the Island. I am here, I am sorry to sort of go along with other members – I'm here as a trustee for the future of the Island and I am not prepared to sacrifice it on the altar of an emotional populist appeal. But if we do decide to settle, as I think we must, we must make sure that there is no possible way in which we can be entrapped like this ever again.

Deputy Le Hérissier

Thank you Sir. It's one of the phenomenas of this debate that everyone is calling themselves, or the other side, emotional and I think that's totally misleading. I think, Sir, I will address some of the excellent issues raised by Deputy Ferguson but what appears a rational case in my view, is as emotional as some of the other cases that have been presented here in the debate, so we'll come to that. First of all, if I can go over some of the key issues, the nature of the legal advice – there's been a lot of talk about , has there been incompetence or hasn't there been, and I think there's been an over emphasis on that quite frankly. I think people have worked in a very murky area, I think people have worked in an area where it's very very difficult to get precision and so forth and delving into history. And while I'm not benign about what happened, I'm not sure incompetence has occurred on the scale some members have intimated. So that brings us then, Sir, if there isn't a cock up, is there a conspiracy at work? And again, I don't think there is – I think the explanation is much more banal, that the thing floated along, there wasn't a deep sense of urgency, people were lulled into a sense of complacency and then all of a sudden, people woke up and thought "heavens, we'd better take this seriously because the other side seem to be taking it seriously" and as the Deputy of St. Martin said, there's a change in the chemistry in terms of a new chief negotiator so to speak. So, I think maybe although it's good fun to run down that path – I'm not sure it goes to the conclusions that people like Senator Ted Vibert would be seeking but Sir, there is a major issue because it was presented in very – quite rightly, obviously last week was largely about the legal advice – but there was Sir, an undercurrent of confusing, deliberately confusing or conflating, legal advice with political considerations, as Deputy Breckon said in his presentation. And we are allowed Sir, and indeed we're enjoined to analyse the case, to see where the gaps are in the case and we are indeed Sir, expected to act – for want of a better term – as intelligent clients. So some of the righteous indignation that's come our way for daring to question, is I think, misplaced. However, in no way should we think ourselves as surrogate lawyers simply because you can add eight views on a question – it doesn't mean one eighth of those views is going to credibly come from within this Assembly – it doesn't quite work like that but some people are working to that logic. So there is a difference, and there is a need to separate out the legal advice and the political issues and that's where I thought, for example, say people like Deputy Crespel, who made a very passionate speech, were barking, in a sense, up the wrong tree because there are political issues as the Deputy of St. Martin said. For example, why did heavyweight political, sorry, legal, officers, attend the Planning and Environment Committee when the issue of the underground car park *et al* was discussed? One would have assumed that it was a normal Committee but it was quite clear that that Committee was under an enormous amount of pressure and it was under this pressure because we did something Sir which was absolutely in my view, as Deputy Fox said, utterly untenable – we crossed a line – we crossed a Rubicon. We said, because we the Government happen to be the other negotiating party – the opposition said "we therefore, as part of the deal, will expect you to change certain policies in favour" and that strikes me, Sir, as utterly untenable in any situation and why was a

line not drawn in the negotiations and people told "I'm sorry, we don't mind having negotiations – we know it's going to be a rough and tumble but we as the government, have to be seen in the way we apply our policies to be utterly impartial and we cannot give you special favours in that regard. That is a line which should never have been crossed so, to answer Deputy Ferguson, yes, we will fight them on the beaches but that is a negotiating line that should have been established and should never have been crossed because by crossing it, Sir, people like us, who have to go to people and justify *ad nauseam* plastic window decisions and extension decisions and so forth, and I have another letter for the ever flexible Deputy Hilton to address on this issue. People like us – what are we going to tell people Sir? Oh, if you are a big corporation or a big company, you can get your own special rewriting of the Planning Laws and policies – it's absolutely untenable and the line should have been totally drawn. So Sir, that to me is why there are major political issues. And there are other issues Sir which I shall come to at the end. Another, Sir if I may switch to a few detail points, Senator Walker compared it to the fight for social security but of course there is a major difference, as I think again Deputy Breckon tried to intimate – much as I disagree with his overall strategy of taking on C.I. Traders, I should add, but there is a major difference in that the populists, in that case, did not have the moral high ground in social security, the moral high ground was held by the Le Feuvres of the world, the Senator Le Feuvre and so forth, who were fighting for social security against a very angry, largely rural, community. It was a much different kind of scenario from the one with which he's tried to make a comparison – all he's saying is simply – if you're in the minority fighting against a large number, an apparently large number of people – then by definition, morality's on your side! Well of course, that's not the case. It <u>may</u> be the case but it's <u>not</u> necessarily the case and that is what he was trying to intimate in this situation because we're under siege and we're a small group – look how brave we are. The line that was picked up Sir by Deputy Ferguson – mistakenly in my view. We've also had the view from two very different sides which while not germane to the major argument – it's a myth that should be punctured – this view that Deputy, sorry Senator, sorry Advocate Falle had this wonderfully visionary view of Havre des Pas, which not everybody shares by the way – I don't think everybody bought into the idea that it should become a vast marina, but anyway, he had this visionary view that was put forward by Deputy de Faye as Senator Vibert's and these naughty States and some political shenanigans took place and since then he's been trying to rectify this apparent injustice. Well I think, and it's used in an argument to say "well why not let the other side win because historically they have grounds for winning" again totally fallacious Sir – that is in the past – that was dealt with rightly or wrongly at the time and it will no doubt come up in the Committee of Inquiry but I think people are very misguided to go down this view because Deputy de Faye developed this idea, albeit using excellent debating skills he says inherited in part from myself, he developed this idea Sir, to suggest, well it will be a quick deal and in any case, you know he was right, in any case with his original vision – you know, yes there might be some nasty people around but at the end of the day, what's a few million between friends and we'll all win. And I think Sir, that is totally totally untenable and again, misusing that bit of history. We then Sir, have Senator Philip Ozouf talking about the rôle of Channel Island Traders and it's no doubt Sir, formed a convenient demon, probably been over demonized but we in the States always do like a demon because we like to personalize issues – that's the issue I'm afraid. And he said we are in a sense, he intimated, we were lucky we were dealing with a local company. But of course Channel Island Traders, as the Deputy of Grouville mentioned last week, has reincarnated itself from a local company – that is essentially, increasingly, or not essentially but increasingly – a charade. It's run by people who didn't grow up emotionally and historically with the company and now have very different interests to those you would typically associate with a company that is well rooted in the local community. So this idea "you'd better support them or you'd better look at them more sympathetically because you could be dealing with wicked anonymous capitalists from outside the Island" is again totally fallacious – it's again, totally fallacious. But Sir, so those are some of the individual points – I don't want to dwell on those because they've been dealt with by people better than myself – as I come Sir, to the overall conclusion, there are broad issues here and I'm hoping I will take away some of Senator Syvret's thunder and shorten his speech in the process, there are broad issues Sir, at work, for example, one it slowed up and this is why the people who said, you know, it's terrible - like the Constable of St. Peter yesterday said "it's terrible what's happened but I have to support P&R because we've got into this mess as the Deputy of St. Martin said and we've got to dig ourselves out quickly". But there are real issues about conflicts of interest that have been raised and some members

can't get out of bed in the morning Sir without facing a conflict of interest these days – that's how serious the situation's become. There are serious issues Sir – not to do in my view – they might be but I simply haven't got the evidence despite the very thorough way in which Senator Vibert was leading to a conclusion, although I don't think it ultimately was proven in the end of the day – but there are serious issues Sir about the rôle of the Crown Officers, I mean in a constitutional sense, as opposed to "was this person competent or did this person do this on that day" and so forth and so on. But there are very serious issues and of course there's the broader issue of the rôle of the Crown. Now we're told Sir that ultimately the Crown is responsible for the good government of the Island and I assume Sir that's why Mr. Shenton has, in my view, misguidedly, has gone with his petition to the Crown and said "look they can't sort themselves out, they've dug themselves into this terrible hole, please Madam will you rescue us?" I think that's the wrong approach but it does raise this issue Sir, who is responsible for the good government of the Island and what is the definition? And quite frankly, quite frankly, there was a large article for example, in the Independent yesterday about this situation – people are going to ask whichever way this goes, even if we do follow the likes of Deputy Ferguson and take the pragmatic route or Deputy Crespel – they're going to ask why did we get into this apparently Mickey Mouse situation where feudal laws can be dragged out of obscurity and governments can be held to ransom and almost brought Sir, to the brink of bankruptcy! How on earth could a situation escalate this far? And people will then Sir, ask the question – which I didn't want to be asked by Mr. Shenton – but he may be right, much as I disagree with the route he took. What is good government and who is in charge of good government and why is this situation being allowed to run out of control? So even though it may be history, these are very very pertinent points. And the last general point that will arise Sir, is the issue of the detachment or the interconnection, depending how you see it, of business from, and with, government. Are the two separate? I think on a slighter side Sir, a lot has been said about Mr. Scott and what a tough negotiator he is and so forth and so on and again, I think that's probably overstated. I think Mr. Scott is probably asking himself – he may have run an excellent, I think, plant hire company in Britain and so forth and may have initially come to a quiet retirement in Guernsey and then realised there were economic opportunities available – but I think Sir, in his more reflective moments, he's probably waking up to the fact – not that he's got these people over a barrel and he's going to take them all away and back and get as many millions, hundreds of millions out of them as he can. He's probably realising that the political consequences of doing this will be utterly, utterly counter productive and that it will make his position, on the Island, ultimately untenable or in the Channel Islands – ultimately untenable because he will find, the feelings, the issues and the action that the government will have to take to close off these problems in the future, will ultimately act against him. It won't be social ostracism – it will be a developing phenomena and he will find his position ultimately untenable. And there's been a lot of talk in previous years about tough business people coming into government but one of the things they find, and I've heard Senator Walker say this in other contexts, is that government <u>is not</u> business – there are different principles at work, there are different issues, and this is an issue Sir, I don't think we've ever learnt fully, here, because of the close interconnections that exist. And that's why Sir, I'm more sanguine about the rôle of Mr. Scott, not that I've read his mind, or not that I know him. But I'm more sanguine about Les Pas – they may possibly take it to the wire but I think Sir, their like us, they will calculate the chances of winning, they will calculate the hassles along the way, they will calculate all the political problems and issues that will undoubtedly arise as part of the fallout of this case, and I think it would be very wrong not to build in that calculation. And I think the people like Deputies Ferguson and Crespel, who've said you know, these are the figures, they've forgotten that there are other figures, there are qualitative issues to factor in, to the final decision! Qualitative issues Sir, about the long-term implications and the long-term costs to the government and while you can take a quick, you know, 40/60 or 45/55 type decision, there are many more factors to be considered and I think Sir, the whole reputation of the Island, the whole notion of what is good government, the whole rôle of business, the whole role of the Crown Officers – all these issues are going to haunt us for some years to come.

Senator Ozouf

Can I raise the défaut on Deputies Voisin and Bernstein?

Greffier

Yes, propose the défauts on Deputies Voisin and Bernstein be raised. Those in favour? Those against? The défauts are raised.

Senator Vibert

…..rise on a point of clarification. I didn't want to stop Deputy Le Hérissier but I seem to get the impression that he gave the impression that I had agreed with Deputy de Faye over the Havre des Pas situation – in fact it was the reverse. What I was saying was that we should not be taking that into account because it was never going to happen in the first place.

Deputy Le Hérissier

I accept that ……

Greffier

Senator Syvret?

Senator Syvret

So far in this episode since this deal was first put on the table, I've been, on the whole, fairly restrained about the comments I made about this matter. I haven't immediately taken a stance that the P&R proposal must be rejected. I've kept an open mind on the subject and I've been available to be persuaded that the P&R proposal in fact represented the deal that was in the best interests of the public and that it was, in fact, the final avenue we could go down – and indeed, I actually made a point of putting that view forward – of actually making that case when we met for the in Committee discussion last week in the hope that the P&R Committee, having heard my concerns and having put on the table what I would need to be persuaded to vote for this deal, they would come to the Assembly today and actually explain in detail why this was the final avenue we could realistically go down, and all other options had been exhausted and that this deal was in fact the decision that was in the best interest of the public. And so far they've utterly failed in fact to have taken up the opportunity I gave them to have made that case. In essence we have heard from the members of the P&R Committee and their supporters, during this debate, in essence the same kinds of arguments that they've been deploying over the recent weeks and indeed in the Committee discussion. So we've had no case put to us that explains why this Assembly could vote in favour of this proposal without, for example, of having the opportunity to question Advocate Binnington, without having a written opinion, perhaps from some independent legal advice, as to why we couldn't pursue avenues such as special windfall taxes, why we couldn't employ retrospective legislation, why we couldn't in fact have sought to have this matter struck out. All of these type of issues we need to have explained to us and I think members have to think very carefully before supporting the P&R proposal that when you explain your decision to have done so, to the public, to your electorate, you will have to say to them "well, it was the last realistic path. It was the only option really left to us and it was the sensible course of action". And we're not in that position! It has not been demonstrated to us. We have not even had the opportunity, as ordinary members of this Assembly, to question Advocate Binnington over his assertions and indeed, his performance. And frankly I find that staggering that members can even be contemplating voting for this appeasing deal without having had that opportunity. It just won't wash. It doesn't wash for me and it won't wash with most of the public. I think we have to consider the deal that's been put before us and I will deal briefly with the arguments put forward by Deputy de Faye and I think there were, in essence, three core points to his speech. The first was that the original scheme for the village and marina development down at Havre des Pas was a good scheme, would have been an asset to the Community to have it done, especially by private enterprise and it would have been done much better by that private enterprise and it would have been infinitely preferably to the mess the States have made west of Albert. I was opposed to the Havre des Pas scheme, at the time, for

good environmental reasons but with the benefit of hindsight, having seen that the mess the States made of their land reclamation scheme and yacht marina, I can see, actually, that with hindsight, that would have been the case. And if I had known, then years ago, twelve years ago, what the States would do, I would have said "let's go with the Havre des Pas scheme". But is that particular argument of any relevance to the decision we're making today? No it's not. But then the second part, the core of Deputy de Faye's speech, is that we're faced with a 60/40 chance and we're gambling, we have very high stakes of losing, very high stakes should we lose but comparatively little to gain in return should we actually win the case. But I think there are a number of really fundamental problems with that view which I don't think we can skirt around in the name of politeness. I mean, I think that view, the 60/40 argument, the risk analysis, all of these kind of arguments, but actually based on legal advice, legal opinions, which we have to view with extreme doubt in the light of the fact that we are where we are today. Can we be confident, can we stand here, today, and be confident that the legal advice we have received and the guidance we have received from our litigation lawyer has been competent, effective, efficient – no we can't do that – not for one moment. So we're now going to rely upon the same advice, the same judgement of somebody who failed to seek in good time the security of costs action – we're now going to rely upon the same opinion in appeasing Les Pas and giving away a public asset that might be worth, perhaps £10m. – were it to have the same policy decisions on it in respect of planning and housing and so on, and were we to clean out the toxic waste and were we to then put it on the open market, would the 90 'j' cats and 10 'k' cats - £10m. perhaps we could get for that site. And that moves me onto I think, the third part of Deputy de Faye's argument that we are in a win win situation, that we would have wanted some kind of quality housing development down there, after all, that's what it's zoned for so what are we losing by giving away the site and enabling this housing to go ahead in this way? Well there is the small matter, as I said, of possibly £10m. that we could gain from selling the site if we did it with the same permissions that we have quite extraordinarily given in the way that we have done – that's £10m. that could go towards health, education, housing – a whole raft of issues. How useful would that money, for example, be towards enacting ……. for example the Bull report, addressing the growing and serious problem of SEBD in the Islands. That's £10m. that we could have but we're not going to have because of this appeasement. And also think about the nature of the building. Deputy de Faye paints this picture of a nice quality construction down there. This is going to be, if it is built, have 90 apartments in it, 'j' cat apartments, three bedroom apartments, probably with at least two of the bathrooms having – two of the bedrooms having en suite bathrooms – and 10 'k' category apartments, which no doubt would want vast drawing rooms and en suite facilities for all of the rooms and so on. This is not just 90 flats or 100 flats, and 100 apartments similar to the ones that have been built down there by the States, these are going to be 100 very very large spacious units of accommodation. This building, certainly in the winter months is going to block out the sun, from part of that reclamation site. It is going to be vast! It is going to be a titanic structure that will stand down there as a monument to this Assembly's weakness and lack of judgement and a symbol of the abject failure of the people's elected representatives, over the years, in this matter. So before you fall for Deputy de Faye's vision of a nice quality development down there, just reflect upon just how big a block of 100 very expensive top market apartments is going to be. It's going to be colossal! You can forget ever seeing Elizabeth Castle again from this region of town unless you happen to be up at the Fort and even then you might not see over the top of it.

Deputy Farnham

Sir, is the Senator assuming this? Has he actually seen the plans? He could actually be misleading the House.

Senator Syvret

No. I think it's quite obvious that if you're creating a 100 units of accommodation of that size just how big the block is going to be.

So before you put your name, as elected representatives of the public, to such a construction – again as I mentioned earlier – ask yourselves are we really against the wall? Is this the last avenue open to us?

Have we exhausted all other parts – have we asked all of the relevant questions? Have we sought second opinions on the legal case? Have we, in fact, even questioned as ordinary members and fulfilled our scrutiny rôle? Have we even questioned Advocate Binnington, our litigation lawyer? We haven't even done that and yet we're going to be persuaded to say "yes" to this. It's worth reflecting I think on some of the many significant errors the public administration has made in the Island over the years and focusing on the syndrome that always arises when something's obviously gone wrong, mistakes have been made, the issue's been mismanaged – always, always, the powers that be, the relevant Committees, the establishment – call it what you will – always fall back upon the device of trading upon individual reputations. And it's a spin device. If you like it Sir, the old notion of the best form of defence is attack. So if you suggest that somebody, perhaps, may not have got things 100 per cent right and they may have made mistakes, possibly like Advocate Binnington, possibly like the Solicitor General, possibly like the Attorney General, possibly like previous P&R Committees – if you suggest that they've made mistakes and perhaps got things wrong, there's lots of huffing and puffing: how disgraceful, they're wonderful people, they're marvellous individuals, how dare you question them in this way! And of course, it's all just nonsense and it's counter to the public good to allow this environment, this climate to persist whereby you cannot criticise individuals who are human beings and will, as human beings, have perhaps made mistakes from time to time. I remember well actually, and it's worth mentioning, an issue that was debated in this Assembly when I was a Deputy about ten years ago, and the then Senator Nigel Quérée attempted to unseat the then Public Services Committee, whose President was the then Deputy John Le Gallais, and I was resigned from that Committee and supported the attempt to unseat it – principally the reason for getting rid of it was that the Committee was not questioning the advice it was getting from its senior officers – advice that was demonstrably wrong, just reading the most rudimentary text books on the subject of toxicology – and they were continuing to just chuck casually hundreds and thousands of tons of toxic incinerator ash into the reclamation sites and even though the case against the Committee was cast iron and no argument was able to be put forward to demonstrate well actually these text books were incorrect – cadmium is not in fact toxic, not a human health hazard – the mood of the Assembly was "how dare you question this fine Gentleman John Le Gallais, he's a wonderful man, been a staunch pillar of the community for many many years, marvellous chap you know and he's going to retire soon you know and it's simply not fair to behave in this way and to treat people like this". And it was that syndrome, I'm afraid, that arises every time in this Assembly when something has gone wrong. It's the same with all of the capital overspend disasters, then this trading on personal reputation and this notion of oh how dare you, how dare you criticise people. It was the same, cast your minds back to a more recent example and the fiasco of choosing a developer for the Island site. Then it was "oh what a marvellous chap the Chairman of WEB is, pillar of the community, wonderful man, total respect for his judgement, how dare you criticise it, blah blah blah, and it was the same syndrome then. Well if we're actually going to advance the quality of government in the Island, we have to crack this syndrome and start being prepared to actually, be rationally and fairly critical of people where individuals may have made mistakes. And I think when we look at this situation as a whole and reflect upon the path it's gone down over the years, there is simply no escaping the fact that legal and political errors have been made – it's blindingly obvious, over the years, the Crown Officers have made some mistakes, our litigation lawyers have made mistakes, the politicians in particular have made mistakes and I don't think, for that reason, it's particularly convincing of this P&R Committee and Senator Walker to say "oh well we are where we are and this is a mess and it's all the fault of previous Committees". Senator Walker's been Vice-President of P&R for a long time, been a member of P&R, certainly for many years, been the President of the Finance and Economics Committee, which surely must have had some regard for potential financial risks for the Community and yet somehow all of these responsibilities that he has held in the past, somehow, can depart and he's now just the man that suddenly being burdened with this problem as though it were nothing to do with him or his colleagues in the past. Well of course, it is, I'm afraid and people can't be allowed to duck that responsibility anymore. Successive P&R Committees failed in continuing to develop the site, thus raising the stakes and effectively painting the States into a corner more and more although I had correspondence with the Solicitor General in the mid 1990s over this very point and it seemed to me blindingly obvious, just as a lay person, that if you carry on raising the stakes and if you carry on investing, in the area, should you eventually lose the legal battle, the plaintiffs end up owning everything that you've build on it – you didn't have to be an expert lawyer to

think that perhaps there was a risk in the States policy then. I also asked if it were possible for the States to try and force, at that stage, some years ago, the issue to a legal resolution – one way or another, so this blight wasn't hanging over us for years and, yes, it was possible. Now if that could have occurred to me as a lay person, why didn't it occur to the then P&R Committees, why weren't those points pressed by the Crown Officers? This P&R Committee hasn't sought, more recently, second legal opinions. I certainly would never have, as he has done as President of P&R, have brought such a proposition to this Assembly and have put such a burden on my fellow States members, without satisfying myself that this really was the end game and in order to have done that, I would have had this final position, the advice of the litigation lawyer, the risk assessment and so on, subject to peer review. I would have asked a lot more questions about it before coming to this Assembly. And it's quite unforgivable, I would suggest, to have put the Assembly in this position and to have put members of this Assembly in this position without having asked all of those questions and carried out all of those actions first. The legal advice we've had guidance over the years, we didn't attempt to strike the action out years ago and that seems quite obvious to me as a lay person, yet we're told by the Solicitor General in last week's in Committee discussion that our litigation lawyer never advised us to do that. Well, as I said at the time, there is such a thing as an intelligent client – why not seek to do this, why not ask these questions, why not press these matters, why not try and exhaust every possible avenue? Why didn't we seek security of costs many years ago? Why has it only happened recently and even then, when the then P&R Committee decided that they might seek security of costs, was there such an extraordinary time gap between seeking, between the Committee taking a decision to seek security of costs and it actually being presented in court and asked for in front of the court? Quite unacceptable! What about Advocate Binnington's lengthy sabbatical? How was that allowed to occur? Does the Solicitor General have no responsibility for overseeing the performance of Advocate Binnington? The Solicitor General was keen, actually, to refute any responsibility for Advocate Binnington's performance when she spoke, when these points were put to her in the in Committee discussion – I think her comments were "well you know, I could duplicate all of Advocate Binnington's work if you wish me to do but you know, as the Attorney General has said, he wouldn't have a Solicitor General if that were the case". But of course, sensibly that's not what anyone's asking. The oversight that the Solicitor General, the duty of care that the Solicitor General owes this Assembly and the public interest is to oversee the performance, surely, of Advocate Binnington in a way that makes sure that some rather rudimentary questions were asked from rudimentary actions taken and some basic work done, such as seeking security of costs on time, such as commissioning, contracting indeed, QCs, to be the supporting counsel – which hasn't happened and indeed that's going to be one of the very interesting questions that the Committee of Inquiry will have to address, is whether the, why the supporting counsel isn't in fact a Q.C., and indeed whether they've been contracted for the relevant trial period? I'm afraid the rejection of any responsibility for overseeing the performance of Advocate Binnington just won't wash. I know the Solicitor General will of course, when she speaks, reject all this, absolutely. But it just won't wash that there's no responsibility with the Crown Officers for having to make sure that some of these rudimentary failures weren't addressed. And those are just some of the questions that will have to be addressed by the Committee of Inquiry. It will have to be fully open, like the Hutton Inquiry. Evidence will have to be taken under oath as it allowed for under the States of Jersey Law, when you have Committee of Inquiries, with of course the consequence, criminal consequence of perjury, should anyone be less than honest in the remarks they make to that Inquiry. It will have to be properly funded to enable expert witnesses to be called. And it's going to have to address some rather fundamental points about the way this Assembly has been guided and steered by things that have been said to us in recent weeks. There are, for example, two issues which have been put to us, and have been used to influence us very strongly. One is the court deadline, which we've been repeatedly told and it has been emphasised to us that we had to make a decision because the court deadline was looming and it would be extremely difficult and, you know, ill, unadvised, to seek to delay that deadline any further and the other issue, of course, is the way that this comment by the Commissioner, about serious issues to be tried, has been used to imply that this was an opinion of his as to the merits of the Plaintiffs' case. That has repeatedly been implied to us and indeed it was said by the Attorney General, to assembled members at Cyril Le Marquand House when we met a couple of weeks ago, that these words leapt off the page at him – those were his exact words – that they leapt off the page at him, and the strong implication he tried to give members then was that this ought to be interpreted and

perceived in some way as a kind of opinion as to the merits of the case. Now most members were there, they will remember that quite clearly and indeed a similar emphasis has been placed upon those words in this Assembly, both in the in Committee discussion and indeed in this debate. Now that judgement is in the public sphere, so I've actually asked other people who know about law, what they think – whether they think those words could be interpreted as being in some way, indicating support or some kind of recognition for the robustness of the case of the Plaintiffs – absolutely not! It is complete nonsense and frankly, it's brazen misleading rubbish to have suggested to members that those words can be taken to indicate the weakness of our case and strength of the plaintiffs'. Absolute rubbish and we, at Cyril Le Marquand House and in this Assembly, have been misled by that assertion. Absolutely misled. Likewise the issue that the court deadline is somehow something that's an insurmountable obstacle, almost, that has been implied to us – complete rubbish! If we did, what I think we probably ought to do now, and sack our lawyers and tell the court that we have donE this, because of these grave errors, there's no question other than that the court would give us a further adjournment – six months, whatever, to brief new lawyers – no question whatsoever. It would be extraordinary, absolutely extraordinary in those circumstances, for the court not to allow us a further adjournment. So to suggest otherwise is demonstrable nonsense. We have to, before supporting the deal today, have to have satisfied ourselves of a great number of questions. We need to have had, I suggest, a second opinion, upon the work of Advocate Binnington – which has, let's face it, significant question marks over it – given his performance in a number of spheres. We have to have, I suggest, taken some kind of specialist advice on the possible human rights implications of retrospective legislation annulling these rights. We ought to have looked at the possibility of windfall taxes and again, have taken some specialist advice on this question. We have to satisfy ourselves of Advocate Binnington's robustness on this issue. We have to have, as individual members have had the opportunity, to question Advocate Binnington and ask him to explain his case. None of that we have done. We haven't satisfied ourselves on those questions and the P&R Committee hasn't done those things, totally, in terms of the second opinions and we haven't had second opinions and we haven't even had the opportunity to question Advocate Binnington on this matter. And frankly I do not think it's going to be remotely credible for this Assembly to vote in favour of this appeasing deal without having done rudimentary initial work first, such as questioning the litigation Advocate. To proceed to agree with this deal today, before it's been demonstrated convincingly to us that it is in fact the last option, would be to cave in and effectively to bail out a P&R Committee that's made regrettably another very serious set of political errors. I honestly don't think the Assembly has any choice credibly, other than to reject the deal.

Greffier

Deputy Baudains?

Deputy Baudains

Thank you Sir. I'd like to preface what I'm going to say with a few health warnings and that is that I'm fully aware that no court case is ever certain. I'm also fully aware that we simply can't afford to lose because if we do, Les Pas will own the foreshore. And I'm also aware that only a fool, or a very rich man who can afford to lose, goes to court simply on a matter of principle. It's never worth the cost. Sir, I'm not advocating fighting a moral battle from an emotional view as some have. Also, as far as I'm aware, I've never met Advocate Binnington, nor am aware of his competence or otherwise. I make those qualifications Sir simply because I don't want my views misinterpreted or dismissed for the wrong reasons. I also have a few comments Sir. And clearly it's Policy and Resources job to act on our behalf in this matter and accordingly their job has been to cut the best deal they can if a settlement is to be the preferred course. It was then Sir up to Policy and Resources to explain it all to members. It's not their job to pressurise members to accept the deal which I believe they are. Deciding whether to choose this deal or to continue with litigation is the job of all States members according to their conscience. Sir, I was one who started out supporting this deal after the meeting in Trinity but I've become increasingly suspicious as we go along. First we find that Policy and Resources haven't given us the whole truth and nothing but the truth. I believe they denied trying to bury bad news and denied arranged the timing so

that members couldn't ask questions. They inferred that Advocate Falle had been frustrated by politicians over his Havre des Pas scheme when it transpires the marina project didn't proceed because of Planning difficulties and because apparently he'd failed to get the Crown signature on his application which I believe further strengthens our case in the matter before us today. In fact I believe I've learnt a lot more from other members' research than Policy and Resources – we've had to fight to get information and that can't be right. Frankly I'm becoming disillusioned with this process. First I got the impression they're leaning on us to accept this out of court settlement as I just mentioned. And then over the weekend, I presume we all had a letter from Mr. Maltwood, Chairman of the JEC, writing to us – apparently on behalf of the oil companies also, encouraging us to accept the deal. Well Sir, we as owners of the JEC, are fully aware of the claim and the ramifications of losing, so why did he write? Given the connections between Policy and Resources and the JEC, I can only presume the letter was solicited – I hope I can be advised otherwise. And now Sir, I come to whether or not we should agree this proposition and settle out of court accordingly. And having listened carefully, as no doubt other members have, to the advice we've received over a day and a half from the Solicitor General, the issue seems quite simple and clear. That the original advice was from an impressive team assembled by Mr. Sowden, including a Queen's Counsel, a specialist in feudal law, Miss Stéphanie Nicolle, and a team of distinguished academic lawyers and historians, who came to the conclusion that the claim was entirely without merit – so clearly there was an accumulation of evidence against the Les Pas claim. And a later reassessment, as we have heard, came to the same conclusion. In November '93, Mr. Sowden described the claim as entirely without merit and a nuisance taking up a lot of time. In '94, Advocate Binnington stated that the claims of the plaintiff were superficially attractive but when examined, fall away. The discovery of documents we've heard threw up no surprises or strong points against us. And apparently no documents discovered to date, have either. In' 97, Les Pas requested discussions on settlement. Also, Advocate Binnington stated that discovery had shown no evidence of ownership, so the Les Pas claim was still unfounded. In 2002, application for security of costs was made and now Advocate Binnington suggests there is a real chance of losing. As I see it, the only substantive issues that have changed, since it was decided that the Les Pas claim was without merit, were that firstly the application for security of costs was rejected – partly because the application was made too late – and secondly, an application to have the case struck out was not made. Apparently, as I understand it, thereby giving some credibility to the other side. I'm no lawyer but I believe both actions, or inactions, were mistakes. However they are only, barely only material changes, and do not apparently count for a great deal. As others have adequately explained Sir, nothing of substance about our case has changed – unless there's something we're not being told. The reference that the Crown's preferred option has been to settle out of court in the past and that might prejudice our case, is hardly recently discovered news Sir. So presumably that was assessed by Mr. Sowden's team originally. So the advice on the claim's merit, on Les Pas' claim, has remained constant for a decade until Advocate Binnington changed his opinion. As so many other members have asked, why did he, when nothing material has changed? Well Sir, I'm not one to shoot the messenger simply because the message is unpalatable. Neither am I, I'm wise enough to select the opinion I prefer and discard all others. But what we have before us are two wildly differing assessments of essentially the same case. One says the case has no merit, the other, we only have a sixty per cent chance of winning – which yesterday apparently changed to 55. Which is correct? If it is the first, then litigation must be our preferred option. If it is the second, and clearly this is the proposed deal, is the best option. Which is correct? Sir, the original opinion was made by a distinguished team, including well respected Queen's Counsel and this opinion was repeated for ten years. Last year's change of opinion was by Advocate Binnington. Perhaps with some limited assistance. Certainly not with a team of the quality previously employed. I therefore come to the conclusion that what we have now – the opinion we now have – is not an opinion of the strength of our case but an opinion of our Advocate's self-assessment of success. Could it be that the decision to capitulate has already been made and Advocate Binnington's comments reflected that? Why else was our team scaled down? I therefore suggest Sir, without any knowledge whatsoever of his ability, that either he's not our best man or else he's under resourced and needs assistance. I was very surprised to learn from our Solicitor General that we hadn't retained any Queen's counsel for the trial – surely it would be normal to do so. Either way, I'm convinced Les Pas' claim remains extremely weak and I can't believe they don't know that themselves. After all, according to our Solicitor General, it was they who approached us to enquire about a settlement. Sir, I'm somewhat

surprised by the tone of several members yesterday. It seemed they were talking down our case and imagining all sorts of disasters instead of what I prefer to do, and that's to put ourselves in the opponents shoes and focus on how weak their case is. We would be doing the Island a great disservice by agreeing to the proposed settlement. It is not Sir, an insurance, an illusion some have comforted themselves with. This deal will not guarantee, according to the legal advice we've been given, that no further foreshore claims will be made. Only, I believe, that they will be highly unlikely – about the same odds I'd suggest to Les Pas winning the current claim. Also acquiescence now would send out a signal to others that the States, Sir, appear to be pushed around. Planning decisions or whatever – if you don't like the answer you're given – go to court - they'll cave in. Insurance Sir, is never what it seems. The world is full of complaints from people not getting the compensation they thought they were entitled to under the insurance policy. Only this year I cancelled my motor insurance, one I've had for many years, and replaced it with other policies at around a quarter the previous cost – so much for insurance. Let's not fool ourselves Sir that this is an insurance. It's more akin to blackmail because there are further instalments to follow. Who knows what further costs await us. Toxic ash disposal is just one. What about the knock on effect of Planning's precedents? And for giving away property worth between £10m. or possibly £20m. depending on who develops it – if we were to retain the land and develop it ourselves – I've no doubt the profit we'd make would be nearer £20m. than £10m. – plus other sweeteners. It's simply not on for such a weak claim. There are Sir, two options basically, with the possibility of a third, the way I see it and that is either to settle on this proposition, to go back to court and fight all the way, or to settle later on. I'm absolutely sure, given the facts of this case, that the last two are the only options we should consider. Let's face it Sir, the de Carteret family would have been best placed to know whether or not their fief included ownership of the foreshore. That they didn't act over the centuries when development was taking place, and ultimately sold the fief for £200, speaks volumes. Had they known that the fief meant 'ownership', they would have taken care of that asset over the years and not let it trickle down until it was practically given away. I'm as certain Sir, as it is possible to be with any court case, that we will win. This is a gamble. Settling is a gamble when in all probability we have given away real estate we didn't have to and shown the world that when it comes to a fight, we haven't the stomach. The legal bill Sir, to-date, is lost, regardless of what we do with this deal. So the £10m or £20m. worth of real estate, to save a possible future - £3.7m. has been estimated – legal bill is just not on – the people of Jersey deserve a better deal. And I have no qualms whatsoever about the strength of our case and the need to reject the proposed deal. Like Major Peirson, I don't intend capitulating – especially given the odds. I'm sure Sir, that Policy and Resources negotiated the best deal they could – I don't dispute that. What I'm saying is that I believe they've been mislead into thinking our case is weaker than it actually is and there is actually no need to negotiate a deal. Also Sir, I am advised many people in businesses are now boycotting Channel Island Traders. This will add pressure but it will be to no avail if we throw the towel in now. That pressure needs time to work to our advantage. Sir, it has been said that Mr. Scott will not get nervous – that may be the case Sir, but it may not also be the case of his shareholders. Clearly we can't change laws in mid stream as our Solicitor General wisely advised us last week and we wouldn't have time, another one simply wouldn't have time to prepare and would also, very likely, give a dangerous signal to the opposition anyway. I believe what we must do is reject this deal and instead arrange for Advocate Binnington to get all the help he needs to fight this case properly. That he is virtually single handed, is a scandal that compounds the mistakes which have got us here in the first place.

Greffier

Senator Le Maistre?

Senator Le Maistre

Sir, I'm taking a somewhat simpler approach to the question. I think first of all we all recognize that the public is very angry and in my opinion, quite rightly so. We need to analyse perhaps a bit more carefully what the public is angry about. The manifestation of anger is very much ugly, focused on what the public see as the bad side of big business. There has been, for quite some time, a perception that increasingly

big business is controlling the Island. Now we're not unique in that, as a community, because in many many places larger than us even, there is that perception. But unfortunately, when it manifests itself in this kind of example, it really enhances that perception and the public now feel that actually big business is not only controlling the Island commercially, but it's actually controlling it at government level. And I would urge members to be aware, whichever way this goes, of the probable fallout, would be quite significant. I don't believe, whether we decide one way or the other, that actually there will be no consequences at all following the decision. And of course, the Connétable of St. Peter – I thought – put it absolutely clearly when he summed up what the situation was, at the time that he was involved, in the question of the reclamation sites etc. And he, at that time, as indeed others, urged or fired warning shots, and of course there were dismissed as being – trying to prevent progress, you know – stick in the mud etc. What this demonstrates is that we have been failing in the past on the question of scrutiny – no question in my mind and I've had that feeling for quite some time – but whenever one has sought to oppose something, usually if the argument itself isn't attacked, then the person is - or certainly, we're accused of being wreckers, that's for sure. But certainly one isn't given the credibility of having access to the information which is needed in order to arrive at a balanced view. And I think that that has been a failure of the previous system but of course it could have been introduced a long time ago, to get that balance and to give an authoritative balance of the information being made available to States members. I believe that when the reclamation sites started, the States was quite correct in resisting the claim and was quite correct in following the advice of the legal people involved at that time. But as the project developed, I think the States were possibly misled by not having full disclosure of advice. And I believe that the decision that we're faced with today was largely, has largely been caused by the fact that advice was not taken when it should have been. In my opinion there was an error of judgement - but actually it was worse than that because I believe that the States was not given all the information which it should have been given – should have had access to – at a time when it was being asked to make important decisions. And the first time that I have seen that advice – maybe I could have researched it and obtained it – was actually in the papers that have been given to us. And to me, that advice was pivotal in terms of a direction chosen by the States at the suggestion of, recommendation of, P&R. And a course of action was taken which inevitably would lead us to today. And that advice is contained on page 6 and 7 of the bundle before us and it was – it's been quoted but I feel it's important to quote it again – at the bottom of the first paragraph – the advice is "it would not in my opinion be prudent or sensible to continue with those schemes without taking a decision on one or other of the following options". And then followed on, on the following page, the fourth paragraph down, 2nd line "Another factor is the risk of failure. The risk as advised above, is small. But the consequences of failure would be potentially catastrophic". The question I'd ask now is "was that information made available to States members at the time that the States was asked to approve the various developments which were proposed on the land which is being challenged"? If the States <u>was</u> informed of that, I certainly never saw that advice because all it did was reinforce the very questions that both myself, Connétable of St. Peter and many others were raising at the time. In other words, what risks are we taking by building on this land, whilst it's a green field site frankly, the value is pretty poor – in fact, all the value is the investment that the States has made in reclaiming that site. <u>Vast</u> areas actually. Who in their right mind would start building on a site, any site, any where, in a field, if they knew that that field had a challenge of ownership on it? The first obvious thing to do is to sort that out. You go and build your first time home on a plot of land that you thought you owned but actually the neighbour said you didn't – or whoever. It's just so basic – it's daft. But of course, those of us who raised those questions were shouted down, literally. We were told that we're not progressive, trying to hold things up, think of all the people who need the homes, you know – all the pressure that could be piled on us, was. And it seemed to me that the voice of reason was just pushed aside. It was expedient to keep going – we needed all these things. I remember distinctly saying "the risk may be small but the potential of losing would be disastrous for this Island". So inevitably, Sir, I feel that we were misled furiously and surely, if there is to be some kind of inquiry, my concern with inquiries is that they usually whitewash over the cracks. But if there is to be an inquiry, I don't want individuals named but whether it's Policy and Resources or which ever Committee, it's a continuum – they have to accept that responsibility. Were there errors made? If so, when and to what extent? Problem with this debate is that it has so many angles on it that it's actually relatively easy to be distracted – to feel passionately about having to fight this case and I can actually empathise totally with that. For goodness

sake, let's beat these guys. The problem is that there is that element of uncertainty. Can I face the electorate in a year's time or two years' time and then say I got it wrong guys, sorry. And the cost of that, I'm actually not so sure that it would be in the hundreds of millions but I don't know because without the reclamation, they wouldn't have those properties on it so there's got to be some counterbalance somewhere, otherwise it really is unfair and the law would be seen to be a total ass in that case. But of course who am I to say? Sir, the consequence of all of this is that I am forced into a corner – a corner which I accept P&R have said they're not comfortable with either – but there is a lot of logic in saying: do I state, and do I risk, the potential future of the Island on this decision? Could I really hold my head up high afterwards and say, well, you guys the public said we ought to fight it, now you're going to have to pay for it guys 'cos it ain't cheap. And I fully understand Senator Syvret saying: it's £10m. we could use for health, what about in two years' time, if it went the wrong way? What are the consequences then? I think that that advice of '93, I think it was, 2nd December, whatever it was, 2nd December '93 was pivotal and that is actually what's got us into this mess. Now the problem is, we can actually risk and continue the problems, that's a choice. And I have to respect those members who feel inclined to take that risk because I can sense their anger, which I share, but I believe that there were a series of errors, in the past, which will surely come out in the Inquiry – if they don't, then it is a whitewash. But am I prepared to actually perpetuate that? I think the soft option, in a sense, is to be seen to be tough and to say: no, sorry guys, I'm going to fight you to the end. And I do actually accept that the harder decision is to say: we're going to bite the bullet. And for the record, because this is being recorded, there are many elements of this deal that I absolutely hate. The one is the continuation of big business saying: no guys, we want two floors in the underground car park, and all of a sudden, the policy of Planning is tipped – just like that! Is that fair? Is that fair to ordinary developers and people who want to put in windows that they can't even do. No, no power, no muscle, just go and take a running jump mate – sorry, we're not going to allow that. Ah but this is big business you see. And the other irony of all this is that we created a reclamation site to help the Island with its rubble, to dispose of it. So what are we now going to do? Dig it out and put it in the other reclamation site. And nobody, but nobody, as far as I'm aware in the debate so far has said: how much longer has that second reclamation site got to go? And what are we going to do when that's full? Because we haven't really thought of that. Or if we have then I haven't heard about it. So there's a lot of elements there that could be persuasive to say: this is nonsense. But the consequences of the other side are actually even worse. So it may surprise both the proposers and those opposing, that I will take that view but I believe that actually the sensible view to take, and I will happily defend it publicly afterwards, and the reason I will defend it publicly is on the advice that we have been given. Of course, I appreciate that if, until there is a settlement, I can't use that and I'll certainly respect that but it will come out in due course.

Greffier

Senator Norman?

Senator Norman

Sir, the amount of money involved in this issue is undoubtedly large but the issues underlying the proposition are, to my mind, quite simple – either we fight on through the courts and we win or we lose. That to my mind is a jump into the unknown. And if we win, it's going to cost us millions or rather cost the Jersey taxpayer millions, and if we lose, it's going to cost the Jersey tax payer hundreds of millions – or we settle with the deal that's offered by P&R and it costs us millions – millions that we know about. So to me, the correct course of action is blindingly obvious. But like most of us here Sir, I suspect that if we do fight on, we will win. But there, of course, there's not even a modicum of certainty that that will be the final result and that is because, in my experience, the courts are not interested in the sort of moral issues that have been expounded over the last couple of days. And in my experience, you don't go to court for justice. The courts are interested in law and they will confine themselves to the law in this and every issue they deal with. And in this case the law will be going into virgin territory, territory without precedents, and we will be going to law against opponents with a well earned, a well deserved reputation for stubbornness, for crusading, and now with extremely deep pockets. Now they too, Les Pas too, might

believe the odds are in favour of the States winning but the potential prize of winning, even against the odds, will be too hard for them to resist if this deal is not accepted. Do not believe Sir, let no one believe that they will be running away if we refuse this deal. Sir, a number of members have asked what facts have changed to encourage P&R to strike this deal. Well as far as I know, no facts have changed. In reality of course, facts can never change. Either a fact is a fact or it isn't. There has been no knock out blow by some new evidence being discovered. I suggest Sir, that's just as well because if such evidence was discovered, then Les Pas would be walking away from this deal and fighting us on in court for their potential hundreds of millions. As many members have pointed out, mistakes have been made over the years in dealing with this issue and to my mind, most importantly, we should have applied for security of costs much earlier and I hope we'll be looking at the possibility of pursuing Mourants for that mistake. But whatever has happened in the past, as much as we would want to, we cannot turn back the clock – this deal is distasteful – no question about that. It makes me angry and it makes me sad to be exploited by one of Jersey's own sons, together with a mercenary for the United Kingdom who has based himself in Guernsey. But as I said earlier Sir, the responsible way forward, the blindingly obvious way forward, is to support the P&R proposition and buy the certainty that this Island needs for the Waterfront.

Greffier

Deputy Farnham?

Deputy Farnham

Thank you Sir. Like Deputy Baudains, I think I've managed to remove myself emotionally from the issue but Senator Norman alluded to what a temptation there is to give them a fight. There's something deep down inside me that wants to really stand up to them and I really hope Senator Walker, in his summing up, will put this Assembly totally at ease with the fact that in his opinion, and the opinion of P&R, that there is no way they will back down – he has to be sure and he has to persuade us Sir, that there is absolutely no way these people are going to back down. If there's any chance of an adjournment or new deal, then the temptation to fight I think for some might be too great. Also, just going on a little further, if we do decide to fight and if we do ultimately lose that fight, then realistically, how realistic is the fact that we will have to pay over hundreds of millions of pounds to these people? Is it actually going to happen? It's been suggested to me by angry Islanders that these people simply be in a good old fashioned Jersey way run out of town. Now I don't know how that can be, legally happen, but I would think their positions in society could become so untenable. Is it really going to happen? I'm looking to the Senator to persuade this Assembly, absolutely, that this is last chance saloon for us because that's what we need to hear. I want to move on briefly to talk about the ramifications for the Waterfront because I believe there are great ramifications for WEB, and the members of WEB have been very quiet in this debate, and that's a bit of a shame because I take great interest in WEB, as a member of the Economic Development Committee and especially as the member responsible for tourism – because there are serious ramifications and great opportunities for the Island here and its economy and for tourism and for leisure, and I can't see in the agreement that the Les Pas consortium are being asked to work with WEB. The ramifications for WEB are the timings and the style of the development and perhaps Senator Walker could just give some information about the collusion there would be with WEB and with the potential developers. And also, there are financial implications for WEB and the Island because the fact that, although it doesn't actually change what's in the WEB plans for this site – WEB have plans for housing – this is what Les Pas are going to develop – there are financial ramifications in so far as the profit that will go to Les Pas was actually going to be used by WEB to be invested in the development site for some seriously opportune tourism and leisure facilities. But having said that, if we don't bring this unhappy issue to an end and bring it to an end quickly, my fear is that development on the Waterfront will all but come to a stop because I can't see hotels being built when there are still conveyancing issues and land ownership issues and I think one of the best and most enjoyable speeches of this debate was Deputy de Faye's, who summed it up very eloquently and quite humorously in so far as we can actually look at this as investing in the site which would expediate the development of WEB and from an economic point of view, we all have to be behind that. I think I have a choice of finishing with a Churchillian moment

which I'm not going to do but I will in Deputy Hill's football analogy suggest that at full time we have a draw – we're going into a golden goal competition – we have two subs on the bench, we have David Beckham and George Best – each one representing – we fight or we do the deal. Now if we bring George Best on, it represents a fight and he scores the golden goal, then we're going to look brilliantly but I think we have to bring on David Beckham and play the safe game and although the temptation is there to fight – and it really really saddens me that we have to do this deal. Unfortunately I think it is the only way and that is the way I will be voting. Thank you.

Greffier

Senator Kinnard?

Senator Kinnard

Thank you Sir. Some time ago now, the Deputy of St. Martin said that the facts remain as they were. Yes, perhaps they do but the interpretation of those facts has changed. Facts are indeed meaningless on their own. Their relevance only becomes clear given the surrounding context. I don't particularly like to use extreme examples but there's been much talk about the Second World War and so on, throughout this debate, and just to illustrate the point we might say that a fact, such as between 1940 to 1945 six million Jews died – that's a bold fact but it tells us very little. It has to be placed in the context of the Nazi regime and their expressed policy about the extermination of the whole race before we can give that fact a proper interpretation. It is that context that gives meaning to the facts and it is the same in this situation. The facts of the Les Pas case can only be made sense of at this moment because the context has changed and it's changed significantly enough to cause the legal advice to shift from "the Les Pas case has no merit" to one of the defendant's case – that's the public – only having a marginally better than evens case and a real risk of losing. So why has it changed – there's been lots of comment about this. Well, it's quite clear why the context has changed. There's been the discovery of documents. There've been the skeleton arguments. It's taken time for those to come to light, to be looked at and to be analysed. And the result of all of that process has meant that the odds have changed to something like 60/40 with the costs of winning, even if we were lucky enough to do so, are high - litigation is always ruinous, even when you win, and that's why in the private sector, so many cases are settled out of court. But the costs of losing for us are beyond contemplation. We have to remember that this is not our money but the public's, not our assets but the public's and we as the Deputy of Trinity said earlier on, are trustees of the public's money. While we may admire risk takers in other spheres, particularly if they win, they tend to get sacked if they don't, but we cannot be so cavalier with other people's money and assets – especially when the stakes are so high. How could anyone of us here Sir, face the public if we were to lose given that a decision to fight on would be against all legal advice. Whether or not individual members of this House accept that advice, I think matters not because if everything were to go pear shaped, the fact of going against that advice would be a bat with which the public would beat us repeatedly. But I don't however criticise those members who do seek to take the moral high ground or to play on the emotional aspects of the subject – we indeed in the P&R Committee have been along that particular roller coaster throughout the whole process. We're all hopefully, although perhaps it might be said it's truer of some than of others, but we're all hopefully informed by both our hearts and our heads – one should inform the other but we must be clear when our emotions are getting in the way of acting in the public interest. I agree with many of the points that were put by Senator Le Maistre and indeed with many of the questions put forward by Senator Syvret but in my view, those are matters for the Committee of Inquiry. Where I don't agree with Senator Syvret is where he claims that if we were to decide, if we had the case to do so, to sack a lawyer and get another one to act – that the court would agree to a delay whilst this Herculean individual would get to grips with all of the rooms full of material. I think that is total nonsense. The way that courts tend to deal with these matters would be that the case has gone on for far too long. It's gone on wasting, if you like, resources, and it's far better that if there is a settlement on the table, that it should be settled. I think we just haven't got the opportunity to go there. But leaving all of that aside, I do think we are faced with a very simple situation. We have an immediate political problem and there are two possible solutions. We may seek to stick to our previous approach of

fighting it out but in my view, that kind of approach is based on an idealised notion really of both economic and political life. It gives a false sense of security to ourselves and the public if we believe we can fight on. Because we base it on how we think people should live and how we feel they should live up to their obligations as we see them, towards other people. I know how this feels, how seductive a position it can be because I've been there several times, as I said, while grappling with this issue on the Committee. But I strongly believe that the public deserves better than this veil of, if you like, a simple security blanket. We have seen the breakdown, or the reduction in deference to authority throughout the last decade, to government power, to experts – we're all facing much more difficult, less clear cut decisions to be made, and we're not sure that the public or even our political colleagues are going to agree. So what we find, as politicians, is that increasingly, more and more of our decisions are inevitably based upon a risk analysis. And there obviously are going to be conflicting claims about the nature of that risk – different view points about how those risks are going to be defined. And it is true that we here today, as the P&R Committee, stand before this House with really more or less uncertain factual information about the probabilities. We can't be certain. But none of us can at this juncture – either answer the question, you know – which risk is acceptable and which is not? The risks facing us have to be weighed up by all of us individually and they have to be weighed up against the less favourable odds of the likelihood of winning. We have that real risk of losing and we also have, not just that, we have the risk of the public backlash – and it will be a backlash whatever we do. We are to some extent in a no win situation. And we also have the risk perhaps of some of the comments that have been made about conflicts of interest of members of the Committee and the mistakes that have been made by the P&R Committee, to which the Committee has held up its hands. There is of course, the risk of adverse outside media comments, particularly linked to our conflicts of interests and so on. We're aware of all of those risks but that is the nature of politics in the modern day. But what flack we're going to face now will be nothing, I bet, in comparison to that which we would attract if we were to fight and lose. Such risks may seem like they should be nobody's responsibility but in reality, in the modern world, in the modern political world, we here in the States must be in the business of that risk management – uncomfortable but absolutely true. This new political context also has a new political moral climate which is marked by, if you like, the push and the pull between accusations of scaremongering on the one hand, and of cover ups on the other. But when a risk comes to light, like this Les Pas case, if the risk – not of our own making actually – this risk has originated from the private sphere but we are the ones who have to take the responsibility about how it all turns out in the end. And the reality is that Les Pas, yes it has a financial risk and that's what's bringing it to the table where, as I've said, litigation is expensive and maybe it's better to have a quick win than expend yet more money when they're not certain either of winning their case. They have a financial risk but I doubt that they worry about the reputation aspects that some people have mentioned – I doubt that very much. But we have many more types of risk on the other side. We've got the financial risks, we've got the political risks and we also have the moral responsibility for managing that risk on behalf of the public. Members have spoken about morality, or in fact the lack of it, as they see it, in seeking to do a deal with Les Pas. But what about the moral issues of risking, indeed gambling – which people know I'm not very keen on – indeed gambling with public assets with the odds – which are not, in my view, at all favourable. Deputy de Faye was right when he said "fighting on is the only way we can lose and that this deal represents a win win situation". I agree with him. I often don't agree with a lot of what he says but I definitely agree with him on that. And I think we must be mindful that risks not taken seriously have a canny knack of coming back and biting us and I think that the example of the BSE crisis in the UK in recent times, is one such case where government ministers very much minimized the risk and that was an inappropriate thing to do as it turns out. Senator Syvret's usually very keen on the precautionary principle but obviously on this occasion, it seems that he's not. Others have argued that doing a deal would show a weak government – giving in to big business – I don't believe that that's the case because this deal has been very toughly negotiated on both sides and I do in fact, congratulate both the President and Senator Vibert for the work that they did on behalf of the Committee and on behalf of the Island. We know – we had the blow by blow account – how toughly negotiated it was. But what I would agree with, something that Senator Le Maistre talked of, that what this issue has done for many people is to bring into sharp relief, if you like, openly highlighted the power of the business sector and the power that it can have, relatively, over the hopes and desires of both government and the public. I do have concerns about this wider point and particularly

of the concentration of economic power, in fewer and fewer hands, in our Island. It is true that Channel Island Traders now have a very wide range of interests in the Island but they're not the only large group. Concerns have also been expressed about the effect of a boycott in terms of what that would mean for people's jobs in the Island. This is nothing new. As long ago as 1975, R.H.S. Crossman, a member of the then Labour Cabinet during that time, wrote in his diaries how an oil company was given permission to build an oil refinery on Canvey Island, which at that time, had a lot of resistance from both the party members and the public. What was clear was they got the agreement for it to go ahead. That political decision was taken at the very highest level of elected government – a government with much greater clout than our Island States – although we might not like to have to say that sometimes. But that government felt more or less powerless in the face of the power of that trans national company and it was clear in that example, that the power of the company was political as well as economic and in our context, I don't like the extra car parking, I don't like the luxury categorisation for the flats either but we are faced with the reality of the situation, as unpalatable as that may seem to many of us, what we see here is the representation of the real politic of today. We have to be grown up about that. We have to realise that there's not an awful lot we can really do about that but we have to manage the risks of it. We are, as I said, in the management of risk because at the end of the day, government action is constrained by the wider context in which it operates – by the power of corporations, by the power perhaps of pressure groups on other occasions – together, we of the government face a lot of uncertainty, and we're going to face particular areas of uncertainty in this subject area because we've got the uncertainty of the common law. We've got the risks of the adverse, potentially adverse court decision. And what that means is that what we would like to be can't actually be. We cannot afford to allow our distaste, our discomfort of the current situation – the real politic of the situation – we can't allow that to colour our clear thinking about where the public interests lies in the here and now. And I believe that the proposal that is on the table is in the public interest. However we may twist and turn, we cannot escape the need to manage this risk now and this risk has to be managed in the reality of the situation. It can only, I believe, be achieved by making the clear decision today, to vote in favour of the proposition because that, my dear members, my dear colleagues, is where the public interest lies.

Greffier

Deputy Bernstein?

Deputy Bernstein

Sir, I'm very sad that we have been forced to make this decision today. We should have sorted this problem out years ago. Having listened to all the advice on offer, I've weighed up all the issues, I'm sure that there is a slight risk but I feel I must vote with my electorate and not support the proposition. Thank you.

Greffier

Senator Michael Vibert?

Senator M. Vibert

Thank you Sir. I don't want to detain members but I thought as one of the negotiators, it was right that I should at least, like everyone else, have my say on this issue and I agree with the previous speaker that it's a shame that we're in this position. I totally disagree with his conclusion that he, who has far more information than his electorate, should not apply that information in the best of public interest but just go along with their views. I'm sorry but I don't think that's what a member of the States should do. A member of the States has to vote with his conscience on all the information he has in front of him as to what's in the best interest to the Island as a whole. And as a member of P&R, I inherited this problem, along with everybody else. I have said to my President, when he did ask me if I wanted to be on the Committee, he didn't actually mention this at the time – can't understand it. So what was my own

starting point? Like everybody else, I wanted nothing to do with it. In fact, I didn't want to negotiate, I didn't want to know, my phrase at the time was that I didn't want even to give them the time of day. But when one looked at the updated legal advice we had, I felt we had no choice. We were being strongly urged to negotiate. Yes, that legal advice is in incredible change from "without merit" to "just better than evens". I questioned the change, I'm still unhappy about the change but we are where we are. No scream! I know Senator Edward Vibert said yesterday that he would scream if he heard that again but I'm sorry, we are where we are, and I know the truth hurts Senator because that is what the position is, we are where we are. We've had several history lessons, history professor gave us one, Senator Syvret, with the benefit of 20/20 hindsight, as usual, gave us another. We've had lots of history lessons. Fine. That doesn't change the fact we're here. We are where we are. Senator Edward Vibert, I'm very surprised also said a public inquiry would be a waste of time and money. Apparently he doesn't want the public to know the full facts. I believe a public inquiry is needed to find out how we got here. The Inquiry is the time to look back at the history of the Les Pas claim and see if and where mistakes were made and how we can learn from them for the future. That's for the Inquiry. Was and is the duty of P&R, on the advice we had, to see if a negotiated settlement was possible. The easy way, would have been, as on the face of it appeared might have happened in the past, to ignore the advice and not do anything. Let the court case take its course. That might have seemed easy for P&R that is, but it would have been a clear dereliction of duty and against the public interest not to have negotiated and see if we couldn't arrive at a settlement the States could at least consider. P&R have done that and now it is up to all of us, the States, to make a decision because like P&R, the States has a duty to decide. Not to put off, as a court case is about to resume, so putting off is the same as rejecting the deal. Not to use any excuse to hide, twist and turn - the States has a duty today, in the public interest, to make a definite decision one way or the other. Lots of talks about facts from some people. Lots of use of quotes from Churchill – mentions of the Second World War. Well one fact about the Second World War is that the British government, Churchill, did not fight on, did not defend this Island in 1940 and in my view, did so in the best interests of the Island and Islanders – did not fight on, did not defend the Island because it would have been against the best interests of Islanders – they would have suffered terribly. And I believe, in this case, it's not in the best interest of Islanders to fight on today because if we lose, and there is that risk, again Islanders will suffer terribly because they will have to bear the consequences. So what about the proposed settlement? Some may be against any settlement in principle. Deputy Fox says he is and I respect that. Don't agree with it but I respect it. I believe, as Senator Kinnard said, that we have to live in the real world. We have to be more realistic and cannot afford, in the public interest, to indulge our principles with their – the public's money. For others, it's the cost of the deal that's the sticking point. They believe a better deal could have been negotiated. I agree, if it was a lot less, it would make a decision easier. But a £10m. value land deal plus adds on is what has been negotiated – it's the only deal in town. Deputy Breckon wants to go back to the negotiating table. We don't have that luxury. We can't put it off yet again as the States seem to like to do – it's not a realistic option. We put up or shut up! If we don't agree today, the deal fails and we're back in court. By the way, I didn't volunteer to be the other negotiator, as Senator Walker just said members might wonder, the Committee felt it had to be politicians negotiating and I was elected. It felt it had to be politicians doing it because it's a political issue – we had to decide what would be acceptable to the States. The original demands of Les Pas were regarded as excessive and we negotiated down, with the full agreement of P&R to every stage, to a settlement we believed we could put to the States. Quite open to criticism – perhaps some feel they could have done better, negotiated better – I accept that but I can assure members I, and I believe Senator Walker as well, did our very best to get the best possible negotiated deal we could. And, on occasions, the other side – Les Pas – walked out, because we were trying to negotiate down further and they were going to walk away from the deal altogether and at one stage, when it broke down, we were again urged, on legal advice, to reopen negotiations in the public interest. Not a nice job to do, no one wanted it but I felt it was a duty to do it. And I would still prefer not to give Les Pas the time of day or even a penny. I believe what Les Pas is doing is totally immoral and against the interest of the people of the Island. But in this debate, we have to balance moral indignation against the risk of the public losing the court case. I do not believe States members can have the luxury of getting on their high moral horse, indignantly declaring they don't want to even consider settlement. I really don't think we have that luxury. I refer briefly to Senator Syvret's speech. Senator Syvret said he had an open mind and P&R could convince

him but unfortunately P&R. I think we're a good Committee but we're not miracle workers and we've not yet been able to persuade Senator Syvret to support P&R. Senator Syvret's question "is this the last realistic path" – Senator Syvret is one of those who wishes to twist and turn, to put it off, to find another way because we're not, find the deal, not something to our taste. But just saying there's other avenues open doesn't make them realistic. There isn't any other avenues open. We are back in court if we reject this deal and I'm afraid I don't accept, in any way, Senator Syvret saying it would have made a great difference had we been able to question Advocate Binnington – we've all had Advocate Binnington's risk assessment – our legal adviser, the person in charge of the case for us is the Solicitor General and I believe she gave members as good and a superb understanding of the facts last week over a day and a half. Quite rightly then, members had the full opportunity to question that legal advice. Senator Syvret said he viewed the legal opinions with extreme doubt. Well no actually, he seemed to view the second legal opinion with extreme doubt because he didn't like it. Didn't seem to view the first legal opinion with extreme doubt because he liked that one. But Senator Syvret, to me, saying that, and any States member saying that – really, who are we to believe? Are we to believe lawyers who are experienced and have been working on cases for years or non qualified people who just don't like what they hear? Also, just briefly with Senator Syvret, I hope I'm not blocking out his sun, he said he, you know, he was worried that the apartments that would be built there would block out the sun – I don't know – I haven't seen the plans – what I do know is that it was always planned and agreed by this very Assembly with Senator Syvret in it, that there should be flats on that site so to hold that up as how terrible, I mean, is incomprehensible. So we are where we are. States members, as Deputy Crespel said yesterday, is a duty of trustee of public assets. Simple question in the end – what's in the best interest of the public? Simply what's the most popular? And I accept, I, a great many – probably all members of both the States and the public are instinctively against doing the deal. And I accept again, if 21,000 people or more had phoned the JEP poll to vote against any settlement, it would be an indication of the strength of feeling that was totally widespread throughout the Island. This would have been an indication of the strength of public opinion against doing the deal. In fact, you get back to facts again, only 881 voted against the deal, which means only that number felt strongly enough to vote against and phone up. And of course polls like this are very unscientific as we know. It's not an opinion poll where a balanced random sample of people are questioned. The telephone polls are self selecting – only those who feel strongly enough to phone in on an issue are counted. In fact, talking about strength and indication of strength of opinion, less people phoned in on the Les Pas issue – half less – than when a poll was held on whether there should be a bridge over the Waterfront! And it could be argued, and I think, from people who've spoken to me, can be argued that many did not phone in because they are well aware they did not have all the facts on which to make a decision which we have. So, do we swallow our pride, indignation and agree settlement valued at around £10m. or do we fight a court case with only a slightly better than even change of winning at a risk to the public of losing what could be hundreds of millions of pounds? I regretfully believe it would be a breach of a States member's duty of trust to take that risk on the public's behalf. I can understand many people's opposition to this settlement – none of us wants to give in to what we perceive is tantamount to blackmail based on a claim to feudal rights. But will the public thank us for standing on our pride and perhaps going along with perceived public opinion – public opinion which has not had all the available information for legal reasons – will they thank us for that? And will those members of the public clambering loudly now for the deal to be rejected – will they be clambering so loudly if they knew the true legal position which we know? No one wants to be in the position we found ourselves in but we are where we are and no amount of hand wringing, looking back as to where it's believed mistakes might have been made will change our present situation one iota. It's time for States members to demonstrate they are Statesmen and women and make the right decision – not in the interest of appeasing vociferous public opinion – but in the real interest of the whole of the Island and all its people present and future. Like everyone else, I regret totally that the legal advice has changed to such an extent at so late a stage but I believe it has been fully explained as to why it has been changed. I cannot understand those members who cannot see a way to accept why. It is explained in Advocate Binnington's risk analysis and his accompanying e-mail. What are those who don't understand why it's changed are expecting? Some form of Perry Mason last minute legal rabbit out of the hat? Some faded centuries-old document that has suddenly turned up and swings the case one way or the other? Doesn't work like that in the real world. Advocate Binnington, our Advocate, acting on our behalf, has reviewed

all the legal arguments and they were not all available ten years ago when the original decision, legal opinion was given. He's reviewed all the legal arguments and Advocate Binnington has honestly, and I believe, bravely, reassessed his legal opinion of the risks of winning and losing. How tempting it would have been, how more easier, more comfortable if he had just continued to dismiss Les Pas' case without merit. We wouldn't be in this position now would we? That would have been a nice easy way out – but that would have been dishonest, wrong and misleading. Instead, Advocate Binnington has told us the truth but he, the legal representative we've entrusted the case to, in his opinion the odds are slightly better than even. That even, that truth may be unpalatable but I prefer to be told it and make the decision in the correct way on the basis of it. Yes, we may not like it – some may not agree with it, but those people are not our legal representative and they don't have to argue it in court, if we reject it in three weeks' time. I'm sorry but I put more faith in the advice of our legal representative – a top litigation lawyer of many years' standing, who's been handling and dealing with the case for several years than all the amateur lawyers we've heard in this House so far Sir. I also rate it higher than the previous advice, legal advice, of ten years ago we had – not because the lawyers then were any less eminent – we've been told how eminent they were, but simply because the lawyers then have not been party to all the discovery process since and all the legal arguments since that Advocate Binnington has had in this case. So we are where we are. The court case resumes unless we settle by the middle of next month. We cannot get alternative legal advice at this stage and within that timescale – this suggestion of Senator Syvret's is pie in the sky idea that we simply sack our lawyer and the court will say "Oh dear, you're not happy with your lawyer so you can have six months to find another one that you prefer and prefer what he/she says to you instead". I mean, I've heard Senator Syvret make some extraordinary unrealistic statements in this House but I think that one tops the lot. It shows a complete lack of understanding of any idea of the court process. It shows a complete lack of understanding of what natural justice should be because wouldn't that be a simple way to keep putting off someone seeking a just representation in court, if someone who had a bad case kept saying "Ah well, I'm going to change my lawyer every six months and we'll put it off again and again". It is nonsense. Members, do not be seduced by the idea we can wriggle out of this one and find some way to put it off again – we can't. We're up against the wall – we have to make a decision. But, also, can you imagine the message we'd be sending out to Les Pas side by saying "can you wait a minute please, we want to get a second legal opinion on the strength of our case". They're likely to want to negotiate a settlement then? Anyway, the deal negotiated is quite clear. If we don't decide by the end of September to accept it, all bets are off and there's no guarantee another deal – let alone a better one – could be renegotiated at all. Even if the court, which I don't believe could happen, agreed to a further adjournment. So we have the best legal advice we can have, and that is that we have a better than evens chance of winning – 55 percent to 45 percent – a very different answer from 10 years ago because all the legal discovery phase is now complete and the legal arguments considered. Can we take that chance? Can we risk so much for so little? We've had this about these sorts of things we've had many analogies made so I hope you will excuse if I make one more – a Jersey one. A Jersey farmer owns 1,000 vergées of land. Someone else claims to own all of them but will settle out of court for one vergée instead and the farmer's lawyer tells him it is a claim that the court might support. Does that farmer risk losing all his land or does he, however reluctantly, accept the loss of that one vergée to secure his right to the other nine hundred and ninety-nine? Well I will, just if I may Sir, put it another way because we've often been told that we've got a gun to our heads. So, are we today playing Russian roulette with the public's money? Potentially hundreds of millions of pounds of it. And odds are important when playing such a game, so I'm told, I've never tried it. Perhaps even if it was pointing at your foot, the odds are important. So, and if the odds are a million to one, perhaps many would take a chance – even a thousand to one- hundred to one might be a bit more worrying but not bad – we haven't even got the luxury of the usual odds in Russian roulette, which I understand is one bullet in a six chamber revolver – we've got at least two bullets in, perhaps three. Many others have talked about having a gun pointing to our heads - well anyone fancy pulling the trigger with those odds? If I believed accepting a negotiated deal would be setting a precedent, it would be a powerful argument against settling. We have legal advice that is not the case. Any other potential claims are prescribed by the 40 year rule. I believe Les Pas and its principals are wrong to pursue the case at the expense of the public of the Island. I believe the public will continue to reflect distaste for the action of Les Pas and individual concerns. This, as it will be broadcast eventually, is a challenge to Les Pas and those individuals. I believe the only way the

Company and the individuals could partially offset this odium in which they are going to be held, would be by, after deducting their own legitimate legal costs, Jerseymen have got to allow that, would be to donate the remaining value of any settlement to a local charitable or community cause. Do they really want to be known as the people who, in the public's eyes, have effectively blackmailed the Island out of £10m. by using the ancient legal device of feudal right bought for a few hundred pounds? It may be regarded as a clever legal trick, but to most people, it is regarded as totally distasteful opportunism. I urge the Principals of Les Pas, to demonstrate they are not totally motivated by greed, by donating the majority of the value of any settlement, in some way for the benefit of the people of the Island whose money it really is – either to a local charity or to a community cause. Whether they will or not is their decision. Our decision today is whether to accept the negotiated settlement or not. I believe it is the best settlement deal we could get and much as it distresses me to do so, I believe we cannot take the risk, on behalf of the public with the potential consequences, if we decide to fight on and then lose the court case. I believe that would be a disaster for the Island if the States decided to go to court and then lost. Alternatively, we can reluctantly give up land worth £10m. – have the issue settled once and for all and have the certainty of avoiding losing any court case. So, however distasteful and unpalatable it is, and it is very, to me, distasteful and unpalatable, I believe it is in the best interests of the public to vote <u>for</u> the negotiated settlement and not take the risk of losing hundreds of millions of pounds worth of public money. Thank you Sir.

Senator E. Vibert

Sir, I wonder if I can raise two points of clarification from the Senator. I didn't want to interrupt him when he was in full flow. Firstly the situation relative to discovery and also in relation to Advocate Binnington not being open to being questioned by the House. Because the Senator did say that the House had had every opportunity to have legal questions answered during the meeting last Wednesday - I'd like the Senator to explain to the House how it is that I asked at least four questions relative to advice given by Advocate Binnington and they could not be answered because they had to be put to Advocate Binnington. And secondly, on the matter of the discovery situation, he made the argument that the opinion that was being given, and previously legally compared to the one that's given now, suffered because there were, new documents came into being because of the discovery process. Could he explain to the House how that sits with the opinion of Advocate Binnington when the discovery took place, was that there was nothing in those documents that caused any concern?

Senator M. Vibert

I thank the Senator for not interrupting my speech and I believe the questions could be better answered by the Solicitor General because they are of a legal nature.

Solicitor General

I can certainly answer the one about discovery and I'll take that one first and the question of Senator E.P. Vibert was, how does the fact that discovery has as it were put more weight to the later opinion than to the earlier one, how can that be squared with the fact that in 1997 Advocate Binnington said that discovery had not turned up any documents and I think the wording in the Act of Committee is "any documents showing the Seigneurs exercising ownership of the foreshore". Discovery as I said is the exercise by which one party makes a comprehensive list of all the documents in its possession which may be relevant to the issue. There were an exceptional amount of documents in this case because of the long period over which the documents have to be withdrawn and the different bodies who held documents – the Receiver General, the States Archives, etc. The exercise of carrying out the first step in discovery is somebody reads all the papers and flags everyone that could possibly be relevant and that is not usually done by the lawyer at the top – it wouldn't be cost effective. It's done by a qualified Legal Assistant or perhaps a junior Advocate or Barrister and they're told the issues are blub, blub, blub, please flag every document which can bear upon that. That part of the exercise which was being carried out and was still being carried out in 1997, was carried out by the legal team – not by Advocate

Binnington personally and they would have been reporting back to Advocate Binnington and if they had found a document that said "this shows the Seigneurs have claimed the ownership of the foreshore", they would have reported him and they would have also said to him "no, we haven't found any". The next stage is the analysis by the actual person at the top of this mass of documents. The first part of the exercise is getting it all in, the second part of the exercise is sifting it all out. The person at the top then goes through all the documents which are relevant and you can have masses of documents which are, to a greater or lesser degree, relevant but there will only be a core of documents which are really crucial – which you're going to rely on in court. In a case like this, it will be a big core but nevertheless, it's not the entire mass of documents so that in 1997, and I think I told members during the Tuesday and Wednesday debates last week, that one of the things that the Commissioner called upon the parties to do was start putting their documents, exchanging their documents - together with a commentary on each document – showing the significance they were going to ask the court to attach to that document. Now that exercise had not started by 1997 so it was a second phase in the discovery which hadn't taken place – which wasn't part of discovery and it was part of the analysis of the discovered documents. And the risk analysis follows the analysis of the discovered documents – not simply the discovery – which is a fairly, it's a mechanical and administrative thing – obviously there is a certain amount of intellectual input – you need somebody of a level to know what is potentially relevant but their sort of getting it all together for the person in charge to do the analysis and sifting. That is why, there is in fact no inconsistency between the fact that in 1997, Advocate Binnington said no documents had been turned up which showed the Seigneurs exercising rights of ownership on the foreshore. And in 2002, once the analysis exercise had been undertaken, he gave a risk analysis as he did.

Now the other question was why did the Senator ask questions at the meeting, I take this to be the meeting on 10th September, but they weren't answered – well I wasn't actually at the meeting on 10th September, so I don't know what questions he asked.

Senator E. Vibert

I don't want to turn this into a debate Sir but I think for the purpose of accuracy, on 29th July 1997, the Solicitor General and Advocate Binnington attended a meeting of the Policy and Resources and Advocate Binnington explained that the Judicial Greffier had made the unusual order for the discovery: "To date the process had yielded no surprises and there was no reason to depart from the view previously expressed by Counsel acting for the States and that the ownership claim of Les Pas Holdings was without merit". But it was more than a report just on the Seigneurs – it was a report on the whole case and again I ask, I wanted to put this to Senator Vibert – what documents were turned up that caused the opinion to be changed?

Solicitor General

I'm sorry but firstly I should point out that the extract which the Senator read referred to discovery to date and discovery was still going on. As for the direct question about what documents were turned up, I would have thought that was a question for last week – I thought I was being asked for legal advice.

Greffier

I think we've had the answer we're going to have on that one. Senator Le Sueur?

Senator Le Sueur

Yes Sir, very briefly – during the last speech I saw you consulting Standing Orders and it may be that you were wondering about repetition and going over the same arguments again – I would certainly have some sympathy with that and so I feel I've very little, at this late stage in the debate, that I can add. But in response to a comment from the Deputy of St. Martin's about the meeting which I attended, where the question was asked "what had changed" and to which I replied "very little had changed". And I was

indeed being very circumspect at that time because the case was, and still is, ongoing. But I think what has changed and what Senator Kinnard clearly identified was the legal interpretation of the facts – the facts have not changed – it's the interpretation and as Senator Ted Vibert said – seems a long time ago – yesterday morning – we should learn from history. I think everyone, including the lawyers acting on this case, as they get older and wiser, they do learn more and their opinion gets refined and modified and improved and what we have now, ten years on, is still improving knowledge. And I believe in the light of that improved knowledge, we should take and accept the up-to-date assessment of what our position is and that is quite clear. An assessment is that there is a significant risk and without going over in detail and repeating the comments started off by the Deputy of Trinity, we are here, acting in the public interest as trustees, to do what settlement that we believe is in the best interest of the Island and I see no difficulty in that respect Sir, in accepting the proposal on the table. It is the only proposal available and we should accept it.

Greffier

Deputy Martin?

Deputy Martin

Thank you Sir, and I will try not to repeat but I still have quite a few questions. Legal advice, we're told that we've had our legal advice defended by every member of P&R and probably every member who is going to support this deal. But when P&R went, to Les Pas, there was a second legal opinion and that was their opinion. Mr. Fysh Q.C. Now when we went to Les Pas, we actually were saying, we've got our legal opinion but we actually think your team of lawyers are better because we want to settle. They didn't come to us – we went to them. Yes, they walked out of a few deals and so they would because we've already given – we've said our legal advice has changed – it obviously hasn't got any better. It's been said in public, it's been said, I mean, we know what is confidential – people out there do know what's going on. The President of P&R said the deal is morally repugnant. Senator Michael Vibert also said the deal is morally wrong but members mustn't be persuaded by their moral high ground to go against the deal. Deputy Farnham asked a question – what have we got to lose? I mean I've read through all these papers and we've had a risk assessment from Drivers Jonas and it basically goes from nought to £40m.+ the power station and then there's another part which says "we're sorry this is not very helpful but this is all we can do at the moment". We don't know what the price will be put on but we do know that this deal is morally wrong – it goes against States' policies. The deal – I don't like how the deal started and I know we are where we are, sorry, but I don't like how we got there. We were all taken up to Trinity – nobody told us about – somebody did ask about the conflicts of interests and this, as they say, will all come out in the inquiry but the inquiry terms of reference have already been written. Can anyone tell me the last four public inquiries and the outcomes and how many heads rolled? Anybody? No, because they are not worth the time and effort of this House or the paper they are written on. And yes the public want to know but they wanted to know, they'll want to know a lot more. We will never know, if we settle today, we will never know if we would have won in court – if the moral's right, if the legal ground was right. We have had a best assessment by the Advocate who is, after years and years got to fight the case. Anyone worth his salt would not have said there is not a risk of losing. It's a two horse race. It's not going to be a dead heat. That is the obvious way to, blatantly obvious. Then Senator Routier, who I do have great respect for, and Senator Ozouf, who I will not comment on, also had the cheek yesterday to tell us: well this is a bit of insurance to know what we're doing, yesterday, now today. Now really, we're just going to pass this deal but Senator Routier, and even then again as I say, Senator Ozouf intimated: we can go back to Les Pas, we can say to Mr. Scott "well actually, you've really upset a lot of people out there – can't we move you a bit just to make it a bit more palatable for us". Yes, I'm sorry Senator, he did intimate that – this is not the end he said – this will not be the end – we will go back – well I'm sorry, Mr. Scott won't be treated like a naughty little boy and say: oh yes, well it's nice of you to give us the land worth £10m. and/or the planning concessions, the housing concessions and the Reg. of Unds. concessions – yes like well this was the best and I again say I have respect for the Senator Michael Vibert but the part of his last speech – no wonder he wants this recorded

for prosperity! These businessmen now, all the profits – he's going to plead with the Principals to give to charity – which world is he in? Really Senator, you are pushing us beyond the limits and that is on tape and I hope when people read it, even hear it, they will take it with whatever's meant to be – blatantly appealing – you all know, a lot of you know, the morals are wrong, the policies are wrong. The President of P&R, you are asking us, telling us, we cannot risk – risk what? They will not be given – they are afforded wrecks and things that float up on the foreshore – nothing on our foreshore floated there. It cost a lot of taxpayers money to get there and yes, the judge did say that Commissioner Page – there are serious issues to answer and I would – the one serious issue is that we've had for many many years been held to ransom over a futile claim, sorry, feudal and futile claim, that is many hundreds of years old and I want to see our day in court, and the people want to see our day in court, and this wasn't even taken round – not to all the twelve parishes and you know why – because the last time P&R went round to the 12 Parishes, over you Constables, you weren't even on the agenda – but that was all that was discussed – P&R have got a complete pasting and they didn't get the answer they wanted. And I do hope the Constables do think about the people who fought their corner because these were the same as our Constable of St. Helier said: they are people who vote, they are people who vote, they are people who do know what's going on and if I feel that I've really had that much more information than them – I don't! I had another legal opinion but in my opinion, the P&R Committee thinks that we've backed the wrong horse – the other legal team has a better advice – so we better settle very quick because we have no chance of winning. And Senator Ozouf might find this very amusing because he is always the one who's defended all the legal advice and he's obviously not a very good betting man 'cos his horse wouldn't have got out the starting gate, thank you Sir. I will finish Sir, and I haven't read any of my speech but I think I got across what I wanted to say. Thank you.

Greffier

Deputy of St. Ouen's?

Deputy of St. Ouen

Sir, I understand it's been a long debate and I don't want to take up too much of it. However, I do want to address this Assembly because of the anger that I feel about this whole affair. I'm angry that certain local and influential individuals would use old customary rights, bestowed by the Crown, on one of its loyal subjects, to gain a purely financial benefit, over, not only the people of this Island but the very authority that originally bestowed that right. This is not the conduct that one expects from people who purport to be loyal subjects and who have already enjoyed many financial benefits from living and working on this Island. I'm also angry at the way that this honourable and respected Assembly has managed this case. I believe it to be appalling in allowing itself to be forced into this current situation. That being said, we now must resolve it. I am not, as much as I would like, to see justice rule, able to agree to a continuation of this case. As much as it grieves me to say it, I will support the settlement option for the many reasons that have already been reiterated by various members. We must recognise that the Crown, itself, is actually supporting this settlement. The States knew, when it purchased the land from the Crown, that the title was not guaranteed and let us not forget, that, the start of this case, was in 1989 – some 14 years ago. Legal advice was given in '93 but it wasn't prudent to carry on with the reclamation development, as Senator Le Maistre said earlier, whilst the title of the land was in dispute – yet the States did. Again in 1993, legal advice was given that failure would be catastrophic – although it was believed, I hasten to add, that the risk was small. It was also, even then, suggested that a compromise should be sought. Mr. Sowden, back in '93, even added that the case should be actively pursued. This has not been actively pursued. I could go on but obviously a lot of the facts have already been covered. I am convinced however, that the States collectively, are not blameless and I like many, look forward to a Committee of Inquiry. I firmly believe, listening to the recent disclosure of legal advice and the delay in resolving this case, that we are forced to look at the settlement options. I am very aware of the many current and difficult financial decisions that we as members of the States are faced with. Not only the ones recently debated with regard to the Resource Plan, but also the projected deficit which will be brought about by zero corporation tax. With this firmly in my mind, I cannot in all

consciousness support gambling public funds to pursue a moral argument in the name of justice. I do not gain any comfort in making this decision. However, I do believe it is the only choice available. Thank you.

Greffier

Deputy Huet?

Deputy Huet

Thank you Sir. Well I can't beat the wit of Deputy Martin - that's for a cert but like her, I haven't got a written speech so it won't be – it will be from the heart what comes. You have heard, and I do believe it's correct, we need facts to make a reasonable decision. The concept of equity i.e. the common good. So what are our assets? Well we do know that the court can't be delayed – it has to go to court on 13th October. O.K., so a good litigator is needed. We have our Advocate. But before I go onto that, I would like to refer back – I know I wasn't here Tuesday Sir, last week, so I hope you'll bear with me. I still have a question that I would like answered. I did bring up, when we were in Le Marquand House, about a certain case that had happened in England, quite a few years previously when a certain gentleman had found he had rights to most of the land that Liverpool was built on. The authorities then, quickly passed a law, which said that he no longer had these rights. Now the Attorney General, William Bailhache, said this would no longer apply because of Human Rights and I did go home and think about that. And I thought yes – I can see Human Rights and that was a gentleman but I thought can Human Rights apply to a company? We're not dealing with a person – we're dealing with a company – and we don't even know who the people are. So that's my first question – can Human Rights apply to a company?

Greffier

If you want to assist us Madam Solicitor General. The question was addressed

Deputy Huet

Thank you very much – so we'll go on from there. So we've agreed that a good litigator is needed. My next question is: has a defence been prepared? We have paid our lawyers one and a half million pounds. Has he prepared a defence for us? He has, well that's really interesting. Gets more interesting by the minute. I was going to ask has a Beddoes application been made but we've now found that obviously it hasn't. So hopefully, our lawyers will be able to claim costs against their insurance. But now let's go back to the defence. I'd like to bring up Sir, when I was a Centenier in the lower courts, the Magistrate's court, I was the first person who ever thought to ring up to book court time because it used to be such a ridiculous situation – everybody scrabbling to book court time and you only have a certain amount of magistrates. I believe it's now general practice and everybody books court time, so maybe women do bring something to things. So I was curious to know how much court time has been booked for this case? Now don't let us forget, this case has now been going for years. They have known it's going to court on 13th October. Now how much court case would you take your bets on that we're going to need in court for this case? We hear the case has been prepared! Now I would say, although I'm not a lawyer, that you would need six months – at least six months. And guess how much time has been booked? Three weeks – not months – weeks! Exactly three weeks have been booked for this court. Now what does that tell me? If I can find out that three weeks have been booked, I presume Les Pas Holdings can find out that three weeks have been booked. So, maybe I'm wrong but does this say well what's going to happen – you can't do this court case in three weeks. So has the decision been made before we stand up in this Chamber? Because why has only three weeks been booked for a court case that's going to last six months? Something's wrong somewhere. So then I would go on to another thing. I have a thing about blackmail. I admit it. I'm emotional. I have a great thing about blackmail. Split the words up – fine, black like ebony, lovely mail – what I read every day – put them together and it's the most awful word I've ever heard. I spent, at school, most of my time outside the door because I would never go along with it.

So its blackmail. The next one we had, the big word that's gone on in this court –in this Chamber – is appeasement. Well, all I can say gentlemen, ladies and whoever – thank God we didn't have appeasement in the last war because if we had, my father, as well as my uncles, would not have lost their lives fighting so as we can stand in this Chamber and speak freely. That's what appeasement is. So then I went on to another one and this is where I thought Senator Vibert, Mike Vibert, was hilarious. Yesterday, while we were here, I must admit I was doodling and I made up a little ditty about – to the words of Robin Hood – which I'm sure you all remember. I changed the names on Robin Hood to Richard Falle but okay, I'm not going to sing it to you Sir – you're quite safe because I'm tone deaf but I actually thought now – maybe I've got it all wrong, you know, maybe we have a very bad government but we have bad schools, terrible education system, awful health system, pensions are awful, ghastly housing and this Les Pas Holdings was going to be the Robin Hood of Jersey – and that they were actually going to use this money, like Mike – Senator Vibert said, Mike Vibert – and I thought, really I suppose they could be using it for a cancer ward, for T.V. licences, for our old age pensioners, the town park, the Hoppa Bus – and I thought: who are you kidding? Do you really believe this? Because I don't believe it for one moment. And I remember the Deputies speaking about seed money and I though seed money – we use seed money in Jersey Overseas Aid - £10m. of it – my giddy Aunt. And I though now, with this Robin Hood, I thought this is nearly as good as I said once before Sir, as seeing Lord Lucan riding across the Royal Square on Shergar! And I have to say, I cannot live with blackmail. At the end of the day, you have to make a moral stand – you have to stand – you have to cannot have appeasement. You have appeasement once and it will carry on, exactly the same as Senator Kinnard – there is no end to appeasement – it's a non ending deal – you have to stand up and be counted. Thank you Sir.

Greffier

There were two legal questions, are you going to possibly try and sweep up at the end Madam Solicitor or do you want to address those now?

Solicitor General

Yes I was going to speak before the President concludes and take all the legal matters then. I would prefer to do that.

Greffier

Thank you. Deputy Troy?

Deputy Troy

Sir I would like to just address a couple of points. There's one that Senator Syvret made about the size of the hundred units, minimum hundred units, on the foreshore. We have some luxury apartments in St. Brelade at the top of Mont Sohier, called La Rocquaise, and each of those luxury apartments – the minimum size of the apartments there is 1,200 square feet and then of course you've got penthouses and so on which are considerably larger, probably 2,000 or more square feet. So this is actually going to be an extraordinarily large unit on the Waterfront and I would like to confirm that that is the case. At La Rocquaise, I think, the apartments there were selling from around £400,000 to £900,000 or so. Then going to Senator Mike Vibert's speech, I did think it interesting that Les Pas Holdings might donate funds to charity and I instantly thought of Al Capone giving away a few cases of whisky and wondered how rightly that would have been but seriously Sir, in common with other members, I've carried out considerable research on the question of ownership of the foreshore and I remember in the previous debate, some months ago, Senator Mike Vibert said that I could have got a job as a historian and I have, in this research, visited the Archives Centre and I've obtained maps of the foreshore from times past – I've obtained documents dating back to the 1600s, I've travelled through legal documents on the Jersey Legal Information Board. I've done a lot of personal research and I didn't have these legal opinions – I didn't have this advice, I didn't really have anything – I was starting from scratch, like many other

members. I would like to say that the staff at the Archives Centre were superb and have really assisted me and I'm sure they've assisted many other members who have been there and I would like to acknowledge their assistance. We've heard that the Crown exercised its rights over the foreshore on a number of occasions without being challenged effectively. And I'm not going to go into too much detail on the history here because it has been covered by many other members so many of the documents that I have referred to at the Archive Centre – I'm just going to look at a couple of things here. The foreshore. The Crown has exercised its rights over the foreshore on a number of occasions, unchallenged, and one case is the Ronez example and another is the lease that the Crown granted to the Jersey Swimming Club in 1893, that was when the lease was first granted. And that lease has been renewed several times, thereby reinforcing the Crown's claim to the foreshore. And in 1935, a new lease was granted to the Jersey Swimming Club and in the 40 years thereafter up to 1975, the so called prescription period – I think that is the correct term – 40 years thereafter, the Seigneur to the Fief de la Fosse, never challenged the 1935 lease, never challenged any of the other leases. 40 years has elapsed – from 1893, through, we've all heard how important this 40 year period is. I personally think that the Fief de la Fosse made an error there and it wasn't Advocate Falle, it was the previous Seigneurs of the Fief, which demonstrates an acceptance of the fact that the Crown owned the foreshore. And there's other documents as well and there's more information that is used in the case from our lawyers but I thought that that lease at the swimming pool was vitally important – the Havre des Pas pool – I really do believe it's quite important. The Seigneurs, as far as I'm concerned, have not claimed their rights and they've acknowledged that by leaving, by acquiescence, by not complaining, they've accepted the Crown's rights. And I'm extremely reluctant to support a deal with opportunists masquerading as Seigneur. A group who lost all credibility once deciding to challenge the Crown, who Sir, many years ago, granted favours which, whilst advantageous to Seigneurs, certainly did not extend to ownership, granting ownership of the foreshore – they gave favours but certainly, I don't believe the intention was to grant ownership of the foreshore. And we must not be intimidated by this group of opportunists holding the Island to ransom. The Les Pas claim is a spurious one and it's referred to as a spurious claim in the documents that we have before us and I feel that it must not be allowed to succeed. And Terry Sowden Q.C., his opinion in 1993, he's a highly regarded, highly respected person and his opinion in 1993 was positive, it was resolute and it was expressed in a manner resolute and definite. Our current legal advice is pensive, it is weak, it is apprehensive, even when expressing the upper hand. I have respect for Terry Sowden Q.C. and his opinion. I do not necessarily have respect for a weak, pensive, apprehensive, legal interpretation and I feel that the people of Jersey feel betrayed, because getting to this point – and everyone has said "we are where we are" – well maybe, not that we are where we are, maybe it's headed where we're headed. I don't know but the way in which our opinion has changed has caused many members a problem and the fact, as others have said, that Advocate Binnington was not available to explain himself adequately, is also regrettable. The only thing I feel that has changed is that what has been introduced is a fear factor and some members are looking at the fear factor and they're truly frightened. I am particularly interested in Terry Sowden Q.C.'s opinion – I respect his opinion and I do not feel inclined to go with the rather weak opinion being expressed at present and I will be opposing the proposition.

Senator Syvret

I propose the adjournment Sir.

Greffier

Yes, members - it looks unlikely that we could finish before lunchtime so the adjournment is proposed and the Assembly will reconvene at 2.30 p.m. May I remind members to leave the bundle of documents please before they leave the Chamber – they will be available after lunch.

24th September 2003 – afternoon

Greffier

You have distributed the bundle of papers to the Deputy Greffier Deputy Duhamel.

Connétable of Trinity

Thank you Sir. May I on behalf of, certainly my Parish as Connétable like to express to Deputy Martin that as many people may have had many representations over Les Pas, I actually have not received one phone call over this dispute. If anything I have had the most when I've spoken to people the advice that they gave me there, it really only makes commonsense if you think about it, is to settle, and may we not be on the confrontation side but I would like to add further, I've only been in the House a short time now Sir, and basically since I have come into the States we are hearing of continual financial problems, obviously it looks likes raising more taxes towards the end of the year, and other problems which we could say is in the future. I have children and grandchildren and we have been many, many years in this Island. And I think I am representing what I hope may be commonsense attitude. I, like all the other members deplore having to come to an agreement. But at the end of the day, we are talking about the financial future of future generations. Now it won't affect myself, or any other members in the States today, but if we did go to Court, and we did lose, the ramifications I'm afraid could be horrendous and I fully understand all the other members arguments, I sympathise with them, but I'm afraid that at the end of the day, I'm taking the commonsense attitude that in most cases, sometimes the first loss is always the cheapest, not always the best Sir, but it is at least I'm thinking for the population of the Island, the future generations. Not to put them in the situation that we have even more problems in raising money in the future.

We know there are problems ahead and I think as trustees, as have most people have said, Ah, our Island we should be thinking of them. We all know on hindsight this should have been settled many, many years ago. Let's be fair I'm sure on hindsight the President of Finance and Economics would wish that the one before them hadn't given the generous allowances that we have today. That would make their life a lot easier as well, that's hindsight. Let's put that behind us Sir. Let us start now and put the whole Les Pas case behind us - settle and I wish in many cases, it's come out in a lot of cases that we are actually giving them £10 million cash, a lot of people think. It's not that Sir, it's land for a settlement.

I agree with a lot of the other members, my heart doesn't like it and I'm afraid Sir, my head does, and I'll be voting with the proposition. May I just say on, Senator Edward Vibert mentioned the race between Phil Rondel, Deputy Phil Rondel and Paula Radcliffe, well after coming back from France the other day, Sir after my trip with my honorary police, I saw the race finish. Now I've got news for Senator Edward Vibert as I told him this morning he didn't check on all his medical history of Deputy Phil Rondel of St. John, he has an achilles heel problem and I think I would still back Paula Radcliffe with a broken leg Sir.

Sir, I know this is a hard decision for all of us, we've been put in this position, but this is not the time to back down and I will be supporting the proposition. Thank you Sir.

Deputy Southern

Sir, I think I bring a slightly fresh view and I'm not repeating everything that's been said before. Before I start I'd like to apologise to Senator Ted Vibert, I'm going to use that phrase, but only once. We've been told repeatedly by the President of P & R that like it, or like it not, and we are informed that the President along with each and every member of his Committee likes it not one jot, nonetheless like it, or like it not, we are where we are. This statement of apparent fact is designed to lead us to accept that the deal so superbly negotiated by our representatives is the best, nay, the only way forward. I ask members instead to take some to ask themselves just how we got to this position we are in today. Not to allocate blame that may or may not be the remit of any inquiry we might choose to set up. But to carefully

examine the deal in the context of the strategy and tactics on both sides in terms of arriving at the deals which is before us today. The negotiations. It is my belief that in terms of tactics and timing, if members were to agree to the proposition before us today then rather than providing a solution members will be falling into a carefully prepared trap and opening the way to future challenges which will make the scale of this current problem fail into insignificance. As a trained trade union negotiator I have some experience of the mechanics of negotiation process. Before entering any negotiation each side will assess the alternatives and seek what we call a BATNA. A BATNA, the best alternative to negotiation. Put at its crudest, if negotiations break down and we can't agree, have I got a big stick I can hit my opponent with? My BATNA. If it's big enough you can force your opponent back to the table, whether they like it or not. I'm no doubt that Advocate Falle and now Les Pas Holdings assess the situation more or less along the following lines. The States want to get on with the Waterfront development as quickly as possible. If we carry on with this court case it may take who knows, eight years, perhaps longer to resolve. In addition to their legal costs, their legal costs will be mounting, who knows £7 million. Furthermore there is the risk which will prey on their mind that our case, weak though it is, may prevail and the compensation costs may be of the order of £200 million, £300 million. That's quite a big BATNA. Well what about the States? Have we got a case, have we got a big stick too. What is the alternative? Surprisingly our BATNA is very similar.

We too have the option to walk away from the negotiating table with the words "we'll see you in court". For each day in court not only do our costs go up, but so do theirs. And how much are Les Pas Holdings prepared to sink in this case? As the case drags on what will be the effects of a boycott of Channel Island Traders on their operating profits, or more importantly on the company's reputation and in turn on their share price. Already I've heard of one company which has reduced its dealings with Channel Island Traders to a minimum. Thereby removing £½ million worth of business. This is also some BATNA.

The second item in the negotiation process is to draw up your negotiating positions and decide on your tactics. This depends on a complex mix of assessment of the strengths and weaknesses of both sides of the negotiation including what is realistic and especially what is the mind set and motivation of each participant. The position each party adopts is dependent not only on the perception of the facts of the case but also on the perceived skills of the negotiators. The negotiators on each side essentially will enter negotiations with a range of options in view. If the negotiator views the negotiation as fairly evenly balanced he may choose to go for a win, win solution whereby both parties walk away from the negotiating table with some sense of satisfaction. If one of the parties perceived one side is much stronger he may choose to go for a win, lose solution whereby one side clearly is seen to win and the other is the loser. Some idea of how the negotiators view the case can be judged from their respective negotiating positions. Essentially each case will have a best case or opening gambit, a bottom line a position below which they will not go, and a middle position which represents for them a satisfactory outcome. Whether it's win, win or win, lose. They will also have in mind a timescale, that is, does a quick outcome convey some advantage or should they take their time?

So what can we interpret from positions and the progress of the negotiations so far. What do we know of how we arrived where we are. Let's examine Les Pas case first. First the originator of the claim, Advocate Falle, no longer is the sole litigant. Either he's decided he's sunk enough into the claim or no longer wants to take on the whole risk and pursue the claim. He has convinced a group of businessmen to share the cost and behind the walls of limited liability to continue the claim. On the surface it appears an excellent situation for the opposition. Les Pas now cannot be made liable for our costs and the deal seems to be risk free for the litigants.

But further examination puts a slightly different light on the situation. How Advocate Falle convinced his group that the case can indeed be won ultimately in the House of Lords. He is very persuasive I'm told, but I doubt it. After all, both he and we know that a win for the Crown and the States is the likely outcome even if it's 60-40, it's still the likely outcome. No, all he has to do is persuade the other members of the consortium that there is a good chance of doing an out-of-court deal. We cannot know his motivation, we can surmise that his sense of pique at not achieving his original marina plan is part of

his driving force. But is surely not shared by his new partners. For them this is a business proposition, pure and simple. And here that I must say that much as I enjoyed Deputy de Faye's speech yesterday, I fear he had his analysis wrong. Tom Scott didn't wake up to find a partner in Les Pas and notice the big prize, the big crock of gold at the end of the rainbow. I believe he saw an opportunity to use his considerable negotiating skills and get P & R to the table for an out-of-court settlement in short order. And the key there is, in short order. And this he's done very effectively. It's here today. Look at his tactics, his opening gambit is a classic. Let's look at some £25+ £40 million worth of land cash, come in hard, giving every indication of total confidence and going for outright victory. Frighten the opposition. Take it or leave it. If you reject it next time we come back it'll cost you more.

Again examination, closer examination of this position reveals a different picture. Could Tom Scott maintain this stance or anybody maintain this stance and force P & R to accept that what would be a crushing defeat? Of course not. More to the point could he realistically expect P & R to deliver such a package. Again the answer must be of course not. Imagine if that were the case today and we were discussing some thing of the order of £30 or £40 million worth as the deal and not the £10 million. It wouldn't stand a change. So realistically can he expect to get that, of course he can't. Instead what does he do? He allows himself reluctantly to return to negotiations and slowly give ground inch by reluctant inch until he gets close to the comfort zone that he's set out to achieve from the start. All of sudden it starts to look like win, win, Les Pas leave with a healthy profit a nice chunk of land whilst P & R leave having saved face to some extent and having negotiated their way down from a large claim £40 million perhaps to £10 million. Let us contrast to that approach, the tactics of Les Pas with what we know of the approach for our own side.

Our side approach negotiations with a very different frame of mind, having recently been told that they have failed to obtain security of costs from Les Pas. This I believe was the single big change. Even if we win now it's going to cost us perhaps £7 million. Following this news, they receive a fresh risk analysis from Advocate Binnington. The analysis is positive. We have a case that we are likely to win. However this is not guaranteed. Unlike the advice of previous decades that Les Pas had no case to present. Now the size of the compensation we might lose starts to occupy the minds of our negotiators. Our perception of the claim goes from overwhelmingly positive to one which is now negative, like a rabbit caught in the headlights of a car, We seem to be frozen. Fixated by the danger of such a large loss that we've lost sight of the fact that we are likely to win. I believe that we have lost sight of the bigger picture and have timidly opted for the short term fix. In doing so, we have played into the hands of our opponents and the key is the element of time. The rush to the middle ground of the win, win scenario shown by our opponents demonstrates their own weakness. They have absolutely no wish to go back to Court. They need this deal to be struck early, if they are to limit damage they may suffer.

In addition to their own mounting legal costs as the claim drags on, they must also be aware that the mounting disgust at their venal action amongst their customers and the shareholders will cause increasing levels of disquiet in the market. For Channel Island Traders with 12.5 per cent of Les Pas Holdings they might be looking at some £2 to £3 million from the test settlement. If they allow the action to drag on it would not take out that much to wipe out this sum from their share value. Not only do our opponents want a quick settlement. It's an absolute necessity for them.

Now this argument is not based on notions of right and wrong, my argument is not an emotional outpouring of the morality of the situation, it's a matter of tactics. Now is not the time to throw in the towel and sue for peas. Now is the time to be strong and to say, see you in court, and if we too quietly suggest that we might be open to negotiation in six or 12 months time on our terms in the unlikely event that Les Pas Holdings are still pursing the claim, then the result may well be to our advantage. Taking a different view there is no point on reaching a settlement unless both sides can deliver. In this case if members reject this deal, as I believe they should, then we send our negotiators back to negotiations with added strength. As a union negotiator I know that there is no stronger position than to be able to report that my members won't have it. You'll have to move. Where do we go next? If we were able to put it to the electorate, we know we'll get an 8:1 majority for rejection. Rejection of this deal simply earns a little

more time and puts the onus back on our opponents to come up with a new deal. However acceptance of this deal is final. We as a government will be seen as weak. Not only by the electorate but also by big business. We will be the government that can be pushed around. We are told that there cannot and will not be a repeat of this type of claim. This is the last of the Seigneurial challenges and I'm sure that this is so. But this case is not just about medieval rights. It is become a challenge by a group of businessmen on the legitimacy of the States.

Senator Ozouf, in his speech yesterday, pointed perhaps unwittingly to the future, when he suggested the interest in Les Pas could be sold on to specialist firms who live off the proceeds of litigation. If we fail to see off this challenge today, how long will it be before we face the next challenge from business over some legislation that we wish to enact. As we speak today the argument rages and litigation is being pursued over tax avoidance group litigation orders (GLOs in the U.K.). For the U.K. to duck out of that challenge because they could not face legal costs would be unthinkable. If we wish to be considered a serious player in the finance and business world we must see these challenges off. Others have already spoken of the peripheral aspects of the deal. They too do not bear scrutiny. The agreements on double parking which breaks planning guidelines. It's clearly open to challenges by the next developer and the agreement over disposal contamination is equally suspect.

Deputy Le Main yesterday suggested we should look on ourselves as a family protecting our savings. We are not a family. We are a government. Several speakers have suggested that we are trustees, but we are no more only trustees than we are a family. We are a government and this Island is not yet Jersey PLC. No doubt this deal makes sense in a strictly business sense. Nonetheless if we accept this deal today we will lose all respect as a government. It will be demonstrated to the world at large that under pressure we buckle, we fold. If we accept this deal can we realistically expect to properly govern. I believe we cannot. I urge members to reject this proposition. It is a capitulation only equalled by the surrender of Moses Corbett, the Lieutenant Governor to the French on 6th January 1781. He too believed the enemy's propaganda. He thought he was outnumbered. Thankfully, Major Pearson did not and fought on. I urge members to fight on again today. Thank you.

Deputy Voisin

Thank you Sir. We have heard much talk since yesterday morning, discussing a number of areas surrounding this case, but I think the one that keeps on coming back, and we heard it again in the last speech, is why the advice relating to our chances of success have changed. Now that does seems to be a view that, among some members, that there is a conspiracy to make the States position look worse than it is so that the Assembly will support the deal referred to in this proposition, and I must say I find that actually is a very, a very sad state of affairs that speaker after speaker has made these insinuations and suggestions that actually there is some sort of conspiracy going on. For those who have been involved in litigation, those people know that at the start litigants are usually very confident of their case and it's only as they and their legal adviser explore the proof needed to support their claim, and indeed compare it with the evidence provided by the other side that doubts arise. There is a realisation that the other side can actually support their argument and it comes really as no surprise to me that the early advice on the Les Pas case was that it was without merit. Equally I'm really not surprised that as the legal team became more familiar with their own case and that of the opposition they advise of a real risk of losing.

We've also heard much discussion raising questions over political errors that have been made in the past. Actions of certain minority shareholders linked to this Assembly. The detail of our case and people trying to do the job of a legal adviser, indeed, who are supposed to be advising us, this Assembly. And of course we've heard a lot about the moral issues which arise, and I must say again in discussing the moral issues, I think that whether we believe that the deal before us today is moral or not, I think the fact of the matter is that the other side believes that they have a legitimate right to this land, and we can't just ignore the case of the other side until it has been to Court and that, of course, is the nub of the problem. And indeed that is the core decision that has brought us here today.

The decision is whether we want to continue litigation with Les Pas, and of course that decision goes hand in hand with the decision over whether we want to run the risk of losing this litigation and then face the financial, the serious financial implication that will result from that loss. And it is the financial implications that make this debate so, so very, very important and indeed I think that members should also be aware that it's probably the last time that the States are going to actually make a conscious decision over this case, because if we decide to settle then a line will be drawn underneath it. If, on the other hand it's decided that litigation should continue then we, this Assembly will merely be the passengers on the legal roller coaster, I say roller coaster because one minute we'll feel that we'll win our case, the next case we'll think that we're losing it, and so we'll have all these roller coaster rides heading towards the final decision that's being made. But I think that Sir, everybody should be aware that this is the last time probably that we're going to be able to make a decision. The previous speaker said that we should go back to negotiation with Les Pas but the trouble is, that in exactly the same reason as some members don't feel that we should agree with this deal because we will show weakness, exactly the Les Pas negotiating team are in exactly the same situation whereby if they agree to renegotiate this deal, and let's face it, we'll only be prepared to go back to negotiations, we'll end up with a better case, a better deal, a lower price, in other words then that will show weakness on their side as well. And I really believe that if we reject this, if we reject this proposition then we will go into Court and we will go through the whole legal process.

I think it's worth also reflecting that the facts that there are some certainly, certainly three key facts that are really not disputed. The one is that if the States of Jersey are being litigated against, we're not the ones that started this. We are committed to enormous legal bills. Even if we win, even if we do follow this through Court, the States are still liable to legal costs of many millions of pounds.

The other fact that's accepted, is that the value of the assets that are in dispute are valued at many, I think conservatively estimated at probably £100 million, especially when one takes into account the power station on the site. So those that are the core facts that I don't think anybody is really arguing with. There's some disagreement over the advice that we have a 40-60 per cent chance of losing, but this is really we have to draw ourselves to a decision because we now have the opportunity to settle this litigation by giving up a piece of land valued really at a fraction of the disputed assets. Now if we do decide to settle there are a number of benefits that result. First of all of course we'll remove the risk of losing and remove the risk of facing the financial implications that may result from that loss. We will also remove the uncertainty hanging over this whole site and we will save the considerable effort and officer time, States and political time in fighting the case, and I do think that that is something that merits consideration.

If we decide not to settle what are the benefits? Well there are none. None that I can see. We may win, we may win but we will incur legal costs, we've been advised similar, similar to the value of the land that it's proposed to exchange in this deal. However in not settling, we continue to carry this very serious risk of losing and facing the consequence. I won't go into that more because previous speakers have already covered that ground. But for me I think I should repeat what other speakers have said. The risk is simply not worth taking and I would implore the States members that this a decision that needs our heads to rule our hearts. It's easy to become fired up with emotional argument that Les Pas are holding the Island to ransom, pointing a gun to our head and we've had the comparisons drawn between our actions and the actions of people fighting in the War, fighting off an aggressor and to me they're quite, quite different. The difference is of course is that Les Pas Holdings believe that they have a legitimate right, and our advice is that, yes, they have a case that we, the States need to respond to. The raw question is do we want to continue this litigation, do we want to take the inherent risk that goes with a decision to continue litigation? Do we want to continue to enjoy the 99 vergées of farmers land that was used by, as an example, by a previous speaker? For me there is really no, there's only one sensible answer and that's, that is we should settle. We must put whatever anguish, whatever sense of injustice of our position behind us and we should accept the deal for the good of the Island.

So I believe that this is one of those decisions that there is no right or wrong but a decision to settle. A vote in support of this proposition is the most sensible, logical and level headed action to take. Let the public vent their frustration on the perpetrators of this litigation tomorrow but today is for us to make a careful considered decision.

Connétable of St. John

Sir, I too am very angry and dismayed at the situation we now find ourselves in bearing in mind that the real problems which have led to this present situation occurred more than 10 years ago. I would first of all say that the petition currently being brought by ex-Senator Shenton was in his opinion obviously a very worthy one. But having said that, one thing that intrigues me is when can we expect the Crown to make an answer to that, will it be before the next stage in Court, or would it be afterwards? The same ex-Senator was a prominent member of the States when they chose to ignore the very correct and sensible legal advice given to them by the then Attorney General, Mr. Philip Bailhache in December 1993 not to proceed with any further investments into the reclamation site and work on it until the title to it had been legally established and confirmed, and in fact I now read the extract from Mr. Bailhache's letter and the relevant bit is "the other material factor is that the States have begun committing substantial funds to land reclamation schemes to the west of the Albert Pier and to the south of La Collette. It would not in my opinion be prudent or sensible to continue with those schemes without taking a decision on one or the other of the following options" and then he sets out the various options.

Now the point I'm trying to make that it's all very well for ex-Senator Shenton to make it very clear to the public of his current attitude to the whole issue, but it appears that he may have been a party to the ignoring of very sound legal advice given to the States in 1993. To the layman, and I include myself in that, it seems quite clear that ignoring that advice in what has been primarily, has primarily brought us to the current and most difficult situation. And I can only hope that the proposed Committee of Inquiry will provide us and the public generally with all those people who were responsible for taking that decision at that time because bearing in mind that for many years it's been suggested that the quality of the Statesmen in the years gone by was somewhat higher than those we have at the present time, I am quite surprised that they chose to ignore that advice. For my part I can agree wholeheartedly with what my colleague the Connétable of Trinity has already said and I too am of the opinion that there's only one way for us to go at this stage, bearing in mind that we do have to give consideration to those who will come after us and of course the Island's on-going welfare. Thank you.

Senator Le Maistre

Sir, on a point of order

Deputy Hill

Yes I was going to ask a point of order as well

Senator Le Maistre

I didn't want to interrupt the speaker obviously, but it is my belief that that advice, quite correctly that the Connétable has referred to was not made available to States members generally, and he would be quite right from criticising both myself and any other member who was a member of the House to have ignored that advice. On the contrary, those points were made by the members then present and were rubbished by certain people who I believe had that advice but didn't share it.

Deputy Hill

Sir, I just like to add to that because I mention in my speech this morning, at no time was any member of the States made aware of that letter during the whole course of the time the propositions came to the House.

Senator Walker

Sir, if I may, I'm not quite sure that's entirely correct. My understanding is that advice was made available to the Policy and Resources Committee of the day. Now I don't believe it was made more widely available at that time.

Deputy Hilton

Thank you. As chair of the Planning Committee and Vice-President of Environment and Public Services I will try and address some of the comments that have been made regarding the planning issues. I must say I was rather disappointed with the Connétable of St. Helier with his remarks yesterday. Certainly I wasn't aware that he had any difficulty with the decision that we came to at Committee, a decision that was made unanimously, I would like to add. He certainly didn't express any view there that he was having problems with, and in fact he did express the view that he felt it was entirely reasonable to expect two parking spaces per three-bedroomed apartment. Now several speakers have alluded to the Planning Committee making exceptions to policy and as the Connétable of St. Peter and also the, Deputy Fox of St. Helier, will know because they are past members of the Planning Committee, yes, we do make exceptions to policy. Obviously we weigh up policy against lots of other factors. So I just really wanted to mention that.

Senator Paul Le Claire raised a couple queries on the tipping issue, he's not actually in the House at the moment, but I think he was slightly confused at how we intended to get rid of the waste that might be generated on the site and indeed we've, or there's been a rough calculation of £640,000 to remove the waste actually on that site and that covers two floors of basement parking. If the issue of ash does come up on the site, that will be disposed of in a completely different way and the method that they actually used on the Albert housing site will be employed in exactly the same way and the cost of removing the ash on the Albert housing site was £148,000. So I just say that for members' information, but there certainly is, as far as I'm aware, no plans to actually take that waste off the Island. There are also comments made today. I think Senator Syvret made a comment with regard to the size of the proposed development. In fact he said it is a titanic structure, it will stand down there as a monument to the failure of elected members. Well I'd like members to be aware that in fact that the Waterfront Hotel that's already been agreed down there will stand seven storeys in height and the Harbour Reach development, which has also been passed actually stands at five storeys, if my memory serves me correct. Yes it does, so it's five storeys in height. So I don't see that the issue of a development five storeys in height is going to look particularly out of place down on the Waterfront. So really those were the only comments to make in relation to those issues that were raised.

I would like to on to say there's been a lot of criticism expressed by some speakers with regard to the quality of some of the decisions which have been made during the past ten or 20 years. How issues were not confronted at the time and dealt with leaving us now in a very sorry state indeed. If this proposition is not successful we would impose on our children, and even possibly our children's children, the very same problems we are now facing. One only has to look at the Lesquende issue to realise just how long litigation can drag on. That particular problem commenced in 1990. Surely this is not a legacy we would wish on our future generations. We have to face up to the fact that we have a very hard decision to make and yes, it is a tough one. And as a previous speaker indicated, he believed he was elected to use his head when it came to making decisions. And use our heads we must. Do not be swayed by the emotional arguments being used in the debate. Yes we are all sick to the stomach, as we're being held over a barrel. But you have to base your decisions on the hard facts. And the hard facts are that I believe it would be a gross dereliction of duty to the people of this Island bearing in mind the odds of 40-60 not to agree with this proposition. And in doing so safeguard the assets of our Island for our people.

The Connétable of St. Helier referred to in his speech the Guardian-reading, or right winged people of a certain age, urging him to fight on. Does he really believe that these very same people, if they were in full receipt of the facts like States members are, would still be saying fight on. I think not. Nobody in their right mind could possibly believe that it would be in the public interest, with the stakes as high as they are, not to support this proposition and bring to an end something that should have been done at least a decade ago. The consequences of not doing so are too horrendous to even think about.

The prospect of one man controlling our energy sources which, make no mistake will be the position we shall be in if Les Pas were to win any subsequent Court action against the Island. The JEC stand on this reclaimed land, and as Her Majesty's Solicitor General has quite rightly pointed out, any successful claim to the foreshore will include any building now standing on it. Tom Scott as chairman of Channel Island Energy owns Jersey Gas, and with the fuel farm thrown in for good measure, hey presto, there we have it, all nicely wrapped up in one big bundle for one man and let's be quite clear about this. If you think this action against the people of the Island is morally repugnant you will not have seen anything yet compared to the power he would be able to exert over every strand of Island life when we have lost control over our entire energy resources. I believe a moral vacuum exists in the Board Room of Les Pas Holdings which will ultimately consume everyone within it. Sir I support the proposition.

Senator Walker

Sir, may I ask yet another point of clarification which the Deputy made and I think it's an important point. She made the point about policy and policy change, is she implying that the Committee is entitled to change policy which has been accepted by this House without reference to this House or is this policy which has been made by the Committee and therefore is open for the Committee to change. I think it's important because clearly people who will be listening to this debate in the future, I think, need to know what the situation is.

Deputy Hilton

Would the Senator like to

Solicitor General

As it's a question about legal, the legal powers of the Committee I wonder if it would be more helpful if I addressed it. Sorry, I mean I

Senator Le Maistre

Sir, this was a political question, not a legal question.

Deputy Hilton

If I could just ask.

Senator Le Maistre

policy rather than legal

Deputy Hilton

Could the Senator make it quite clear to me, is he referring to the policy with regard to the actual buildings, or the policy with regard to our parking strategy?

Senator Le Maistre

The policy is regarding that which was accepted in terms of car parking, and published for all to see, in terms of what would be accepted and not accepted on the Waterfront.

Solicitor General

I think it actually really is a legal question. I'll defer to the other side of the House if they are certain. I do think what a body, which has been vested with a discretionary jurisdiction, can and can't do. I mean this is absolutely standard public law stuff and so if the Deputy wants first crack at the answer I think I should give way to her, but then I do think I ought to give an answer on the legal powers of a body vested with the discretion to change policy. I think it's legal.

Greffier

Perhaps the Deputy may wish to add afterwards or

Solicitor General

Yes, the position is that any body which is vested with an exercise of discretionary powers, firstly it does not have to form a policy but the better course is to form a policy, and it's better that a policy should be formed that the body with the decision making body proceed in accordance with the policy.

Second point is that for such time as the policy is in force and the body is not contemplating changing it. The Committee, or the body, should always have regard to the policy but must not simply apply it like an absolute rubber stamp decider, because if it does then the decision will be open to challenge on the ground that the body has not looked at the case on all its facts. So that's point one.

Point two is a, that's departure from policy in individual cases. Point two, which is formulation of new policies, is that any body which is vested with the decision, with a discretionary decision making jurisdiction, has the power not only to form policies but to change them, and indeed is supposed to keep them under review, there is, it is no ground for a challenge that a body has changed a policy, the body that makes it can change it. And I think the final part of the question was the significance of the fact that the States have approved it, it is a certainly settled law so far as planning matters go that it is the Planning Committee which is vested with the discretion, and that while it may bring matters to the States, and in fact has the power under the law to do so, and approval of the States may make, may raise presumptions, it is the Committee not the States which must both formulate the policies and apply them, and certainly in one of the planning cases, Fairview Farm, the Committee was criticised, and indeed in BBC Radio versus Housing, the Committees were criticised for paying excessive regard to the views of the States, that was regarded as not a satisfactory discharge of the Committee's own, the Committee being the decision making body. That was regarded as not a satisfactory discharge of the Committee's duties.

Senator Le Maistre

Sir, I think that, I don't want to prolong this because I think it's an issue for another day, but nevertheless the decision was taken on an application which had not been publicised, and therefore no representations were able to be made and I think that is perhaps one of the aspects which concerns a lot of people.

Deputy Troy

Sir, can I ask the Deputy for clarification on one point. In her speech Sir, she mentioned that we were in danger of losing our electricity supply. I understand that we now import 80 per cent of our electricity

from France and that I would challenge that assertion that was made and am I correct in looking at Appendix II that the power station is in the compulsory purchase zone area, and storage tanks are out in the other area that's disputed, so that in actual fact the compulsory purchase zone includes the power station. I just wanted to check that?

Solicitor General

I don't think so, the compulsory purchase zone certainly doesn't go anywhere near La Collette, it's all west of the Albert.

Greffier

It's a blue area.

Deputy Troy

I'm looking at the blue area trying to work out a very small diagram.

Solicitor General

The compulsory purchase area is west of Albert, it's the, west of Albert flats and moving towards the cinema and the other buildings, it's not down by La Collette.

Deputy Troy

Right, O.K. thank you.

Senator Ozouf

May I just seek a point of clarification, I think it's an important one that Senator Le Maistre mentions, he's left the Assembly, but he suggested that the application that Planning considered in relation to the car parking, and I'm just confining my question to that was not, he suggested that it was not proper in terms of it not being actually published. And that's a fairly serious matter I would have thought, but then I would just invite perhaps either the Solicitor General or the Chairman of the Applications Sub-Committee to deal with that once and now.

Greffier

I wonder if the Vice-President could tell us the nature of the application, that was a formal application or a?

Deputy Hilton

No Sir, it wasn't a formal application. It was an agreement in principle. It was an agreement in principle as part of the deal basically. So any application that comes back to the Committee will be dealt with in its entirety and all the different standards apply to the application, so it's not, you know, they still have to make the formal application and representations would be heard.

Connétable of St. Peter

Sir, on the same subject, could the Chairman of the Planning Sub-Committee inform the House whether they received any form of plan to the effect upon the proposed development or was it merely just verbal, or was it in correspondence to the Committee.

Deputy Hilton

No, we didn't receive any sort of plan, it was given to us as a presentation by the Director of Planning, just with outline drawings basically. As I said nothing, you know, it was just a principle in agreement for 100 three-bedroomed flats with underground parking.

Connétable of St. Peter

On the basis of outline drawings what **(microphone not working properly**) been on display in here, they could I feel they helped immensely on appreciating what is going to be seen for the future.

Deputy Hilton

Sorry, I didn't catch the

Greffier

Why the drawings perhaps were not available for members to see but

Deputy Hilton

It was just, it was literally just sketches to show the Committee that 100 three-bedroomed flats could be comfortably encompassed on the site.

Greffier

Very well. Does any other member wish to speak.

Deputy Troy

Yes Sir, sorry going back to my previous point about the JEC. In Appendix II Sir I'd like to go back on page 4, it states that the area, the area under dispute is hatched in pink, and as far as I can tell that comes round outside of the land area Sir, I just wanted to check this and you can see four, three round circles which are presumably the storage tanks. As far as I can tell the JEC is not in that area. Can I just, I want that clarified because

Greffier

Perhaps Senator Walker when he sums up can clarify that my reading of the plan certainly acknowledges the area that the power station is within that area just below the white, there's a white protruding part on the northern part of the

Deputy Troy

It's the white section, but it's the area that's in dispute is the pink area I believe.

Senator Walker

Sir, I can positively confirm that the power station is in the pink area and is on the land which is the subject of the claim.

Greffier

Very well, does any other member

Senator Le Claire

Sir, I've been trying to get a point of clarification but all I'm enjoying is dirty looks Sir, when I've been trying to seek one. I think it's really appalling. The discussions have gone just very recently over to the conditions in relation to Deputy Hilton's speech and the planning submission and it was not standing to defend Senator Le Maistre, I had an idea as to what he was saying, which was referred to by Senator Ozouf, and that was the fact that it was not a normal, I don't think Senator Le Maistre was referring to as an improper practice merely an unusual and not normal application. But on further clarification, I note from the minutes that the Committee further recalled that it had noted that among the material planning considerations it could consider, was that ownership of land afforded more control of users than planning control. What does that mean, and going on to that, because if it's been agreed in principle, as it says as it goes on, the Committee has given its consent in principle as required by the agreement, so that question then proposes it could consider.

"The Committee further recalled that it had noted that among the material planning considerations it could consider was that ownership of land afforded more control of users than planning control". What does that actually mean?

Greffier

Can you assist us Vice-President?

Deputy Hilton

Well ownership of land does offer you more control over what actually goes on it, doesn't it, if you own it. Yes? And so the Committee took the unanimous decision in the public interest to go with the deal. I hope that answers the question.

Greffier

Very well. Does any other member wish to speak??

Deputy Fox

Can I just have a point of clarification please Sir.

Greffier

In Committee discussion, but very briefly Deputy.

Deputy Fox

Well it was just a question that if the Policy, if the sorry, if the States didn't agree to accept this proposition that the whole of the JEC and the power supply would be in the hands of one individual or a company. The President, I'll ask the question, although I know the answer. The President, is the President able to confirm that it would not take much for the JEC to divert their cable from France to their Queen's Road and be able to supply the Island's electricity from that source, which there's already one there?

Greffier

Perhaps Senator you would like to address that in your summing up?

Senator Walker

I can't confirm that it wouldn't take much for the JEC to do that at all.

Deputy Fox

Well, all I'm saying Sir is by the time you're going to sum up you might have the answer to it.

Senator Walker

No Sir, I won't, that's a matter for the JEC and their engineers.

Greffier

Very well. Madam Solicitor you indicated that you may, I get the sense that no other members wish to speak before Senator Walker sums up.

Connétable of St. Brelade

Thank you Sir, I'll be very brief. One of the things it seems to me that I think we all agree that our hearts say let's fight on but many of us feel that, let's be ruled by our head. I believe that we should settle at the moment. If we don't and we go, we carry on fighting the Court case then it's going to run into millions and millions of pounds. That is going to have to be paid for. Now who's going to pay for it? Our rainy day fund? I don't think anybody wants to touch that, not for that. Therefore it will be the taxpayer, the general public of this Island. Sir, I cannot risk, it's almost like going down to a bookmaker and taking a gamble. For me, no thank you Sir.

Connétable of St. Clement

I think I thought I ought to join in. I've just got a simple question really. It all depends, I think, on the conversion that was dramatically made by Advocate Binnington last year because his attention had been withdrawn to other papers. This is to disclosure, I think, all it means is that some more legal documents have come to light. It strikes me therefore that our research wasn't very good and their research was excellent. That's besides the point. What I'd like to ask, particularly, is, we have been at the negotiating table three times. Three times they've asked for something slightly less each time, until finally we came to the solution that we've got now. What worries me is, did we negotiate enough times, because they've already agreed or disagreed or we've disagreed twice, why should we come to a final time and say this is the end. What I'd like to know is, does that have any influence, it's 45-55, our chances. The fact that they've been to the negotiating table, the fact that they've, we've refused what they've asked for, and they've come back again, does that give us any advantage?

Solicitor General

Yes, can I just have one moment sorry.

Greffier

Yes of course

Solicitor General

Right, in the normal way I would address the House only on the legal points, but here and there during the speeches of members, there have been some factual points which I think reflect slight misconceptions, so this will deal partly with the legal points, and here and there, I think some factual

points as well. I'm going to follow the speakers through in the order in which I have noted them as speaking, or more or less in the order I've noted them as speaking.

The first speaker after the President was Senator E.P. Vibert. He referred to the question, of the advice of the present Bailiff when he was Attorney General, that the possibility of losing could not be discounted, and said that he, though not a lawyer, he thought that that meant that the then Attorney General was simply saying that there was a risk but really, it was remotely possible. He used a comparison, a metaphorical comparison, of a race between unevenly matched opponents, and said that there would be a risk because one of them might be overtaken by some act of God, and suggested that Mr. Bailhache, as he then was, meant no more than that. Firstly, when a lawyer is advising on litigation, and I've seen other people's advice, I've given advice myself, if what you're thinking is that there is a risk of which you would say that's not, you know is it remotely possible to use the Senator's words, you would not go to the client and say "there is some risk and you should think about, one of the things you should think about is negotiating." What you would say is, "if some extraordinary unforeseen act of God happens, there's a sort of 1,000-1 risk the other side might lose but it is so negligible that really you don't realistically need to look about, look at it." And I can say that both as a litigation lawyer, and also because I worked with the present Bailiff from September 1982 when I joined the Law Officers until December 1993 when he left them. He simply would not have said that you should consider settling, if what he was thinking was this is a risk, so remote, that it can only happen if there is some extraordinary unforeseen accident.

He then said, he referred to, he went through a chronology and he referred to May 1995 and said that Policy and Resources was informed that the present Attorney General, Mr. William Bailhache had lost, that he had fought an application brought by Les Pas, and he had lost it. The application was not brought by Les Pas it was an application by the defendants for a declaration, it was not fought by Mr. Bailhache, it was argued by me. He said that it was lost on the basis of Mr., that the alleged conflict was Mr. Bailhache's close involvement with the structure of Les Pas that is not so. The basis was that the firm……

Senator E. Vibert

I did not say any of those things, through the chair. I did not say that at all, I dealt with that application and said it was because of his relationship with all the businesses associated with Les Pas, but all the businesses associated with.

Solicitor General

Well, I have marked, my note written at the time is "his close involvement with the structure of Les Pas." And I think it is right to make clear seeing the previous explanation I gave of this was at an 'in camera' debate which may not be broadcast to the public, I think it's right to make clear that the basis of the objection was that the firm of which Mr. Bailhache was then a member, Bailhache Labesse had, that his firm Bailhache and Bailhache had merged with Perrier and Labesse, which at an earlier date had been formerly, before a split, had been Perrier and Labesse, Bois and Bois and the perceived risk was that a former, a member of Perrier and Labesse, who was a former partner of any of the former partners, that Advocate Falle might inadvertently make the marks in the hearing of Advocate Bailhache.

Senator Le Claire

Excuse me Sir. I beg your pardon, I'm sorry, I do not wish to interrupt the Solicitor General.

Greffier

Unless if it's very important, Senator

Senator Le Claire

I think it's quite important Sir. The Solicitor, I would like to have clarification please.

Greffier

Well you could ask ……

Senator Le Claire

The Solicitor General has said in trying to establish her response to speakers as we've just begun that the previous meeting which was held 'in committee' may or may not be released to the public or broadcast to the public. Can we just have some clarification on whether or not that will be the case.

Greffier

I think it's an issue we can address Senator but I can I, with respect I don't think that was an issue worthy of interrupting the Solicitor General. Perhaps we could hear her out.

Solicitor General

The next matter which Senator E.P. Vibert said, was that the size and extent of the fief is not in agreement with a lot of local historians, and that there is nothing in the minutes to show that it was investigated. On this point the question of the size and extent of the fief was raised by Deputy Troy during the 'in committee' 'in camera' debate and I then explained that there was a bornement which drew two different lines, one for the right of *gravage* further to the west, and one for what was referred to the boundaries between the fiefs, and the argument for Les Pas is that the further of the two western lines should be taken; the argument for the defendants is that the, the one more to the east should be taken. It has been investigated. The parties have given their conflicting arguments on it, it is one of the things to be resolved by the Court.

Deputy Duhamel said that he read the advice of Advocate Binnington as saying that there was not much risk, that there was an element of uncertainty but an indication that it is small. Advocate Binnington said that there was a real risk, and I would add that he attended with me on the Policy and Resources Committee in January 2003 to confirm the advice of the Law Officers that the Committee should look at settlement, and perhaps I should explain to members that what had happened was that the Attorney General had attended and disclosed his shareholding. The Committee, although it had, did not in any way doubt the integrity of the Attorney General's advice, the Committee decided that the best practice would be to have independent advice from people who did not have any interests in any of these companies, and therefore Advocate Binnington and I attended together, and the purpose of the attendance was so that we would either confirm or differ from the advice of the Attorney General. And so, Advocate Binnington was there at a meeting when we took the Committee through the joint advice of the Law Officers which was towards settlement.

Deputy Duhamel also said, he said that there was no one document had been shown, and other speakers said the same thing in different wording. Deputy Hill said no killer punch, others said nothing had changed in the way of documents. It is certainly true there's no killer punch, if there was the defendants would have been knocked out, but they, it is not possible to point to one document because this is the cumulative effect of a long period of discovery, and to illustrate what I mean I brought to the States the indexes to the documents, these are not the documents. These are the indexes to the documents, and if one looks for those members who can see, each page has a list of documents. Advocate Binnington would have had to come to wherever it might be, and go through every document saying, now this document which is a letter from the Guernsey States Supervisor to the Receiver General of Guernsey 18th September 1947 says, and so on down every page. Working out, drawing out the cumulative effect

of the documents to which these indexes are only indexes. And it's not a practicable exercise. What he has done is review the documents, and as I've told members, he was engaged on the exercise of, for the Court proceedings, putting together the bundles of documents and giving notes for the Court on the, the significance which was to be attached by the defendants to them. What he's done is look at that, and assess a risk, and give his advice of how he assesses the risk.

The Connétable of St. Helier firstly referred to the proceedings. He said that Senator Walker had said that there was an openness of process but that he would struggle to think of a less open process. Now as regards openness of process the Committee proceeded in accordance with the legal advice. It has always been well known to, both to the Committee and to its advisers, that if this agreement is not approved by the States, and it's entirely in the hands of the States, if it is not approved, the litigation continues, and if the litigation continues, it is crucial that Les Pas has not, in effect, been able to tune in to the legal advice given the States and to the practical issues debated. And therefore, if any member feels that there has not been sufficient openness of process it doesn't lie at the door of the Policy and Resources Committee. The Committee has been advised that it is, that it was of the utmost importance that confidentiality be maintained in the way in the way in which it was. The Committee then, when the agreement had been signed, had the presentation to members, but before then, the advice would have been that the matter should remain confidential.

The Connétable of St. Helier also referred to the planning advice given by the Attorney General. He said it was, that crucial advice was given by the Attorney General and that the planning decision was therefore tainted. Whereas I have explained that it was a meeting which I was asked to attend, and attended. I was there throughout, the Attorney General was not, because he was at another meeting for part of the time, and certainly the advice, it was a meeting where the contributions went around the table, but certainly the advice was as much mine as the Attorney General's, and in particular, the advice that there was authority for taking into account, as a planning consideration, wider public interests.

Deputy Le Hérissier asked why the Law Officers attended Planning. Well, I attended Planning because I was asked to do so by the Planning Department, whom I have advised on planning matters for many years. I had already given some written advice, and I was asked to attend it and explain it. And that was because the Planning Department was extremely anxious that they should proceed properly as a Planning Authority, and not in any way be simply rubber stamping something or doing something which really they ought not to do.

Deputy Breckon suggested that there might be government action to put pressure on Channel Island Traders. I should warn that there is here the potential for challenges to either Judicial Review, or possibly even straight litigation, because it would open the States up to allegations of misfeasance, if the States use their position as a government body, to secure tactical advantages in litigation which is simply, well I know it is a matter of great significance to the public and to the House, it is at the end of the day litigation about who owns a piece of property. And Senator Norman rightly said, that the Courts are interested in the law. In the eyes of the law, the States and Les Pas are two litigants, and in the eyes of the law the subject of dispute is a right to property. And Sir, I think it would be a very dangerous course to start trying to use a position as the States to railroad an opponent in litigation.

Deputy Hill, he deplored obstacles in the way of reading the minutes. Now again, as much as was possible was made available at the earliest stage possible, but litigation privilege had to be protected and still has to be protected, because if this is not approved the litigation goes ahead.

Senator Syvret said, firstly there was no independent advice why it was not possible to pursue retrospective legislation to remove windfall taxes. To be perfectly honest, I don't think that's a question which would need specialist advice for any, on any human rights view, for a government which was litigating over ownership of property and which decides its position may not be all it would like. To use its position as a legislature to enact legislation which would effectively deprive a citizen of a property right is simply, it would be a breach of human rights, and the human right to enjoyment of one's

proprietary interests is one of the rights which can be interfered with in the public interest, provided it is proportional. The argument was put forward that a Court would find that it was proportional, effectively, to deprive Les Pas of the entire enjoyment of its property, because it was proportional, because they were to be described as carpet baggers. That would not, in my view, be available as an argument on the papers which would have to be produced to the Court. It was put, I mean I can't improve on the way it was put by Deputy de Faye. At the start they were seeking to prove copyright of an idea. They do believe they have a legitimate claim.

Senator Syvret then said the Law Officers have made, well he said the Crown Officers but I assume it was a reference to the Law Officers. He said the Law Officers have made mistakes. Now that is too unspecific to answer. He referred to the continuing reclamation. He said he raised it with me and asked why the points were not pressed by the Law Officers. Members will recall from the previous 'in Committee' debate, that when I was taking members through the chronology, and got to the point in 1994 when there was a proposed acquisition of some foreshore, I intervened by writing to the President of Public Services, pointing out the risks, and I had a telephone call from Senator Derek Carter, as he then was the President, and my note of it which was made at the time, was that he said to me that even if they had to pay Richard Falle millions later they had to have it. I then wrote formally saying, it was a political decision if this was prudent, but I think I should make the point, the Senator said why did the Law Officers not press it?

Whilst the Law Officers have given legal advice there is a strict limit to how far, once the politicians take a decision on that advice, it just wouldn't be proper for the Law Officers to say, well, I don't agree with your political decision. I've given you my legal advice, now I'm going to give you my political advice. We cannot do it. He asked why Advocate Binnington's sabbatical was allowed. The sabbatical was for a period of three months at an earlier stage during which time the day to day handling of the matter, it was handled by two legal assistants who were working to the supervision of two advocates, Advocates Lace and Wilson, now they are both quite competent to deal with day to day matters and with interlocutory queries. He said that a striking out was quite obvious, I have to differ there. Striking out. An action can be struck out on either of two grounds. One is abuse of process. The other is that the action is frivolous and vexatious. If you're seeking to strike out on the grounds of an abuse of process you cannot have any evidence and you must do it on the assumption that all the facts alleged by the plaintiff are correct. Now, if it were to be assumed that all the facts alleged by the plaintiff were correct, you would have to assume that the plaintiff had acquired the foreshore. Now, if you assume that for the purpose of the striking out, the striking out gets nowhere on the abuse of process.

So that leaves the frivolous and vexatious. To succeed on the frivolous and vexatious test, it must be possible to show that there is no, no hope of success. That is that is a doomed application. It simply cannot succeed. And in this particular case I have to say I think that it would, that would be quite impossible. There is the advice, the members have seen the advice of the present Bailiff back in 1993, when he says there is some risk, and also refers to Mr. Kidwell and Mr. Gadney as having said that the possibility of losing could not be discounted. Now, if one has to prove on a striking out, not that we've got a better than evens chance, not that we've got an absolutely almost overwhelming chance, but that they have got no chance at all. There is no case to argue. It wouldn't have been worth taking it. Furthermore, it would have been necessary to demonstrate convincingly to the judge who heard it that there was absolutely no way in which Les Pas could prove ownership of the foreshore. That would be tantamount to deciding the basic issue.

The next point he made. The next point he made was that it was the Solicitor General's duty of care to oversee the action. Firstly, it is impossible for one lawyer to oversee the conduct of an action which another lawyer is litigating. That is because the lawyer who is doing the litigating sees the documents as they unfold, is involved with the correspondence, and actually knows what is going on. You know back seat drivers may have their points, but it is very, it is not a good idea in litigation to have a back seat driver who can't see the road, telling a driver who can see the road, which way he should be driving. The second reason why I differ from him on that point is that, not only is a misconception of litigation to

think that, in some way another lawyer who isn't involved can give directions as to how it should be going. But I have to say I don't think it shows a complete grasp of the working conditions in the Law Officers' Department. The Law Officers are actually doing a job of work, and to take off the amount of time that would be needed to mug up on some completely different case which had been farmed out in the first place because we did not have the resources. It simply would not be operationally possible.

The next point that Senator Syvret made was in respect of the commissioning of a Queen's Counsel. He said he queried why no Q.C. had been appointed and, if members will just bear with me, he queried why no Q.C. had been appointed and he said, just finding it, yes, he said that there were some rudimentary questions, why the commissioning, no commissioning of a Q.C. to be supporting Counsel. I think here I should actually explain the relationship between a Q.C. and a junior and the points at which you need them. The English, all the members of the English bar are barristers. After barristers have been in practice for a certain period, they can apply to be made Queen's Counsel or silks, and if they are successful they become Queen's Counsel. A Queen's Counsel is not supposed to appear without a junior, a junior being a barrister who is not a Queen's Counsel. When a Q.C. argues for example, in the Privy Council, the Q.C. would have a junior, and members will remember when looking historically back at Mr. Sowden's advices and when I took the chronology, he selected, he selected a silk and a junior with his eye forward towards the, a potential Privy Council in due course. That does not mean that he envisaged having a silk sitting with him in Court. It is far more likely he would have had a junior, he was a Q.C. himself and the Q.C. and the junior prepared the opinion. But once Mr. Sowden was in Court I don't think one has to assume he would have a Q.C. Certainly when he argued the case of Foster, which I've mentioned to members, it was a leading fraud case with very extensive research into customary law, he had with him in Court, not a silk, but Mr. Gadney who is counsel but not a Queen's Counsel, and who is a junior. And therefore, having obtained an opinion from a silk and a junior, it does not follow that Advocate Binnington ought to have a silk in Court with him. That said, and reverting to the Senator's complaint that there was a failure on my part to oversee, because no Queen's Counsel was commissioned the, what insofar as is relevant, what actually happened in relation to commissioning a Q.C. at this stage was when, after Mr. Kidwell had retired, and when things were moving further down the litigation line, I decided to make enquiries as to a suitable Q.C. to replace Mr. Kidwell. I spoke with Advocate Binnington, I consulted with Paul Matthews of, the London solicitor, and we actually did discuss who would be suitable silks, for an onward trip to the Privy Council, who had a knowledge of this kind of thing, who would be a good Court representative. I made a note of the names. I then discussed it with Advocate Binnington and Advocate Binnington's view was that, while a silk might be needed at a later stage, for the argument in the Royal Court it was not, it would not be the best course to have a silk supporting him in Court. He would be better off with a junior, and this is when he informed me of the name of Mr. Carlton who had a French Law degree and who had worked on these things before, So, you know, I'm sorry that this accusation of negligence or whatever it is in respect of not looking into the matter of a Q.C. has been made without first asking me if I had any comments.

The Senator then went on to say that, what he referred to as my rejection of responsibility for overseeing Advocate Binnington would not wash, that these are questions which will have to be asked by the Committee of Inquiry, that it will have to be under oath of penalties for perjury and properly funded. I have assumed the fact that the Senator first referred to questions which I have to answer, and went on immediately to say that the Committee of Inquiry's question should be under oath and with a penalty for perjury, were not intended to suggest that he thought that if it was not under oath I would not give truthful answers. If he meant that I wish he would say it perfectly openly. **(Senator Syvret comment unheard)** Good.

Right the only thing I can say on the subject of Committees of Inquiry is, and I'm now actually departing from the advice, I'm just expressing a view, and it is this. I sincerely hope there will be a Committee of Inquiry, and I would be sincere, I would sincerely hope I would have an opportunity of appearing in front of it, because I'm beginning to grow tired of accusations or allegations of professional incompetence and professional negligence, which allegations are either so vague that I cannot answer

them, or make allegations of facts such as I have negligently not seen to commissioning a Q.C. which is based on a lack of information, which could have been given had it been asked for. I'm very tired of it.

Deputy Baudains said that he thought that the fact that Advocate Falle did not get the Crown's signature strengthens our case. It won't strengthen the case. The Crown's signature was required by the Planning Committee even though it is not a requirement of the law so evidentially that shows no more than that the I.D.C. of the day decided they wanted a signature, that cannot possibly support a claim to ownership. The fact that Advocate Falle didn't get it, shows nothing more than that the Crown was not prepared to give it. So in both cases, it's simply the action of somebody who is one of the defendants. And the defendants can't provide evidence to support their own case. Planning can't say, you had to have this signature, because they actually didn't have to have it. The Crown can't say, well you couldn't get the signature that shows you don't own it, because that's simply a decision of the Crown's.

Deputy Farnham asked whether it is really the case that Les Pas will be paid compensation if they are successful. In fact the compensation relates only to the area which has been compulsorily purchased. As far as the rest of the foreshore is concerned, it won't be a question of paying them. They will actually own it. From the moment of the judgement it will simply be their foreshore.

Deputy Huet asked a number of questions. The first was whether a company can have a human right, that was answered, it's yes. The second was has Advocate Binnington prepared a defence. The answer is yes. It's in this legal litigation advice bundle at page 10. The third question was has a Beddoes application been made? A Beddoes application couldn't, in my opinion, be made, a Beddoes application is, it's an application which is made in trust cases by trustees who want to seek directions of the Court as to how they should use the trust assets or what steps they should take. Now, I know members have compared the position of the States to trustees, and I think it is a good comparison, because the purpose of the comparison is, that these aren't members' own assets. They have them, they are looking after them for others. But that doesn't make, this puts the States in the position of trustee who can go to Court with a trust deed, and say, look here's the trust deed, we are the trustees, we've thinking of taking such and such an action, can you tell us if it's alright? So there wouldn't actually be an opportunity for a Beddoes application in the case of this nature. The Courts would simply see it as a property dispute.

The next query was why only three weeks had been booked. The answer is I don't know. I would have attempted to find out earlier if this had been brought to my attention. When the matter, the hearing which has been adjourned was booked for 12 weeks, therefore there was obviously going to be a, they're doing it in stages. The first hearing, the preliminary hearing in March, was a couple of weeks. It must be that the commissioner's movements mean he cannot come for a full 12 months, sorry for 12 weeks, all in one go. But I'm sorry I haven't been able to make enquiries of that one, I didn't realise it was going to be an issue.

Deputy Troy asked about the lease to the swimming club, and said that the Seigneurs did nothing. The lease to the swimming club did contain a specific reservation, and it said that the lease was subject to the rights of private individuals. Now, Les Pas have always argued that this means it was subject to the rights of the Seigneurs. The answer of the defendants is that it doesn't mean that, because if it did the Crown wouldn't have the lease at all. But again, it is one of the grey areas where there is a point made on both sides, and again it's a point that hasn't been resolved. As one speaker said, it's virgin territory.

Deputy Southern said Advocate Falle is no longer the sole litigant. Advocate Falle, in fact, was never the sole litigant. The company was formed at the stage when they were still looking to develop Les Pas. He referred to, he then said, referred to an appeal to the House of Lords, it would in fact be the Privy Council, but the effect is the same. He said the States, sorry, that Les Pas think the States are more likely to win. Now, no-one can ever know exactly what somebody else thinks but I have, I have this thing progressing since Mr. Sowden's day and from time to time have been in contact with those who represent Les Pas, and if any member is going to take a decision on the assumption that Les Pas think the States will win, I think that is a very dangerous assumption. They have an opinion from Michael Fysh,

which they believe has thoroughly established their position. They had, in the days when he was acting for them, they had confirmation from the present Deputy Bailiff, having studied the Fysh opinion that he thought that they had a compelling case. They have very recently instructed Advocate John Kelleher who is also, in another capacity Dr. John Kelleher a, with a history, with a PhD in local history, they have instructed him and it is highly unlikely they would be putting out that sort of money if they thought the States were more likely to win. So that is a dangerous assumption to make.

Deputy Southern also said the risk analysis was positive. I cannot agree. It says there's a real risk. It certainly, it certainly doesn't say you have a cast iron chance of losing, but it does say there's a real risk of losing, and as I've already said Advocate Binnington with me on Policy and Resources to confirm the advice that the Committee should be exploring settlement. He said, he referred to possible further negotiations in six to 12 months time. In six to 12 months time the litigation, if the litigation is still pending in 12 months time, something very strange will have happened. The Commissioner granted this adjournment only when the parties were ready, prepared to go into court and state publicly that they were making active attempts to settle, and that they foresaw a possibility of settlement. He was adamant he would not give an adjournment on any other basis. If the litigation goes ahead and we've heard it's going to start on 13th October, now obviously from what Deputy Huet said it's not all going to be done in one burst, but I cannot believe that it will not be completed within the six months, and the die would have been cast by then. Nobody will want to negotiate, because one side or the other will know that they're onto a winner.

That I think, if members can just bear with me, I think that completes the speakers in, if members will just bear with me I must just consult the notes but I think that effectively.

Greffier

Perhaps I could, whilst you look into your notes Madam Solicitor refer to the point which I roughly cut off Senator Le Claire about the release of the tape of 'in committee' discussion, I wouldn't imagine that any problem with that release when the litigation is complete. I think the issue may be more practical. I can't imagine Radio Jersey broadcasting four days of

Senator Le Claire

Sir, may I take this option to apologise if I offended the Solicitor General in standing Sir, but I was actually seeking some legal advice as to whether or not there would be anything to stop us securing that

Solicitor General

My only reference to the earlier debate possibly not being broadcast, is I know that the States have decided that this debate will be broadcast, therefore I know it will, or made available. The States have said nothing about their intentions with the other one, therefore I don't know whether it will or not, because it's not my decision, and that was the extent of what I intended to say. I certainly wasn't insulted by the, or put off by the Senator asking.

Greffier

From a legal point of view, Madam, there would be no objection if the States wish to release

Solicitor General

No more objection to releasing that one than to releasing the other one. It was simply that I wasn't in a position to know what the States were going to want to do.

Senator Le Claire

Can I thank you and Her Majesty's Solicitor General.

Solicitor General

No, that does complete the points upon which I had anything to say.

Senator Walker

We refute all of those and to my mind serious allegations against me and my Committee but then Sir, we're all aware of some of the other allegations the Senator's made in public recently which are equally totally unfounded and completely and utterly inaccurate, and all sadly without providing any evidence to support the statements at all.

This is as so many members have said, an extremely serious debate and it's a debate that needs to be decided on the issues, not by vilifying those be it, be it politicians or Law Officers who have done their duty and brought it forward for the States to decide. And what is Senator Edward Vibert's suggestion for what we should do now. We should sack our legal advisers. Very constructive and totally, totally unhelpful.

Sir, the Deputy of Trinity said, and many other members have echoed this, that we clearly do have new legal opinion, I think that's been conclusively shown by the Solicitor General and other members who've spoken. Deputy Ryan I thought made a very good point when he said there has not been a direct legal judgement that the Crown own the foreshore, and if it were to continue in Court we would actually be establishing legal history. Hence the risk, or much of the risk. There is no firm precedent on which this case would be judged. He suggested that mistakes had been made in the past, and that may well be true, but of course other members have made the same point and that will be the subject of the public, amongst other things, of the public Inquiry and he was the first I think to say that my heart tells me to fight on to reject the proposition. My head tells me that I must accept it and he ruled, or went with his head. Deputy Scott Warren referred very, I think sensibly, and accurately to the future financial well being of the Island and concluded that we could not take the risk of continuing in Court.

Deputy Duhamel said that we should stay in Court, take it to the Court and hope for a sensible judgement. Well yes Sir, we can always hope and it is I suppose a valid view, that most of us are not prepared to take the gamble, just to base it on the hope we will get a sensible judgement. I am sure we will get a sensible judgement, but it may not be a judgement which is in our favour. There is a considerable difference.

Deputy Dorey made the point that much of what had been said to-date, I think he was mainly referring to Senator Edward Vibert, was relevant to the public inquiry but totally irrelevant to the major issue, the question that has to be answered in this debate, and he went on to give an analogy to talk about, effectively, insurance as other members did, the analogy of the child car seat, a sensible investment, because your not expecting the worst, you never know what's going to happen. He also said, and I couldn't agree more, that he prefers to take legal advice from the professional lawyers rather than some of the amateur lawyers that have appeared out of the woodwork during this debate and in the preceding weeks.

Deputy Breckon suggested that the negotiations were not, in fact, successful. I'll come to that point when I conclude and he asked what did Les Pas have to lose. Well of course, Les Pas have to lose basically the potential of owning the entire Waterfront which is in dispute. Take them on he said, call their bluff. Well, as I said in my opening speech those are, apparently, brave words but they could be foolhardy words as well, because there is that risk of losing. A 40 per cent risk of losing. And he did say which I thought was a pretty extraordinary comment that if we were to lose the cost to the public purse is

down the road, which rather sort of airily waved it away. So because it won't happen immediately, it doesn't really matter, it's not that important. Well my view and that of my Committee is it doesn't matter whether we lost this case and it cost the Island hundreds of millions of pounds today, next month, next year or in ten years time, the effect is still catastrophic for the Island in financial terms.

Deputy Taylor saw, said it was quite clear and he referred to page 44 of the pack of papers we've got where the legal advice changed, and again I'll come to that right at the end. He also made the point, and I agree again, we're not in the risk business.

The Deputy of St. Mary said we're between a rock and a hard place, and how right he is, and of one of many to express his anger at being put in this position. And Deputy Le Main talked of the duties of the public, the fact that we are, in his view and I agree again, trustees, and he was the first one I think to actually mention the word insurance, and that was taken up by other speakers, and again I think it was a very good focus for all of us to concentrate on.

The Connétable of St. Helier referred to the comment I made about, possibly, foolhardy words to fight on, and then went on to say that either I or my Committee had called opponents to the proposition stupid. Well certainly Sir, I have not, most definitely not, used those words and nor am I aware that any other member of my Committee.

Connétable of St. Helier

Sorry Sir, it was the Deputy of Trinity who used that adjective.

Senator Walker

Well you were using it in a bit of a rant against Policy and Resources Committee at the time, Connétable and certainly it did not cross my lips or those of my Committee. And he said Sir, he'd been given a roasting by P & R. That is not the case. The views he holds are legitimate, absolutely legitimate, and he referred to public opinion, and he referred to his parents who said for goodness sake fight on, but I would go back again to something I said in my original speech. How many of the public, including the Connétable's parents, are fully aware of all the facts. And the answer is none, or at least the answer should be none. And he also said we're not just trustees, we're also leaders of the community, and again I agree entirely and this actually, although a number of members wouldn't agree, is an issue where we need to show a lead in the face of undoubted public opinion against the proposition. He also said that we hadn't engaged, as I said in my opening comments, in open government and it was very difficult to get information on this. All I can say to that is, that we have brought this matter to the States at the earliest possible opportunity. We briefed the vast majority of States members on 3rd June, 2½ months ago, and we'd given every piece of information we could under the legal constraints placed upon us, without risking jeopardising our face should we stay in Court. So I refute the suggestion that we'd gone against the principle of open government. This is a unique situation, one in which I've never found myself before, and my Committee hasn't and I don't think any other member of the States has either.

The issue relating to Environment and Public Services has been adequately covered by Deputy Hilton, very adequately covered, and I'll deal with that very briefly a bit later on.

Senator Le Claire said, and I was grateful to him, that P & R were in a position where they would far sooner not to have had to bring this proposition to the States and I can speak from the heart from all seven members, on behalf of all seven members of my Committee when I say, absolutely right, none of us wanted to be in this position, none of us has enjoyed being in this position and we're still not enjoying being in this position, but we have had to do our duty and bring this forward for the States to decide. He then went on to talk about who are the owners of Les Pas, and are they trusts people hiding behind trusts and so on, and I agree with him, that is an issue for the public inquiry and I'm hoping that the public inquiry will be able to get in to all such matters. He then went on to talk about the issue of conflicts and

perception and trust of the public, and I understand again where he's coming from, but that is not the issue we're being asked to judge today. That again is an issue for the public inquiry. And so far as the interests are concerned now, here, today, is when it matters. This proposition would have come to the States irrespective of the interests of individual members, and the States would have to take the same choice today. For anything else to have happened, or nothing, if you like to have happened, would have been dereliction of duty, and so today is when it matters and none of the members who have an interest have been present in this Chamber, have participated in the debate and nor of course, will they be able to vote in a few minutes on the outcome and to take the decision.

And I have to say then Senator Le Claire went on to confuse me greatly when he said he thought it might be the best thing to do, that the proposition might be the best thing to do and he may vote for it, then he went on to say that he wouldn't, which in fact it didn't surprise me as much as it might I suppose. But he also went on to say that votes against was a message to the Court that we'll think we'll win. Well really Senator, please think again, that is, I'm afraid, totally, totally wrong.

Senator Routier, thank you, referred to the June meeting where, as he said, we openly discussed the issues and we sounded out members opinion. Now I may be wrong, but I left that meeting believing we had the support of the vast majority of people who were there. I don't argue with the Connétable of St. Peter that there was no vote or individuals, that they didn't stand up and say I'm for, I'm against, but the overwhelming feeling we got from the questions that were asked, the comments that were made, afterwards that we had the support of the vast majority of members who were there, not all by any means and there was some clearly stated opposition, that's fine. But I did think, and I know my Committee felt the same, that we did have considerable support.

Senator E. Vibert

Can I make a point of order?

Senator Walker

If it's a point of order Senator

Senator E. Vibert

It is a point of order I do know what they are.

Senator Walker

Are you sure? I would prefer to continue. These interruptions are far too frequent.

Greffier

The Senator can raise a point of order and it is a point of order.

Senator E. Vibert

The point of order I wish to make is that what the Senator has just said about the meeting on June 3rd is in fact not accurate.

Senator Walker

You were there, you were there?

Senator E. Vibert

It's not accurate as recorded in the minutes. Well because, can I read the minute? I'll read the minute. Deputy Breckon questioned why, when the States had been advised in the past that the case had no merit, had this legal advice changed? Senator Walker concurred that this has always been the basis of advice received that in view of the mounting costs it was now being prudent to seek a settlement.

Senator Walker

Sir, I haven't referred to that at all. I don't know what the relevance of that point, so called point of order is whatsoever. All I said was that we left that meeting with a clear understanding, or a clear impression that we had the support of the majority of members present. That's all I said. I didn't refer to the point raised by the Senator whatsoever. I made no opinion on what anyone said. I said, actually, that there was some clearly stated opposition which there was and I respect that, but the vast, the feeling that we had was that the majority were in support. That's all I've said about it.

Senator E. Vibert

Sir, the point of order Sir, was that the advice, the legal advice that had changed had not been given to those members at that meeting. The meeting was never told that the legal advice had changed.

Senator Walker

Of course they were not given the full legal advice, that was impossible at that point, but they were given a very clear insight. Very clear insight, and Senator it's a shame that either you weren't there, or secondly you didn't take the opportunity presented to you to have the same presentation made to you at some point thereafter. Had you done so, you might not have jumped to some of the totally unreasonable conclusions that you had.

Senator E. Vibert

Sorry Sir, I beg your pardon Sir, I do beg your pardon.

Senator Walker

Senator Routier also asked if we can go to Les Pas to see if they really want to go ahead. Well, that's remains to be seen, but I think there is very overwhelming evidence that they are determined to push this issue to the end, if that's what they have to do. He also was the first one to make the very, very valid point, and I make no comment on whether an embargo or a boycott of Channel Island Traders is appropriate by the public, but he did make the point that if such a boycott was as successful as some members would like it to be, then many, many local jobs would be at stake. He went on to express his gratitude to the Policy and Resources Committee and the Solicitor General for our due diligence and guidance. And I'm very grateful to him for those comments.

The Connétable of St. Peter rightly, I think, said that this would make history for many, many years, generations, I think to come and I do agree but it's not history that we've particularly happy to have to make but I think that's a conclusion that he's come to as well. Very far from happy to be in this position, but basically coming to the reluctant conclusion that there is no alternative other than to accept the proposition. I think we all have great sympathy with that point of view and indeed share it.

Senator Ozouf confirmed just how difficult it has been for the Policy and Resources Committee to engage with this issue to consider what best to do, and ultimately to bring this proposition forward, and he was one of a number of members of the Committee, acolytes, I don't think so, as had been suggested. He was one of a number of members of the Committee who quizzed me and Senator Vibert and the Law Officers very, very hard indeed on the whole issue before he was prepared to say, I believe this is the

right option. And it was a pretty onerous task that we had to go through to convince him, and other members of the Committee, that this was the right way forward. He expressed his concern for the States financial position, and also talked about insurance premiums, and made the point that come what may we need a belt and braces public inquiry and I absolutely subscribe to that and support it.

Deputy Fox said, and I'm grateful that he understood the Policy and Resources Committee position, but quite understandably cannot support a morally wrong report and proposition. He recognises the risk but can't support such a proposition. An entirely valid view, I don't agree with it obviously, but an entirely valid view.

Deputy de Faye, and I have to say I thought in a quite excellent speech, certainly the best speech I've heard from this Deputy since he joined the States and not just for once because it was in support of Policy and Resources, it was an excellent speech. Yes, Sir I wouldn't mind having him in my crow's nest after all, but he said we had a duty to act as Statesmen and Stateswomen in relation to the economy and in so doing put a lid on the emotion that this debate has generated. That this is no time for a populist position and I again to wholeheartedly concur. He was also one of the speakers who said this should have been sorted out ten years ago, and that is I think almost certainly right, but again an issue for the public inquiry. And he made the point, and again I entirely agree, there is no way Les Pas are going to capitulate now. A number of speakers had said put more pressure on them, they will capitulate. There is no way they're going to do that because, as the Deputy said, they have their eye on the main prize, the whole of the land under question. And he made the very valid point, that if we pursue litigation it is the only possible way we can lose. That is the only possible way we can lose, is by pursuing litigation and going back into Court. And then he went on to give the analogy of the high stakes poker game with £3 million on one hand and hundreds of millions of pounds on the other and asked a very valid question who loses in that context. Who loses? and the answer is of course it would be the public and the Island. And he also referred to insurance policy saying it was gold plated, copper bottomed and lasts for ever and yes he's absolutely right. This proposition gives us total, complete certainty and that's what we're all about.

Now the Deputy of St. Martin, deliberately or not, offended me enormously. I am a fellow Arsenal supporter and to liken me to Glen Hoddle, that was the one insult that really wounded me through the whole debate. But Sir, I do say, I do acknowledge that the Deputy has engaged in an enormous amount of time researching documentation, history, etc., etc., and I commend him for that, but he did go on then to criticise Policy and Resources Committee about the availability of documents, legal opinion and so on, but I'm sure the Deputy does actually realise that we have been working to our intense frustration under very clear legal constraints and under very clear legal advice. It has not been possible to release as much information in the sort of timescales as we would have liked, and I know the Deputy and others would have liked. But it is a shame that the Deputy and other critics of the proposition have at no stage approached me, or as far as I'm aware any member of my Committee, to sit down and have a discussion and to have the same briefing as was available on June 3rd. I think that's a great shame. He went on also to talk about the 1997 letter, and the report and proposition, which said that the case was without merit, and he said there was no, none of the qualifications to that were put forward, none of the much less robust advice that had been received from the Attorney General and others. Well of course they weren't, because that was a public document and what you don't do, certainly couldn't do at that stage, is put in the public domain that you weren't rock solid certain about your case. That's all part of course, the tactics leading up to a Court battle. The States would have looked absolutely daft if in the blue, the report and proposition they had repeated and replicated the advice of the Attorney General which said well, hang on a minute I think may be, should consider a compromise as things as things aren't quite, perhaps quite as rosy as you'd previously or otherwise been told. You can't do that. And what you do of course is you state your position in public as robustly as you possibly can and that's got to be the case. There is an issue, I agree, about how much information was given to States members at the time. It's absolutely an issue, but that's a number of years ago now and there is no way of course, that any member of my Committee can be held responsible for that. That is also an issue for the public inquiry.

But he then went on to say because of that that the only change has been the constitution of the Committee. I do absolutely categorically deny that that is the case. The previous Policy and Resources Committee were seeking to arrive at a negotiated settlement when they went out of office. And he also talked quite erroneously, and I thought we killed this one, that Les Pas stand the opportunity of making a £40 to a £50 million profit out of this deal. That's not just possible. The estimate from the property advisers, the property consultants to the Environment and Public Services Committee and through them to P & R, is there any additional profit after taking £30 million or so at risk is going to be well down in single figures. Nothing like £30 or £40 to £50 million. And he also said Sir, and I was sad to hear it, that he believed some things have been hidden from us today and I can again categorically deny that that is the case. We have brought forward to this House as much information as we possibly can. And goodness me, how much more information members could require after the day and a half the Solicitor General was on her feet last week and the public, I'm sorry the private briefings we've given States members, and the papers have been made available, I'm not at all sure.

Deputy Ferguson said that the question of blame, and she's absolutely right, is for the Committee of Inquiry and we could all have 20-20 hindsight. Well of course we can. We're all brilliant, infallible, with 20-20 hindsight, sadly none of us has actually, actually got it, and she went on to say, this is the here and now. And made I think a massively important point. Compromise is not capitulation. Capitulation would be to give in and to say here you are, and here's the Waterfront, here's what you're claiming. That's capitulation. Compromise is not capitulation, it is a sensible negotiated settlement of a very, very complex and difficult issue, and I thank her for making that point because it's actually of some considerable significance.

Deputy Le Hérissier, and I was grateful to him for saying he thought there had been over emphasis on alleged incompetence and suggestions that there was a conspiracy, then he went on to say it didn't think there was. I'm not sure he didn't go to suggest any further remarks that he really actually thinks there is, but that's another issue. He talked about an attack on good government, but the fact is we cannot undo the past. We are where we're at and if we were to lose, I'm sorry, I've been trying to resist the horrible sound of Senator Edward Vibert's screaming so I've tried to avoid saying that, but I fell into the trap. I beg your pardon. But the fact is that we've got to take a decision today, and the good government of this Island would be seriously under attack if we stayed in Court and we lost, and to the tune of hundreds of millions of pounds. That's when good government would be in question, that's when good government would be really under attack.

Senator Syvret opened by saying he'd been fairly restrained in his comments so far. And I would agree. But he then went on to say that he had given P & R the opportunity to provide him with the information he needed to vote in favour of the proposition, but we haven't done so. Whilst I don't know, well perhaps I do, from his further remarks, what exactly he was looking for. He was looking for of course a second opinion, ignoring the fact that that would take many months for anyone to get up speed. He was looking for a peer review, well the same thing applies without any question at all, and he went on to, I think, make some very unfortunate suggestions about the ability of our legal advisers, including the Law Officers, and I think that was sad and unnecessary. I have no hesitation saying, whatsoever, I have complete faith in our Law Officers and the advice they've given my Committee and this House in this whole issue.

He also talked about the £10 million could go towards housing and health etc. Well yes, theoretically at least it could, but as somebody else pointed out what happens if we go to Court and lose and we're hundreds of millions of pounds that would have otherwise go, could go to health, education and whatever and that's lost in the hands of the greedy developers that he's so anxious to take on. They win hands down in that context, and the Island loses hands down in that context. He also talked about the very block of flats, I think that's been dealt with adequately, more than adequately by Deputy Hilton, but just make the point that that particular site has been zoned in principle, was previously zoned in principle for 132 two-bedroomed flats and there was little if any change in bulk as a result of a change to 100 three-bedroomed flats. So any question of size in this context is irrelevant to this debate. He also said

that he hoped the public inquiry would look into everything in depth, and again I absolutely agree with that. He then went on to say, and I thought this was astonishing, that if we were to agree with Senator Edward Vibert and sack the lawyers, then the Court would be bound to grant a further adjournment. Where that level of knowledge comes from I really can't imagine. It's totally, totally false. It's pie in the sky, wishful thinking, basically.

Now Deputy Baudains, and I'm sad Deputy Baudains is opposing the proposition, but I understand because I know as he said, he was minded to support it originally but I understand his position. The one thing I would perhaps challenge in which he said, was that the property could be worth up to £20 million. I assume he was referring to the site which is the only subject of the proposition and I can say that the maximum value that's been put on it is £10 million, other values have been less, but we've chosen, deliberately chosen the highest figure so that there is no question of the States being misled in that respect.

Deputy Baudains

I was including development as well.

Senator Walker

Ah well, at the end of the day Deputy, that may well be true. As I said in answer to a question from you a couple sittings ago any developer, Les Pas or anyone else, will have to risk £30 million or so of their own funds to achieve that, which I think we understand now.

Senator Le Maistre made, I thought, a very thoughtful speech talking about the public anger and understanding it, and saying the public is quite right to be angered, and particularly as he sees it the bad side of big business, and I understand exactly what he's saying. But he then went on to say, it's easy to be distracted by the emotional arguments, let's beat these guys but then he said, I think it's another important point, can I face the electorate having lost the Court case and say, sorry guys I got it wrong, here's the bill hundreds of millions of pounds and he concluded rightly having assessed this, I think rightly of course having assessed the risk that he would support the proposition.

Senator Norman made, I thought, an excellent and typically punchy brief speech when he said going into Court is a jump into the unknown, absolutely right. We have certainty on the one hand, risk and the unknown on the other. Now that's the choice basically, and I know where I sit, and thankfully Senator Norman feels the same and other members obviously do as well.

Deputy Farnham has a temptation to fight, but didn't actually conclude whether or not he was going to, I think. But he did, was concerned that if we don't conclude this agreement that there could be a halt to development on the Waterfront and was concerned about WEB's position. We're all concerned about WEB's position but we have consulted very, very closely with WEB throughout this entire process, and they understand fully why this proposition is coming forward and accept the need for it and, of course their position would be materially jeopardised if we don't conclude this agreement and the whole thing spins out for years in Court, their position would then be seriously jeopardised.

Senator Kinnard, and I'm very grateful to her, gave a very supportive speech and she was one of the other members of Policy and Resources Committee, well they all did, and Senator Kinnard has a habit on P & R of questioning, questioning, questioning and she will only sign up to a final conclusion when she's fully satisfied that she's had all the answers to many, many questions. And I commend that and obviously I'm very pleased that she, along with all the rest of the Committee, unanimously agreed that the proposition was the right way forward. And she's made a very good point as well. People have said well, the facts haven't changed and she said absolutely right. The facts as they are have not changed, what has changed is the interpretation of those facts and the advice, and that's very clearly what we said from day one, and she also said it's very clear in what way those interpretations and advice have

changed, and that's very clearly I think, included in the papers that we have. And it is clear, why it's clear because the new advice is after, not just as we heard from the Solicitor General, not just discovery, but the analysis of the discovery, and having all the skeleton arguments in place, and then producing a risk assessment. Those are the reasons it's changed, people have said well, we've had nothing to show us, or tell us why the advice has changed. It's very, very clear and very clearly referred to any information members have. And Senator Kinnard also went on to say that the costs of losing are beyond contemplation and of course I most wholeheartedly agree. And she also said how could we face the public if we lost? And any public backlash in that scenario would be infinitely worse than the sort of public reaction that we have had in recent weeks. The issue she said is risk management and we're facing the uncertainty of common law. It is absolutely, absolutely right.

Deputy Bernstein decided that having weighed up all the issues he would vote with his electorate and that of course is absolutely his right. I don't agree with him, I don't think that's actually what we're here to do in all cases, and we do, of course, have much more information available to us than do the electorate but I respect fully his decision.

Senator Michael Vibert who, is my fellow negotiator, said again, not the first speaker to say so, mistakes are for the inquiry and our duty is to see if a negotiated, or was as the Policy and Resources Committee, to see if a negotiated settlement was possible. The easy option would have been to ignore it, just to sit on it and let it carry on in Court. But as I have said, and he's endorsed that, would be a dereliction of out duty to this House and to the Island. And he also asked the question who do we believe, the lawyers who are advising us, experienced, reputable, qualified legal advisers, or the totally non-qualified members of this House and others who seem to be researching legal advice and suggesting that they know better than our professionals. Well I know very much who my Committee believes, and there is no doubt, it has been suggested to the contrary, that Advocate Binnington has been open and told us the truth as he sees it. There is no doubt that the odds have changed, and I explained, and other members have explained, why. And I certainly put my faith in his advice and those of our Law Officers rather than anybody else. And indeed rather than the previous lawyers as well. Although I don't doubt the pedigree of the previous lawyers, the Solicitor General has also referred to Mr. Michael Fysh who is eminently qualified as well, who gave a totally contrary opinion to that of Messrs. Kidwell and Gadney. She's also referred to the current Deputy Bailiff then in private practice, who gave an alternative view, but the big issue is that none of those had the access to all the discovery documents, none of those could do the analysis of the discovery documents, none of that advice is up to date. The advice we're now getting is based on new information accumulated over months and years, and is current, rather than the advice of Messrs. Kidwell and Gadney, which is now, well, many years in fact, out of date.

Now Senator Le Sueur has been not accused exactly, but has been questioned as to why he said, I think at the St. Martin's public meeting, that very little has changed. Well of course he couldn't, then, say the legal advice has changed, because again that was in the public arena and what we'd be doing is handing a present to the opposition, jeopardising the public's case. He couldn't say it, and the only reason I could say it, and I first said it at the St. Peter's public meeting, St. Peter's public meeting was because then I was advised by the Attorney General that Les Pas had signed the conditions precedent, so there was no question of them being able to pull out of the deal. I couldn't say that before then, it was only at that point that we were able to say it. So it's frankly nonsense to say, well why did Senator Le Sueur say well nothing much has changed, why didn't he say the legal advice has changed. He could not and my goodness me he most definitely should not and was totally correct in no doing so.

Deputy Martin said "risk what?" well hundreds of millions of pounds basically is the answer to that and she said O.K. it's a legitimate view, we want to see our day in Court, fair enough. The Deputy of St. Ouen talked about the anger he feels, that this of course is something he shares with me and many other members, I think most other, probably all other members of this House.

Deputy Huet spoke from the heart and said she couldn't give in to blackmail and appeasement, I don't believe it's appeasement, I'm not arguing necessarily about the blackmail, I don't believe it's appeasement but again I respect her position.

Deputy Troy has done an enormous amount of research, and there's no doubt that and he is to be commended in my view for that, but I think sadly he sought to use that research to second guess our legal advisers and I don't believe that's a supportable line for a politician, a layman in law terms, to take.

The Connétable of Trinity talks about our future finances and our grandchildren and is absolutely right. Those are things, children and finances, we have to take very, very much to heart.

Deputy Southern, actually it was Deputy Southern who first said in this part of the debate, we are where we are, but there we are and he said we'd fallen into a carefully prepared trap. Well I don't believe that that's the case. He then went on to talk about the procedures of negotiations, and said you go into negotiations with a strategy, you go in with a best case, worst case, yes absolutely right and my instructions and that of Senator Vibert from the Policy and Resources Committee were, negotiate a settlement which is very close to the cost of winning the Court case. That was our strategy. Those were the instructions we had, that's what we went in with and that's what we darn nearly came out with. So don't tell me we were unsuccessful, we had a strategy and we came within a millimetre of pulling it off. And certainly Les Pas had a different strategy and they came nowhere near getting what they went in with.

Deputy Voisin made some supportive remarks, and again said the same things that many members have said about difficult position and so on but the risk suggests we should accept.

The Connétable of St. John asked about the petition to The Queen, the petition by Mr. Shenton, and asked whether it would be before or after the Court case. Well the information we've had from the Department of Constitutional Affairs it will most certainly be after, in fact they, all they could say it's receiving consideration but somewhat to our surprise, nobody seemed terribly clear what had happened to it. That remains to be seen, but it certainly not going to, by the sound of it, not going to be an issue before we would go back into Court if the House rejected the proposition.

Deputy Hilton, and I'm really grateful to Deputy Hilton for clarifying the Environment and Public Services Committee's position. She said she's disappointed in the Connétable of St. Helier, and I'm sure her sense of disappointment is shared by her fellow colleagues on the Environment and Public Services Committee, because the record is quite clear, the Connétable made no protest against what Environment and Planning were asked to do, voted in favour of it, it was a unanimous decision. And he's made, sadly and for whatever reason, a complete u-turn since. The Deputy, Deputy Hilton also referred to future generations and the difficulty of property issues such as this and referred quite rightly to Lesquende, and said the consequences of carrying on and losing in Court are too horrific and again she hit on a very, very important point. The land in question, if Les Pas got hold of it, would give them an absolutely vice like grip over the Island's energy supplies. Now is that a position this House wants to put itself in?

Senator Le Maistre is a director of Jersey Electricity has confirmed to me that if we couldn't operate the power station we would be entirely at the mercy of the French run or French influence cable supply. What we have here is another insurance policy, we rely heavily on the French supply through the cable, but we can of course generate our own electricity should we need to. If we lose ownership of the power station, either we'd lose that capability completely, or we would probably have to pay through the nose to the owners of Les Pas to achieve it. Now is that a position that members really want to risk putting the Island into, I can't imagine that it is .

The Connétable of St. Brelade said we can't risk proceeding in Court and the Connétable of St. Clement asked about negotiations and said we only went, or we went into negotiations three times, well actually I think Connétable, it was probably overall on two occasions that there were negotiations some time ago

between the previously Policy and Resources Committee representatives and the then representatives of Les Pas when their demands were outrageous, and we walked away from the table. Then really this last set of negotiations had been split into two bits I agree, because there was Senator Horsfall and myself towards the end of last year, and then Senator Vibert and myself more recently. So I think Sir, that the Connétable is on the right lines Sir, but it's probably only twice that we've only negotiated, because we've had many, many more meetings than that with them. I've lost, I haven't kept track to date, of how many meetings we actually did have with Les Pas representatives, but it certainly was a significant number and I genuinely don't believe having said what I just said, that we went into this with a strategy to achieve a negotiated settlement no worse, or little worse, than the cost of winning the Court case, that we could have achieved a better result. I genuinely do not believe we could.

And Sir, can I conclude all the speakers by thanking warmly again the Solicitor General for her consistent and clear advice.

Sir, I also like to refer at this point to the fact that in her final address, thank goodness she demolished the innuendo that's been aimed at her and other Law Officers, and demolished the ill founded allegations of incompetence and negligence that have been put forward. I think it's very sad that she even had to do so.

Sir, finally can I say how grateful I am again to members, to the Solicitor General and to my Committee for wrestling with this unbelievably difficult issue. And I understand fully the views and the feelings, the emotion of those who wish to fight on on the basis of morality, public anger and so on. And I sympathise with that view, I don't agree with it but I sympathise, I understand the point. I also understand members who believe they must be influenced by public opinion. Again I don't agree, but I understand it. But let's keep the public opinion also in perspective. Frankly the number of people who telephoned the JEP poll for an issue such as this ultimately was pathetically low, pathetically low. We've seen six people in the Royal Square yesterday suggesting that we should boycott Channel Island Traders. I fought through crowds in the Royal Square before now demonstrating against propositions coming to the States, (interruption) (only outsourcing ones) and the disabled transport allowance. There was nothing along those at all so just how heavy is public opinion. There hasn't been anything like the demonstration of it as some members of this House has suggested or indeed I think would like. And Sir, in any case, the public, as I've said, are not in possession ands cannot be in possession of the full facts.

The legal position I'm not going to dwell on, it has changed and I was going to read it but time is late, page 44 of the pack of papers we've had, very clearly spells out in an e-mail from Advocate Binnington, very clearly spells out that fact and I'm not going to go there any further.

The question of interests, etc., jobs not being done in the past or whatever, all of that may or not be valid but it is a question for the Committee of Inquiry. And Sir, finally I do genuinely believe, and my Committee genuinely believes, that the risk to the Island of continuing in Court, the risk to our financial future and our whole financial stability is far, far great to take. Whatever members assessment of that risk may be it is a risk we simply cannot in the public interest afford. We are gambling as Deputy de Faye said, on the one hand £3 million, against on the other hand hundreds of millions of pounds, and that's not a gamble, it's not our money, it's public money, and that's not a gamble in my view we should even contemplate and taking. We are not in the gambling business, and we are leaders and we need the courage, because I believe it does take courage to vote in favour of a proposition such as this. We need the courage based on the information that we've all got, which nobody else has got, to show that leadership and to stand up and vote in favour of this proposition and remove all future risk to the public purse and to the public interest. And Sir, I very, very strongly urge members to accept the proposition.

Senator Syvret

I ask for the appel.

Deputy Hill

Sir, before we go any further, I was specific with three questions I did ask in my speech, and I would like the answers if possible, because I think they are important, and if you'd like me to remind the President of them again Sir, I can get them, and they weren't legal questions they were questions which I think were quite genuine and were deserving of an answer. Could I ask again.

Greffier

Yes Deputy if you feel they weren't answered.

Deputy Hill

The first one was why was the risk analysis not carried out before seeking security of costs? O.K. there's two others, do you want to

Senator Walker

I can do whatever way you like Deputy, I don't mind.

Deputy Hill

Oh please do that one and I'll come back with the others.

Senator Walker

The answer, the Solicitor General may be able to answer that more clearly than I can. The answer is I don't know, I wasn't there at the time, so I don't know. So that's a matter that would be under the remit of course of the Policy and Resources Committee of the day, and the legal advisers of the day, so I'm afraid I' can't answer your question.

Solicitor General

Yes, the position was that Advocate Binnington had advised that an application for security for costs should be made. He had not then said that he thought that a new risk analysis was needed, and until the judgement came out, there was nothing to suggest that a new risk analysis should be asked for.

Deputy Hill

The second one again was why did Advocate Binnington have to be asked for that risk analysis again? that was subject to 23rd August meeting. It said he was asked to provide a risk analysis and I asked the question, why did he have to be asked?

Solicitor General

Well it may well be that, I mean he was asked almost immediately, it may well be that if he'd not been asked he would have volunteered one.

Senator Walker

Sir, I also, may think that does demonstrate as, I'm not sure if it was the Deputy or somebody else suggested that there's such a thing as an intelligent client. And I think the client was there saying we need up to date information, we need a new risk assessment and therefore received it.

Deputy Hill

I've just been pointed out the minutes actually said he had to be asked for it. And the third one, which I think is quite important actually. Would we have continued with the litigation had we had security of costs?

Senator Walker

Absolutely Sir.

Solicitor General

Well I wonder if I can add something to that because what, what the States would have done is a matter for the States but the advice that would be given is obviously a matter for the lawyers. If an order had been made for a security for costs and Les Pas had put up the security, there would not be the risk of total exposure to costs, although there would be a partial risk, because costs are always taxed costs and a considerable amount will always be taxed off, and also one can never be perfectly certain that at the end of the day the ultimate Court will make an order for costs. But there wouldn't be the same level of risk, nevertheless, the risk analysis is so significant that it actually outweighs the costs element so that if there had been security for costs but, a risk analysis of this nature, the advice would have been as it has been, to seek to explore settlement, because there's no point in having security for the costs you'll get if you win, if you've told that you've got a real risk of losing.

Senator Walker

Sir, can I clarify my answer? I didn't necessarily understand the Deputy's question completely clearly. Would we have pursued the litigation? No not necessarily, would we have pursued action and would we have negotiated irrespective of the outcome of costs? the answer is yes. I suspect we'd be still in exactly the same position today as we are with or without the costs award.

Deputy Breckon

On a point of clarification I didn't like to interrupt the President, but he said that I said, in a sort of dismissive way, that if we lose, payment is years down the road, and I would like to refer him back and I do have my notes here. When I made reference to continued litigation and years down the road, it was in respect of the visible shareholders of Les Pas and the effect that we could have on them, it wasn't in a dismissive way of what could happen to us, which was what the President suggested.

Senator Walker

I accept the Deputy's comments.

Greffier

Very well. Well it has been accepted that we most vote in public, of course the media were warned that we were coming to the end and perhaps the Deputy Greffier

Deputy Breckon

Sir, can I ask that Telecoms scrutinise the vote?

Deputy of St. Ouen

Sir, just to say that we're all aware of what happens next regarding the decision and judgement and what we are able to say and not say. Could we have some guidance as to the procedure that we're proposed to follow?

Deputy Le Main

Could I just add on that President that I spoke to you yesterday that only a couple of times I've had my, we've caught people going through the dustbins and we must be very careful with the paperwork that we destroy any paperwork or any issues relating to this.

Greffier

Perhaps you could give us brief guidance Madam Solicitor, or remind members possibly to return these documents?

Solicitor General

Yes, those should be returned. As to what happens once the decision is taken if the decision is not to approve the settlement, then obviously everything remains totally confidential, and all papers turned in. If the decision is to approve the settlement, the actual decision can be made public, but nothing should be said about anything that has been disclosed during the debates until the timescale, which members will remember I gave, which was three weeks following the approval of the States and the Lieutenant Governor. From that point, three weeks for the passing of the conveyance, and then from that point there's a further week for the actual withdrawal of the action. And it's only after the action has actually been withdrawn, the formal notice of withdrawal gone to the Judicial Greffier and the thing is settled, completely and irrevocably, that any word about the content of the debate or the papers should be made public.

Greffier

Members will be notified of that, if that were to happen. Very well.

Well if we could ask the Deputy Greffier to invite the ushers and the media back into the Chamber.

May I remind members about the, I reminded members from the chair some time ago that the sound works a lot better if members put their microphone on when they vote. We wish the public to hear the outcome.

The vote is for or against the proposition of the Policy and Resources Committee and the Greffier will call the roll.

Members present voted as follows –

"Pour" (26)

Senators

Le Maistre, Norman, Walker, Kinnard, Le Sueur, Routier, M. Vibert, Ozouf.

Connétables

St. Brelade, St. John, St. Peter, St. Clement, Trinity.

Deputies

Trinity, Le Main(H), Dorey(H), Voisin(L), Scott Warren(S), Farnham(S), Ferguson(B), St. Mary, St. Ouen, Ryan(H), Taylor(C), Hilton(H), De Faye(H).

"Contre" (16)

Senators

Syvret, Le Claire, E. Vibert.

Connétables

St. Helier.

Deputies

Duhamel(S), Breckon(S), Huet(H), St. Martin, Baudains(C), Troy(B), Le Hérissier(S), Fox(H), Martin(H), Southern(H), Bernstein(B), Grouville.

Greffier

The proposition has been adopted.26 votes were cast in favour, 16 votes against.
