

**In the Supreme Court of St. Helena**

**Citation: SHSC M2/2022**

**Civil**

**Judicial Review**

**The King (on the application of Joy Elizabeth Jeremiah)**

**-v-**

**The Attorney General of St. Helena**

**Judgment dated 15<sup>th</sup> September 2023**

**The Chief Justice Rupert Jones**

1. This is my judgment on an application for judicial review filed on 29 November 2022 by the Applicant, Joy Jeremiah. I heard the application remotely by video on 7 July 2023. The Applicant appeared in person and Edward Garner, Crown Counsel, appeared for the Respondent, the Attorney General. I am grateful to them both for the quality of their written and oral representations.
2. The application concerns the decision of the Saint Helena Government ('SHG') to refuse to sell to the Applicant the freehold of a parcel of Crown agricultural land titled as Barren Ground Parcel 7 ('Parcel BG 0007'). The land had been held by her late mother under an Agricultural Licence and cultivated by the Applicant and her family for a long time. It adjoins Parcel BG 0008 to which the Applicant owns the freehold.
3. In short, the Applicant claims that during the course of her dealings in 2022 with the Agriculture and Natural Resources Department (ANRD) and Crown Estates, the relevant Government Departments, its officers gave her a legitimate expectation that the freehold of the land at BG0007 would be sold to her and that SHG acted unreasonably and unfairly in refusing to do so.
4. The Respondent denies that its actions gave rise to any such legitimate expectation, or that it has acted unreasonably or in any manner so unfair as to amount to an abuse of power. The Respondent denies that it has acted unlawfully in the processes and steps SHG has taken in relation to BG0007.

## **The Grounds for Judicial Review**

5. The Applicant pursues six grounds for judicial review:

(i) the actions of the public officers of ANRD and Crown Estates created a substantive legitimate expectation that Parcel BG0007 could be sold and that it would be sold to her.

(ii) In the alternative, the actions of the public officers of ANRD and Crown Estates created a procedural legitimate expectation that the application for the purchase of Parcel BG0007 would be treated in accordance with established policy and procedure and consistently with previous decisions to sell agricultural plots in similar cases to the Applicant's, none of which resulted in a refusal to sell.

(iii) The decision of the Head of Property and Housing ('HP&H'), communicated in a letter dated 2 September 2022, to refuse the sale of Parcel 0007 to the Applicant was *Wednesbury* unreasonable.

(iv) The decision of the HP&H to determine that the transfer of BG0007 removed its agricultural classification rendered unlawful his subsequent offer of a 5 year lease for 'landscaping' purposes.

(v) His later decision, as indicated to the Applicant by letter dated 25 November 2022, that BG007 would be transferred back to ANRD for managing under their asset portfolio and that the Applicant's application to purchase it would be cancelled was unlawful and unreasonable. It was an attempt to expunge everything that had taken place over the last 11 months and to defeat her proposed application for judicial view by it no longer being held by Crown Estates so that it could be sold to the Applicant.

(vi) Further, by taking the matter to the Estates Strategy Panel ('ESP'), as indicated in the letter of 25 November 2022, long after he had determined the application by himself, the HP&H was clearly not following any proper procedure. The Applicant was given no opportunity to be heard by the ESP, rendering that part of the process unlawful and unreasonable. Again, the Applicant submits it was an attempt to defeat her proposed application for judicial review.

## **The factual background**

6. The evidence for the Applicant consisted of her two affidavits and exhibits. The evidence for the Respondent consisted of the affidavits of Gina Henry and John Holman together with their exhibits. All evidence was accepted in writing without any oral testimony being heard.

7. The following paragraphs of SHG's Land and Buildings Disposal policy are relevant to this application.

Section 2 – General Principles

The general principles for the marketing and disposal of Crown Land and Buildings which will be adopted are as follows:

The Head of Property & Housing (HP&H), in accordance with the Estates Strategy, has an obligation to appropriately release Crown Land and surplus or redundant built assets onto the market, applying a duty of care to demonstrate value for money.

The sale or letting of Crown Land or Buildings will not always be purely on the basis of highest market bid but will be determined by the assessment of bids against objective evaluation criteria. In the case of land or buildings regarded as significant (see Glossary) prior approval shall be obtained from EXCO, who shall have regard to both the Estates Strategy and the Sustainable Development Plan and where appropriate take into consideration any recommendation made by ESP .

All transactions entered into must be in accordance with the Registered Lands Ordinance.

SHG will act in an open and transparent manner, disclosing all relevant property information where known, except that of a commercial or confidential nature that must be respected.

All relevant transactions must be in accordance with the Immigration Ordinance 2011, as far as it relates to land ownership.

The operation of the Land & Buildings Disposal Policy will be consistent with the promotion and support of a competitive market in land. The general approach to agreeing price/ value should, where possible, be by reference to Market Value.

Nothing in this policy compels SHG to sell or lease any land. SHG reserves the right not to accept any single tender or bid, and is under no obligation to accept an application which is not deemed appropriate by the HP&H, and/or the ESP. SHG will endeavour, where possible, to assist Crown tenants to relocate if their lease is terminated by the landlord through no fault of their own. SHG will not reimburse nor indemnify any bidder or applicant for aborted costs in any negotiations or transfer.

...

### 3.2 Land or Buildings identified by Individuals.

None of the above precludes individuals expressing an interest in the purchase/lease of specific areas of Crown Land or Buildings. However, in the case of land or a building that is not already on the Register for disposal, HP&H reserves the right to determine whether the property will be disposed of at that particular time, by reference to the ESP.

In the case of an expression of interest received on a plot of land in excess of one acre, the HP&H shall refer to the ESP for approval to negotiate with the interested party.

If approved, the HP&H will be free to negotiate directly with the party expressing the interest in the asset. If terms (price and any conditions precedent) are agreed, the HP&H must obtain approval to conclude the transaction in accordance with the decision making matrix (Section 2.2). On completion of negotiations, if terms are deemed unacceptable, SHG reserves the right to advertise the land if it so chooses. A land transaction with an individual without Saint Helenian status in excess of two acres requires a Land Holding License under the Immigration Ordinance.

If SHG decides not to dispose of the identified land or building at that particular point in time, SHG may subsequently decide to release it onto the market. In such cases, the mechanism for the release of land onto the market will apply and the land or building will be advertised for lease/sale as described in this policy.

...

### 3.7 Agricultural forestry land and buildings

This category covers Crown land identified by the Agriculture and Natural Resources Division (ANRD) specifically as productive arable, pasture and forestry land, which is to be protected against development.

An overarching policy aim is to increase agricultural productivity through more efficient and productive land use. Agriculture is a key sector for the island and SHG has given a commitment within the 2014 National Agriculture Policy to supporting and promoting sustainable agricultural production growth through ensuring that land is available. SHG will not release the freehold of agricultural and forestry land but will instead make land within this category available on a lease or licence basis only. An exception may be made in the case of very small agricultural plots that are enclosed by private land and to which no tenant has been attracted for a period of three years. This

is to reduce the fragmentation of the agricultural estate and decrease the chance for invasive species to establish on underused land.

...

[Emphasis added]

The Applicant's evidence contained in her two affidavits

8. The Applicant was born in Saint Helena and holds Saint Helenian status. She resides at an address in the United Kingdom for the majority of the year and at an address in St Helena for part. Her address in Saint Helena is Burnt Rock, Nr Horse Pasture – the freehold property, plot BG0008. It is the place in which she has lived more of her life than anywhere else. She regards it as her permanent home. It is now owned entirely by herself following the death of her mother on 27 October 2022.
9. The Applicant divides her time between the United Kingdom and Saint Helena. She has been able to spend more time on the island by taking both accumulated and unpaid leave from her position in the National Health Service. She was most recently on the island from August 2022 until January 2023 and before that from October 2021 to February 2022.

*Parcel BG0008 – the Applicant's property and land*

10. The Applicant's property is situated on Parcel BG0008 which immediately adjoins Parcel BG0007. The freehold of BG0008 has been held by successive generations of the Applicant's family for over a hundred years. The size of the plot is 0.23 acres.

*Parcel BG0007 – Crown land rented under Agricultural Licence*

11. Over the same period of time Parcel BG0007, which is Crown land and consists of 0.44 of acres and forms an 'L' shape round the freehold property has been rented and cultivated by successive generations of the Applicant's family under Agricultural Licences issued for that purpose.

*History of the property and lands – Parcels 0008 and 0007*

12. The property BG0008 at Burnt Rock has been in the Applicant's family since 1907, having been purchased by her grandfather Stephen Stroud. The formal transfer to him took place in 1908 and is numbered 322 C. It predates the land adjudication process which took place in the nineteen eighties following the passing of the Registered Land Ordinance 1980. The importance of this is that what is now Parcel BG0007 is mentioned in the 1908 transfer as being even at that time leased land. The leased land was used for food production for a family of thirteen.
13. The Applicant's father (Percival Stroud) later bought 322 C (what is now BG0008) from his father as he was earning better wages on Ascension Island and could maintain the

house and later provide for his mother Blanche Stroud. Blanche Stroud, the Applicant's grandmother, took over the payments in respect of the leased land following the death of her grandfather but this became the responsibility of her father in 1961.

14. On the return of the Applicant, her father, mother and brother from Ascension Island in 1972, her father continued to rent the land (BG0007) under agricultural licence and it was used for rearing goats and growing produce for their own use and to sell. The family largely lived off the produce and the income from it.
15. The rented area (BG0007) has always been wrapped in an 'L' shape around the freehold (BG0008) and utilised as a single cohesive unit. All of the family worked on the land.
16. The Applicant left the island in 1989 to study in the UK. When her father died in 1991, her mother Beatrice Stroud continued renting the land under licence as she was still rearing goats and growing fruit and other produce on it. When the Applicant returned to the island from overseas training in 1993 she resumed cultivation of the rented land with her mother. In 1996 the Applicant married and left with her husband to work in the Falkland Islands where they had both secured jobs.
17. When the Applicant was back on the island in 2002 her mother wanted her to take over the Agricultural licence to BG0007 which she did. Thereafter, the Agricultural and Natural Resources Department ('ANRD') Assets Policy came into effect in 2007 and this provided as follows, at Paragraph 17.2:

'Tenants of agricultural assets who move away from the island. For more than 1 year should inform ANRD of this intention and They will not be allowed to renew 1 year licences for land and building assets. ...the asset will be offered for licencing in the first instance to the person who may be utilising the asset during the tenant's absence.'
18. Subsequent to this the Applicant was informed by the ANRD that as she had been away from the island for more than a year she could no longer hold the Annual Agricultural Licence. Her mother, in accordance with the above Paragraph 17.2 then held the Licence from 2009 to 2022 and the land continued in use for agricultural purposes.
19. As from 2012 this use was in accordance with the Business Plan submitted by the Applicant and accepted by ANRD (which department has become now Environment, Natural Resources and Planning 'ENRP'). The Applicant's husband had retired in 2010 and from then on they were able to be in Saint Helena for a significant amount of time each year, enabling them to develop BG0007 in accordance with the Business Plan.
20. As far as BG0008 is concerned, the Applicant had been the joint owner of the freehold since 1995 until October 2022 when she became the sole freeholder upon the death of her mother.

21. The Applicant invested significantly in the freehold property at BG0008 over the years including installing electricity in the nineteen eighties and later erecting a large conservatory style living area and a two bedroom extension with W.C. and en suite shower to modern standards. She also modernised the bathroom and kitchen, to provide an improved standard of living for my mother and myself. The extra surface area of the roof enables rainwater to be channelled into large water storage tanks installed at her expense (at a cost of approximately £4,000) in accordance with the Business Plan for BG0007 and is used for garden irrigation.
22. The Applicant also renovated and re-sited existing water tanks adding around another 2,000 litres of storage capacity. The Applicant has also paid for the creation of a perspex roofed nursery area for bringing on seedlings and cuttings and commenced fence repairs. In addition, the Applicant has imported pear and quince trees and purchased coffee trees locally. The Applicant's total investment has been in excess of £6,000.

*Relevant developments regarding BG0007 in 2022*

23. In some time in late 2021 or early 2022, in order to protect her investment and to have the confidence to further invest in the land at Plot BG0007, the Applicant approached Crown Estates as to whether she could purchase the freehold.
24. The Applicant was advised that there was an established procedure for this under which the land must first be transferred to Crown Estates from the ENRP agricultural portfolio and then sold to her with a covenant restricting it to agricultural use.

*ENRP's Letter dated 31 January 2022*

25. The Applicant then wrote a letter dated 9 January 2022 to the Director of ENRP, Darren Duncan. In a letter dated 31 January 2022 the Director of ENRP wrote to the Applicant and her late mother as follows:

'We recognize the issues you have highlighted with regards productivity of the agricultural plot that is Parcel BG0007 and are happy to support your request for the freehold to be bought by yourselves. In this respect I will make the necessary arrangement for the Parcel to be transferred out of ENRP's agricultural portfolio of land to facilitate its disposal by the SHG Properties Section at Essex House.'

[Emphasis Added]

26. The land was transferred to Crown Estates in accordance with the letter and this was confirmed to the Applicant by the Crown Estates Officer. In so transferring the land from its portfolio, ENRP gave up the ability to grant any more Agricultural Licences in respect

of it. It was accepted that the sole purpose of the transfer was to secure the long-term use of the land for agricultural purposes by the freehold being sold to the Applicant.

27. In March 2022 the Applicant's mother allowed the Agricultural Licence to BG0007 to lapse as she believed that she and the Applicant would be purchasing the freehold.

*Crown Estates' letter dated 27 May 2022*

28. The Applicant subsequently received a letter from the Crown Estates Officer dated 27 May 2022. It stated that following a consultation with stakeholders, all of them had returned forms indicating approval for the site to be used for its existing agricultural use. The existing agricultural use was as agreed between the Applicant and ENRP in her Plan. She was also informed in the letter that the next step was for a survey to be undertaken for which she would bear the cost. This was carried out and she bore the cost, a sum of £227.50.

29. The Applicant believed that the cost of a survey is only paid in cases where there is to be a sale - in the case of licences/leases it is borne internally within St Helena Government ('SHG').

*Crown Estates' letter of 26 July 2022 – the invitation to tender*

30. On 26 July 2022 the Applicant received a letter from the Crown Estates Officer, Gina Henry, which stated:

'With effect from the March 2016 under the current Land Disposal Policy, all land identified or applied for by individuals will be reviewed via a valuation and negotiation process with the applicant and Crown Estates Management, therefore, you are invited to submit your tender to purchase the land.

The value of the land has been set at £1,320.00 and the deputy Head of Property would like you to consider our value as the purchase price. In view of this it has been agreed for you to confirm this to me by the 9th August 2022, if you do not agree with this value please include your own value on the submission of tender by the same timeframe.

As a reminder, the property will be registered with a clause stating that the land will only be used for agricultural use.'

31. The Applicant believed that the letter was entirely clear: if she accepted the purchase price as set by the Deputy Head of Property and Housing then the land would be sold to her. She believed there was no other reasonable interpretation of this, as is borne out by what the Estates Strategy Panel said about this subsequently.



32. The Respondent's Evidence and Disclosure demonstrates what happened between the letter to the Applicant inviting her to make an offer to purchase the land on 26 July 2022 and the later refusal of sale which was communicated in a letter dated 2 September 2022. The Applicant and her mother heard nothing further between the letter of 26 July 2022 and the letter of 2 September 2022 .

33. An e-mail of 26 August 2022 from Gina Henry of Crown Estates to 'Andy Timm' (Andrea Timm, the Agricultural Development Officer at ENRD) reads:

'Following a review of the application to purchase the land registered as BG0007 by joint tenants Joy Jeremiah & Beatrice Stroud. The Head of Property & Housing (HoPH) would like to know if ANRD will release this land to Crown Estates as a development plot and not for the existing tenants to purchase for its existing use. Please advise soonest so that I can advise the HoPH accordingly.'

34. The reply to this from Andrea Timm by e-mail dated 30 August 2022 reads:

'ANRD transferred BG0007 to Crown Estates with the intention that the land would continue to be used for agricultural production. As you are aware Mrs Joy Jeremiah had enquired about purchasing this land for a number of years so that their investment in the land could be protected. A business plan has been submitted to this Portfolio outlining the development plans for the land, and there is evidence of fruit production already taking place. In view of this we are not supportive of the land being released as a development plot. Taking into account the potential of this land for agricultural production, we would be grateful if the land could be returned to ANRD and managed under our Assets Portfolio please.'

35. The correspondences gives rise to the inference that the intention of the Head of Property & Housing (Mr Holman) was that the Applicant and her mother would be refused either immediately or at some time in the future any entitlement to the land at all.

*Letter of 2 September 2022 – the offer of a 5 year lease*

36. The Applicant later received a letter from the Crown Estates Officer, Gina Henry, dated 2 September 2022, which stated:

I am writing to advise that following an internal meeting with the Head of Property & Housing ('HP&P') about various land applications, in which your application was also presented. The Head of Property Housing advised the land you have applied for cannot be sold, but we can be offer you a lease.

The conditions of the lease will be as follows:

1. Grant of a 5 year lease with an option to review/renew

...'

37. It was said in this letter that there had been an internal meeting at which the application had been considered, the date of which is now said to have been on 24 August 2022 but it is now clear that what was subsequently offered to the Applicant cannot have been decided on that date because as of 26 August 2022 consideration was being given by HP&H to the land's use as a development plot rather than leasing to the Applicant.
38. The Applicant did not accept the suggestion in the letter that the land 'cannot be sold' and believed this was manifestly incorrect. She believed there was an established procedure for selling it which got as far as an agreed purchase price.
39. The letter of 2 September 2022 went on to set out proposed terms for the 5 year lease which were based on an annual rent of 10% of the 'revised landscaping value' of £1,638.12. This was the first mention of any suggestion of a lease or of 'landscaping value', which is a term not to be found anywhere in the Land & Buildings Policy.
40. The Applicant believes there has been no previous case of agricultural land transferred to Crown Estates for this purpose and the sale then being refused. Her belief was that it is not the function of Crown Estates to issue leases for agricultural land – it was only passed to them so that there could be a sale.
41. On 21 September 2022 the Applicant therefore wrote to the Crown Estates Officer requesting further information, including as to why it was now said that the land could not be sold.
42. The Crown Estates Officer replied by way of a letter dated 26 September 2022. This referred to a provision in the Land Disposal Policy stating that: 'Nothing in this policy compels SHG to sell or lease any land. SHG reserves the right not to accept any single tender or bid, and is under no obligation to accept an application which is not deemed appropriate by the HP&P, and/or the ENRP.'
43. The Applicant believed that this ignored the fact that SHG had accepted her application and that it had proceeded as far as stating a price for the purchase. It did not explain the suggestion that the land 'cannot be sold', it only stated that the Head of Property & Housing 'wishes to accept a lease and not a purchase'.
44. The Applicant then wrote to the Crown Estates Officer by way of a letter dated 16 October 2022, hand delivered to Essex House the next morning, requesting an appointment with the Head of Property & Housing. An appointment was later offered for 14 November 2022, some four weeks after it had been requested.

*The meeting on 14 November 2022*

45. On 14 November 2022 the Applicant met with the Head of Property & Housing, Mr Holman. Also present were her husband and the Crown Estates Officer. The Head of Property & Housing is a contract officer from the United Kingdom who was not in post when this process started but has been in post since March 2022.
46. The Applicant asked Mr Holman if he agreed that the plot was agricultural land. His reply was that 'it was for time being' but its future use could be for anything that this was, 'up to Planning'.
47. In short, the Applicant believed that acceptance of the lease offered to the Applicant would have given her no long-term security, although the HP&H suggested that it did. The Applicant's husband asked whether he was aware that in all the previous cases where pieces of agricultural land of this size had been transferred from the ENRP portfolio to Crown Estates in order to facilitate sale of the freehold there had not been a single instance of a refusal to sell. The Head of Property & Housing said that he had not been aware of that. The Crown Estates Officer then confirmed to him that it was the case.
48. The Head of Property & Housing then said, 'I probably am applying various different approaches to what we've done in the past. That's my role.' He added, 'I wish to keep options open to get value for Government.' He thought it irrelevant, he said, that he had no background in or experience of agriculture. He said that he had taken a different view to that of the Portfolio Director of ENRP (who has responsibility for agriculture on the island) but had not considered it necessary to speak to the Portfolio Director of ENRP about it and had not done so. He agreed that landscaping was different to agriculture.
49. In the course of the meeting the Crown Estates Officer also confirmed to the Head of Property & Housing that a survey fee is only payable where a sale is envisaged and not in the case of a lease. Shortly before the meeting finished the Applicant's husband informed the Head of Property & Housing that the Applicant had an appointment with the Public Solicitor later that day in order to commence proceedings for judicial review.

*The Referral to the ESP – and proposal to offer a long term lease*

50. Following the meeting of 14 November 2022 and having been told then and there that the Applicant was making an application for Judicial Review and had an appointment with the Public Solicitor that afternoon to take this forward, Mr Holman then referred the matter to the Estates Strategy Panel for a 'second opinion' (Paragraph 18(c) of his First Affidavit).
51. The Estates Strategy Panel met on 17 November 2022, and the draft minute records: 'Crown property accepted the offer [to purchase at the price set by the Deputy Head of Property and Housing] but JH (Mr Holman) on reviewing the arrangement stopped the sale as it does not represent V[alue] F[or] Money'.

52. The Applicants believes there is no provision in policy for this referral. It is either properly referred to the Estates Strategy Panel ('ESP') from the outset or it is not. If the H&PH makes the decision himself it is not a matter for the ESP. She believes that because Mr Holman had not referred it the ESP before making that decision and nothing thereafter gave the ESP any role in the decision.
53. Mr Holman relies on Paragraph 3.2 of the Land & Buildings Disposal Policy 2016 in which there is provision for reference to the ESP but he only did that three days after he had been told that the Applicant was going to take action by way of Judicial Review, and almost three months after he had made and communicated his decision to the Applicant.
54. The Terms of reference of the Estates Strategy Panel have remained unchanged since 2014, other than as to its Membership, which is set out in the Land & Buildings Disposal Policy. It can be seen from the Terms of Reference that it was set up to deal only with 'significant developments', defined as significant historic buildings and other sites over 2 acres. This does not apply to Plot BG0007.
55. According to the Land & Buildings Disposal Policy:
- 'The Estates Strategy Panel shall be made up of the following principal members (or deputies). Director ENRD, Chief Executive Enterprise St Helena, Chief Secretary, Financial Secretary, Chairperson of ENRC and an independent lay person appointed by the Governor.'
56. The draft Minute of the Meeting on 17 November 2022 states that the Members present on that day were the Chief Secretary, the Minister of Treasury, Infrastructure & Sustainable Development, the Acting Financial Secretary, the Head of Infrastructure and the Head of Sustainable Development.
57. Mr Holman and the Crown Estates Officer were present by invitation, but nobody with any responsibility for agriculture was there. Nor was the Deputy Head of Property and Housing, who had instructed the Crown Estates Officer as to what to write to me in the letter of 26 July 2022. The Minute records that she sent her apology. It is notable that she played no further part in this and no evidence from her has been filed by the Respondent. Nor was any independent person appointed by the Governor present.
58. In the absence of any person to argue on behalf of the Applicant (the Applicant was on the island at the time but not informed of the meeting being convened) the Panel agreed 'after much discussion' that the plot 'should not be sold to the family who currently use the land but to offer them a long term lease through ANRD'. At the top right hand corner of the draft Minute, for 'Action', it reads:
- 'JH/GH to submit to ExCo [Executive Council] for agreement the ESP's recommendation for plot BG0007 to be offered to the family for a long term lease through ANRD'.

59. Without any reference to Executive Council, it appears that the Applicant could not be offered a long term lease. This action was not taken by Mr Holman – the matter was not taken to EXCO and there was no offer a long term lease made.

60. The Applicant believe that had the matter been taken to ExCo and she had been informed of this, it might well have resulted in a decision there that the land should be sold to her. This is because she believes she would have had an opportunity to make representations to ExCo and the Minister responsible for agriculture would have been there to speak in support of her Portfolio Director’s original reason for transferring the land to Crown Estates for the sole purpose of it being sold to the Applicant. Also, the Chief Minister, who holds her Portfolio for her when she is absent from the island, would have been present.

*Subsequent events– offer a licence instead of a lease on 25 November 2022*

61. Instead of the matter being referred to ExCo, Mr Holman tasked the Crown Estates Officer to send an e-mail to ENRD posing a question (to which the Applicant believes he already knew the answer). Already knowing that a ‘licence’ (a lease is no longer mentioned) was normally granted on an annual basis, he asked if ENRD would grant a licence for ‘15 – 20 years’. Following this (no answer to it is included in the Disclosure) he instructed the Crown Estates Officer to write to the Applicant as follows that it was agreed by the panel:

‘...to lease the land and not sell.

62. On 25 November 2022 Gina Henry emailed Andy Timm as follows:

“Andy,

I write in reference to your email.

I am writing to advise that following an Estates Strategy Panel (ESP) last week, in which Joy's application was presented. The background of her application was provided to the panel by myself and the recommendation was provided to the panel by the Head of Property to grant Joy an agricultural lease, but it was felt by members of the ESP that this decision would mean that we at Property would be managing a lease that would be best suited via the expertise at ANRD, however it was still agreed by the panel to lease the land and not sell.

The Head of Property has since then advised that the land that Joy have applied for will not be sold or leased, but will be internally transferred back to ANRD for management under ANRD's asset portfolio and the licence will continue. John (Head of Property) has asked if there is a possibility for the licence to be 15 - 20 years, I did tell him that normally the licence is granted year to year.’

63. On 25 November 2022 the Applicant received a letter from the Crown Estates Officer, stating that there had been a meeting of the Estates Strategy Panel ('ESP'), at which the Applicant's application had been 'presented'. This was the first mention in the whole of this

process of the ESP having any involvement in it and came well over two months after Mr Holman had refused the application on 2 September 2022.

64. It stated that Mr Holman recommended to the ESP the grant of an agricultural lease. The letter states: ' ... but it was felt that this decision would mean we at Property would be managing a lease that would be best suited via the expertise at ANRD, however it was still agreed by the panel to lease the land and not sell.'

65. The penultimate paragraph of the letter stated:  
'The Head of Property has since advised that the land that you have applied for will not be sold or leased but will be internally transferred back to ANRD for managing under their asset portfolio and they will continue to licence the land to you at their respective rates, ANRD will be notified and your application will now be cancelled with Property.'

*The Applicant's current position – no freehold, lease or licence over the land*

66. The Applicant believes the HP&P had no authority to decide what ANRD will do. The licence was held by the Applicant's late mother, not the Applicant and it was not open to ANRD to grant an Agricultural Licence to the Applicant. Although the Applicant spends significant time on island, including six of the last twelve months, she is not a full time resident and cannot be granted an Agricultural Licence. This is the effect of s.17 (4) of ANRD's Assets Policy.

67. The Applicant believes that the offer of a licence was not the action required by the ESP Minute. It also ignored the fact that the Applicant was not the licence holder anyway and that by that time her mother, who had died on 25 October 2022. The Applicant is unable to hold a licence. She did in the past but cannot do so now. She has no right of any description to continue to use this land. The position has not been restored to the 'status quo ante' as suggested by Mr Holman in Paragraph 16 of his affidavit.

68. Accordingly, the current position is that the Applicant has no entitlement now to continue making use of BG0007, thus forfeiting the benefit of her investment of time and money in it, and has no right to the enjoyment of it in the future as she does not hold a licence, lease or freehold.

69. As of 28 November 2022 ANRD had not been informed of the Head of Property & Housing's latest decision. At the time of filing her application for judicial review the applicant is still awaiting a copy of the ANRD Assets Policy which was not available on the St Helena Government website.

70. The Applicant believes the land was not returned to ANRD but was retained by Crown Estates in a clear effort to end its designation as agricultural land. It will be recalled that Section 3.7 of the Land & Buildings Disposal Policy under the heading 'Agricultural and forestry Land and Buildings' states:

71. 'This category covers Crown land identified by the Agriculture and Natural Resources Division (ANRD) specifically as productive arable, pasture and forestry land, which is to be protected against development.'
72. If the land is kept from ANRD it would no longer be so identified and protected. When the letter of 2 September 2022 was sent to the Applicant it offered a five year at a rent based on its 'landscaping value'. Acceptance of this would have meant that it was no longer agricultural land. The Applicant believes that this is the outcome that Mr Holman desired.

*Subsequent correspondence regarding the constitution of the ESP*

73. Subsequent to the Respondent's disclosure, in April 2023 the Applicant enquired of the Chief Secretary how and when the Membership of the ESP was changed and on what authority. Her reply explains the changes and adds: '...the Land and Building Disposal Policy is currently being reviewed with a view to the Estates Strategy Panel being disbanded. In light of this, there is currently an interim membership on the Estates Strategy Panel', which she then sets out, adding 'Mr John Holman, Head of Property – invited as required'.
74. It is not clear if he acts as a Member when his attendance is required. There is reference elsewhere to 'principal members', which clearly suggests that there may be other Members as and when required (Exhibit JH01 to the First Affidavit of John Norman Holman, Paragraph 1.0). If H&PH does become a member when he attends then the Applicant believes he should have recused himself when her application was put before the ESP on 17 November 2022. The Minute does not show what his role was considered to be on that day but it does record that another invitee was there for only one item. Presumably Mr Holman was there for all of them.
75. As far as an independent member appointed by the Governor is concerned, the Applicant wrote to the Governor's Office by e-mail on 14 April 2023 and received a reply later that day (JJ13). They were unable to answer her question but had put it out to 'relevant teams within the SHG'. The Applicant heard nothing further since then. The Applicant believes that nobody knows if the Governor has appointed an independent member. Certainly, no such member was present at the meeting of the ESP on 17 November 2022.

**The Respondent's case**

The affidavit of Mr Holman

76. In his affidavit Mr Holman explains his responsibilities of the Head of Property include the management of the Crown Land in St Helena; this encompasses land and property that the government occupies and uses directly but also land and property that is made available to the public for disposal by lease, licence or freehold. The role excludes land managed by

the Agriculture and Natural Resources Department. The Crown Estates Officer reports to the Deputy Head of Property, who in turn reports to him as Head of Property. He is a technical cooperation officer and was not in Saint Helena prior to March 2022.

77. He explains that parts of the Crown Estate that are agricultural and which are, generally, managed by way of annual licence to agricultural producers are managed by the Agriculture and Natural Resources Portfolio ('ANRP').
78. In exercising the function as to disposal of land from the Crown Estate certain disposals may be authorised by the Head of Property, others by the Estate Strategy Panel comprised of senior government officers, and in some instances by Governor in Council as described in the Land & Buildings Disposal Policy 2016.
79. The respective levels of authorisations for disposals together with policy considerations guiding officers as to prospective disposals are dealt with in the published policy document that is the Land and Buildings Disposal Policy, 2016, the authorisations for disposal being illustrated there at page 7 of the policy. The Agricultural and Natural Resources Department are not authorised to determine disposals of land other than the provision of agricultural licences. In the Land and Buildings Disposal Policy the Head of Property and the Estate Strategy Panel are respectively referred to as 'HP&H' and 'ESP'. In that respect, Mr Holman fulfils the function described in the policy as belonging to the Head of Property & Housing.
80. Guidance is issued for the internal use of staff considering or processing requests for disposal of Crown Land, that is the document dated February 2016 and headed 'Internal Guidance for Crown Estate Staff'.

*The duty to seek Value for Money in Property Disposals.*

81. For disposals of Crown Land where the Head of Property is authorised to consent to and conclude the transaction Mr Holman understood the responsibility in dealing with public assets and transactions to encompass a fiduciary duty of care toward the public property and a duty to seek value for money.
82. The obligation to achieve value for money in land and property disposals is dealt with at the first bullet point of Clause 2.0, headed 'General Principles' and which reads:

‘The Head of Property and Housing (HP&H), in accordance with the Estates Strategy, has an obligation to appropriately release Crown Land and surplus or redundant built assets onto the market, applying a duty of care to demonstrate value for money’.

*Consideration of the application for sale of Barren Ground BG0007.*

83. The granting of agricultural licences is a matter for the Agriculture and Natural Resources Portfolio and Mr Holman understood that the parcel of Crown Land that is Barren



Ground 007 has for many years been subject to annual agricultural licence in favour of the Applicant's family.

84. In January 2022 the Agricultural and Natural Resources Portfolio sought to transfer the management of Barren Ground BG007 to the Treasury Infrastructure and Sustainable Development Portfolio for disposal. By December 2022 he had decided against sale of the land and considered the most appropriate course of action was to remit the land back to the management of Agricultural and Natural Resources Portfolio for continued agricultural use.

*Decision not to sell Barren Ground BG0007*

85. Up until 4 August 2022 the application for sale of the land went through administrative steps, including transfer from the Agricultural and Natural Resources Portfolio, correspondence with stakeholders who may be concerned with the sale, a land registry survey (at the applicant's expense) to confirm the boundaries of the parcel and a value of the land indicated to the bidder to be the Crown's value of the land if sold with covenants to keep the land in use for agricultural production. The rate applied was that relevant to small plots sold for minor landscaping or incidental sales, the land in this matter is significantly larger than would be considered under this guidance and for commercial use. By way of clarification that indication was sent by the Deputy Head of Property.
86. On 24 August 2022 the application, prepared to the point of decision, was referred to the Applicant for consideration in line with the authorisation required by the Land and Buildings Disposal Policy 2016.
87. Upon presentation of the application, and consideration of it, Mr Holman declined to authorise the sale of the land and recommended that a lease of the land be offered instead.
88. He declined to authorise sale for the reasons the parcel size of Barren Ground is 0.44 acres and the price proposed for sale was £1,320 for freehold title albeit it with covenants envisaged to preserve the agricultural use of the land. This did not represent value for money.
89. For example. the Crown owns neighbouring land, including Barren Ground 005, a parcel of 1.5 acres. That parcel together with Barren Ground 007 would amount to some 2 acres although they border more Crown land still. Notwithstanding the present use of Barren Ground 007 it was, in his judgement, foreseeable that those parcels may, in future, be utilised as a cohesive development site capable of providing much needed homes on Island. The land is of a size and gradient suitable for that purpose, in a planning zone amenable to that purpose and with utility services nearby. In those circumstances and prospectively impinging upon the cohesive development of neighbouring Crown Land that would likely attain a higher sale price, he did not consider the sale proposed to represent value for money for the Crown estate.

90. In declining the sale of the freehold Mr Holman recommended a 5 year lease be proposed to the Applicant to continue horticulture at Barren Ground 007. Ultimately the proposal has been to remit the parcel to the management of the Agricultural and Natural Resources Portfolio with a view to the continued agricultural licencing of the land, in effect returning to the status quo ante, with the tenant paying a fee and deriving benefit from the land with no agreed or implied right that the land will be sold or purchased.
91. Having declined to authorise the sale, Mr Holman subsequently remitted his decision to the Estate Strategy Panel on 17 November 2022 where, upon review, the decision was unaltered. The draft minute of that item (that is yet to be confirmed by the Estate Strategy Panel) was compiled by the secretary.
92. Mr Holman believed that at all times the proper execution of his function and the proper application of the Land and Buildings Disposal Policy 2016 supported the decision made. In particular he believed that the following parts of the policy were served in the following ways:
- a. At page 4 of the policy (introduction) the 5th bullet point expresses the policy intention to 'protect and promote the productive use of agricultural land for sustainable food production and the food security of the island'. The reversion to agricultural licence will enable this intention.
  - b. At page 7, in the paragraph immediately preceding the heading of paragraph 2.1 the express wording is clear that 'nothing in this policy compels SHG to sell or lease any land. SHG reserves the right not to accept any single tender or bid and is under no obligation to accept an application which is not deemed appropriate by the HP&H, and or ESP', In that respect the published policy did not oblige him to accept the bid. Indeed, Mr Holman considered that in respect of my obligation to secure value for money and comply with the Policy, he was unable to accept the bid.
  - c. If land is not on a register for disposal (and there was no register at the relevant time, or now) the policy is clear, in respect of land identified by individuals, that 'HP&H reserves the right to determine whether the property will be disposed of at that particular time, by reference to the ESP'. Mr Holman had made a determination against sale and subsequently referred the matter to the Estate Strategy Panel. He did so in order to seek a second opinion as to his application of the policy.
  - d. In respect of agricultural land to be protected from development, the policy, at page 12, is clear that 'SHG will not release the freehold of agricultural and forestry land but will instead make land within this category available on lease or licence basis only'. Albeit that an exception exists for very small plots, enclosed by private land and to which no tenant has been attracted for three years. Mr Holman believed that does not apply here, not least that the plot is not, a very small piece of land.

e. There is no obligation burdening the Crown to dispose of any of its land at any time, indeed quite the contrary if such disposal does not serve the Crown's interest. In this regard Mr Holman considered he had acted in accordance with the detail and spirit of the Land & Property Disposal Policy 2016 throughout this matter.

*The affidavit of Gina Henry*

93. The First Affidavit of Gina Leola Henry deals principally with past practice as to agricultural land. She gives details of 13 pieces of land transferred since 2017 from ENRD to Crown Estates. Perhaps the most relevant is BG 343, consisting of 0.47 of an acre, the freehold of which was transferred on 8 June 2019 for agricultural purposes - Paragraph 8 of the First Affidavit of Gina Leola Henry.

**The Applicant's response to the Affidavits of Mr Holman and Ms Henry**

94. The Applicant submits that Mr Holman's First Affidavit and the Respondent's Disclosure show that a considerable emphasis has been placed on 'VFM' (Value for Money) being secured in relation to BG0007 (see Paragraph 15 of Mr Holman's affidavit and the Minute of the ESP Meeting held on 17 November 2022 (JH04) which states that he 'stopped the sale as it does not represent VFM.')

95. She argues that it o Mr Holman VFM simply seems to mean securing the highest possible price from selling the land, which would come from selling it for development. This contradicts a number of statements in policy, that land will not necessarily be sold at the best price for it that can be secured. The 'General Principles' set out at Paragraph 2 of the Land & Buildings Disposal Policy include that:

'The sale or letting of Crown Land or Buildings will not always be purely on the basis of highest market bid.'

96. She relies on the fact that in the case of agricultural land the imperative is to reduce reliance on imported food, payment for which results in considerable amounts of money being lost to the local economy. The National Agricultural Policy and Implementation Strategy 2014 – 2020 (Item 2 in the Respondent's List of Documents Disclosed) emphasises the importance of this, the Foreword stating:

'Agriculture is important to sustained food supplies for our community, and its development will help to grow our economy and make us a strong and green island.'

In the Introduction and Context a few pages later it states that:

'It supports economic development through increasing the amount of money spent locally for local produce instead of sending large amounts of money overseas to South Africa and UK for imported foods.'

The St Helena Government Vision and Strategy – April 2022 – March 2025, Page 11 includes as a focus area:

‘Securing sustainable food supplies through import substitution.’

She submits that every item of food produced on the island is an item not needing to be imported from elsewhere. It represents VFM.

97. The Applicant also contends that Mr Holman has suggested (Paragraph 18(d) of his First Affidavit) that ‘not least of the reasons’ why BG0007 cannot be sold to the Applicant under the exception set out in 3.7 of the Land & Buildings Disposal Policy is its size. The Applicant believes this ignores the fact that at 0.44 of an acre it is smaller than BG 343, which was sold for agricultural purposes in 2019.

98. The Applicant believes Paragraph 3.7 of the Policy is relevant to this application. She relies on the fact that Crown Counsel, in Paragraph 6.1(v) of the Response to Written Directions of the Chief Justice, avoided any reference to the exception contained in it.

99. The Applicant also relies on the fact that the Respondent has chosen not to file an affidavit from Darren Duncan, the Portfolio Director of ENRD, who transferred BG0007 to Crown Estates for the sole purpose of the freehold being sold to me for continued use as agricultural land. 3.7 of the Policy clearly applied. Mr Holman has taken the view (see above) that BG0007 is not ‘very small’, which perhaps shows the danger of using relative terms in a policy; what is very small in agricultural terms, such as an orchard and coffee grove when compared to a pasture for cattle, may be different in another context such as housing. The criterion of being enclosed by private land is largely met, it is bounded on two sides by her freehold (BG008). Mr Duncan applied his common sense to the third requirement that it be untenanted for a period of three years. The mischief which the exception is intended to deal with is:

‘...to reduce the fragmentation of the agricultural estate and decrease the chance for invasive species to establish on underused land.’

100. The Applicant submits it would have been perverse if she could buy the land once it had been overwhelmed by invasive species but not while she was preventing this by cultivating it. Mr Duncan is an agricultural expert of long standing and was responsible for drafting both the 2007 Agricultural Assets Policy and the Agricultural Policy of 2013. His intention, as stated in Paragraph 12 of the latter, was to deal with the ‘erratic nature of SHG policies and interventions with a consequent dampening effect on confidence and morale’. She argues that Mr Holman’s intervention in the process has done just this.

## The Law

### *Legitimate Expectation*

101. In order to found a claim of legitimate expectation, a promise or representation made by the public authority and relied upon by the Applicant must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, Lord Hoffmann said, at [60]:

"It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

### *Abuse of power – different or unfair treatment in comparable or identical circumstances*

102. SHG are under a duty in general terms to treat individuals fairly, including those making applications for the purchase of Crown Land. Likewise they should follow their published policies and guidance in determining such applications unless a rational reason can be provided not to do so.

103. The categories of unfairness are not closed but a challenge to the conduct of government departments based on conspicuous unfairness or unfairness amounting to an abuse of power is to be regarded as a challenge that is based on a 'particular and distinct form of irrationality': see *R (on the application of City Shoes Wholesale Ltd) v HMRC* [2018] EWCA Civ 315, [2018] STC 762 ('City Shoes CA') at [66] and *R (on the application of Lewisham London BC) v AQA* ('AQA') [2013] EWHC 211 (Admin) at [111] (Elias LJ).

104. In terms of different or unfair treatment in comparable or identical circumstances, the English Courts have long recognised that this might give rise to an abuse of power. In *R (on the application of British Sky Broadcasting Group plc) v CCE* [2001] EWHC Admin 127, [2001] STC 437 ('BSkyB') Elias J accepted that the duty to act fairly applies to the Revenue in their dealings with taxpayers and that they can be in breach of this duty where, as taxing authorities, they give different treatment to taxpayers who are in the same or a similar position. Nevertheless, he also accepted that the threshold for a finding of unfairness

amounting to an abuse of power is a high one: see, in particular at [8], [13], [14], [16], [20] and [35].

105. In *R (on the application of City Shoes Wholesale Ltd) v HMRC* [2016] EWHC 107 (Admin); [2016] STC 2392 (*'City Shoes'*) Whipple J (as she then was) applied *BskyB* and adopted a three stage or three limb test (which Court of Appeal approved in *City Shoes CA*). She set out that test at [67]:

“I would order the various points made by Elias J in *BSkyB* in the following way:

(1) first, it is necessary to establish whether the Commissioners knew or ought to have known of the alleged disparate treatment at the time the decision was made. If not, the challenge surely fails.

(2) If that knowledge or constructive knowledge is established, then it is necessary, secondly, to establish as a matter of fact whether the Commissioners considered there to be a material difference or differences between the two groups of taxpayers, justifying the different tax treatment. If no material difference was identified, then it is difficult to see how the Commissioners' decision can stand (although issues may arise about differences which have since been identified—not an issue in *BSkyB* or this case).

(3) If a material difference was identified by the Commissioners, then, thirdly, the court should examine that asserted difference to determine whether it was ‘rational and defensible’, or alternatively, ‘material’, such as to justify the different tax treatment. There are a number of notes to append to this third step, all of which emerge from Elias J's judgment: (a) the court's analysis is to be undertaken based on the material which was before the Commissioners at the time of their decision. (b) The court is exercising a supervisory jurisdiction, testing the legality of the decision and not substituting its own decision. (This was confirmed by Elias LJ, as he became, in *AQA*, referred to above.) (c) The fact that the Commissioners are prohibited from collecting the tax from other taxpayers who were in a similar position does not, in and of itself, amount to a ‘material’ difference between the two groups of taxpayers.”

## **Discussion, analysis and consideration of the grounds**

*Ground (i) - The actions of Public Officers of ANRD Crown created a substantive legitimate expectation that the freehold to BG 0007 could and would be sold to the Applicant*

106. I accept that the Applicant reasonably believed that the freehold of BG0007 would be sold to her. This belief was based on the correspondence she received from SHG in 2022 (on 31 January, 27 May and 26 July 2022), the statements made therein, the transfer of the land from ANDR to Crown Estates and the invitation to tender for the purchase at a specified sum. She even went as far as to rely on the letters and to pay the £227 cost of the survey

and her mother did not reapply for a licence in March 2022 in the belief the sale would proceed.

107. However, while the Applicant held a reasonable belief that the sale would proceed based on the statements made by SHG, this is insufficient in law to found a legitimate expectation.
108. I am not satisfied that the statements or representations that the Applicant relies upon in the three letters are "clear, unambiguous and devoid of relevant qualification". I am not satisfied that upon any fair reading the whole, nor any part, of this course of communication with the Applicant in 2022 constitutes a promise or assurance for the sale of the land.
109. None of the language used by SHG in any of the correspondence constitutes an express promise, or even a direct offer of sale to the Applicant and therefore does not give rise to a substantive legitimate expectation that land would be sold to her. The Applicant was permitted to tender to purchase the land but had no indication that such a tender would inevitably be accepted at all or at any given price.
110. In January 2022 the Applicant enquired about sale of the plot. The Director of ENRP was supportive in principle but made no assurances nor promises and was clear it was for another department to pursue. He made arrangements to transfer BG0007 from the responsibility of his department to the Crown Estates Officer to 'facilitate' disposal by the other department.
111. The email and letter sent by the Crown Estates Officer on 26 July 2022 to the Applicant states its purpose being described as to 'commence the tender process', this being described as 'the next phase'. The letter explains that under policy 'all land identified or applied for by individuals will be reviewed by a valuation and negotiation process with the Applicant and Crown Estate Management'. It went on to invite the Applicant to submit a tender to purchase the land.
112. After the consultation stage ended in May 2022 the Applicant was told of the 'next stage in the process' and at the next juncture was told the 'from there the process will continue'. Subsequently a 'tender process' was described as 'the next phase'. The Applicant was advised by letter of 26th July 2022 that 'all land identified or applied for by individuals will be reviewed by a valuation and negotiation process'. The Applicant was invited to submit a tender to purchase the land.
113. To submit a tender is to make an offer, albeit that a price was suggested that was not of itself an offer for sale. What SHG did was make an invitation to tender and not itself make an offer to the Applicant for her to accept the sale of land. Consistently with this, throughout, public officers have spoken of a process, of stages, of applications and of bids to purchase, of tenders to be submitted. Thereafter the email from the Applicant describes that she had

completed a 'Bid to Purchase' form that she had been sent and had then taken steps to return it.

114. Therefore, when the letter of 2nd September 2022 informed the Applicant that upon review by the Head of Property and Housing the Land could not be sold this did not constitute a breach of any legitimate expectation. Looking at the exchanges as a whole, the Applicant was informed told the Crown Estates officer there was 'a process'. Therefore, there was no substantive Legitimate Expectation created by SHG however much the Applicant believed the sale would be completed. SHG made sufficiently clear that its actions and statements were always part of process even though this led to the Applicant reasonably believing the sale would progress.

115. In these circumstances there was no conspicuous unfairness in SHG in deciding not to complete the process of sale despite its invitation for her to tender in July 2022. It is understandable that the Applicant feels that it was unfair not to sell the land to her in light of the content of the letters but that is insufficient in law. All the communications make clear that SHG had not offered the land to be bought, nor accepted any offer by the Applicant. She was given no explicit guarantee or promise that she was entitled to buy the freehold of the plot of land.

116. I reject Ground 1.

*Ground (ii) - The actions of public officers of ANRD and Crown Estates created a procedural legitimate expectation that the application to purchase Parcel BG0007 would be treated in accordance with the established policy and procedure and consistently with previous decisions to sell agricultural plots in similar cases to the Applicant's, none of which resulted in a refusal to sell.*

117. Again, it is understandable that the Applicant expected that the previous disposals of Crown Land in similar circumstances would lead to the same outcome for her. However, I am not satisfied that it gives rise to a procedural legitimate expectation, abuse of power or irrationality on this ground.

118. None of the previous sales of Crown agricultural land were identical to her case. In other cases land previously licenced for agricultural use has been transferred out of the management of ANRD and with the freehold thereafter disposed of by the Crown Estate. The fact that this did not happen in this case, is not proof of different treatment in identical circumstances or unlawful application of the Lands policy or procedure. It does not give rise to unreasonableness, breach of legitimate expectation or abuse of power.

119. Gina Henry gave evidence of the plots sold since the coming into effect of the 2016 Land and Buildings Disposal Policy. To the extent that similar disposals of Crown land previously held under agricultural licence is relevant, there are instructive and relevant differences. The following distinctions are relevant:



a. Four of the six plots range from 0.08 - 0.26 of an acre; selling for £500 at most. Being qualitatively and significantly smaller than BG 0007 (0.44 acres) it may be no surprise that Value for Money was less of a concern for these smaller plots.

b. One parcel, (Scotland 243) was 0.536 of an acre; not dissimilar in size to BG 0007, but this was sold for residential development; the imperative to preserve it for agricultural use being, presumably, less achievable than it is for BG 0007 and distinguishes it. If nothing else, the sale of BG 0007 was not sought for residential purposes.

c. The sixth parcel (BG 343) is also 0.47 of an acre, again not dissimilar in size to BG 0007. This parcel was sold and its use continued by the intention for commercial development of slaughterhouse on the site; again distinguishing it from BG 007 in which continued cultivation is not objectively affected by the estate of land, or licence, in which it is held.

120. Likewise, I am not satisfied that there has been any procedural legitimate expectation created by established policy and procedure. The burden in on the Applicant to prove otherwise.

121. In an email of 6th March 2018 and exhibited at GH01 Gina Henry sets out in six bullet points a proposed process for transferring land between the ANRD department and the Crown Estate office; the culmination being that lands are left to the disposal of the Crown Estate office. This was applied in this case, the Director of ENRP describing in his letter to the Applicant of 31 January 2022 steps he would take to "facilitate its disposal by the SHG Properties Section at Essex House'.

122. The policy by which the Crown Estate office dispose of land is the 2016 Land and Buildings Disposal Policy. I am not satisfied that the policy itself gives rise to a procedural legitimate expectation that the Freehold to plot BG0007 would be sold. The general principles within the Land Disposal Policy include in section 2; 'Nothing in this policy compels SHG to sell or lease any land' and 'SHG reserves the right not to accept any single tender or bid.'

123. Relevant sections pursuant to paragraph 3.2 headed 'Land or Buildings Identified by Individuals' state:

None of the above precludes individuals expressing an interest in the purchase/lease of specific areas of Crown Land or Buildings. However, in the case of land or a building that is not already on the Register for disposal, HP&H reserves the right to determine whether the property will be disposed of at that particular time, by reference to the ESP.

In the case of an expression of interest received on a plot of land in excess of one acre, the HP&H shall refer to the ESP for approval to negotiate with the interested party.

124. Paragraph 3.7 on Agricultural Land states:

SHG will not release the freehold of agricultural and forestry land but will instead make land within this category available on a lease or licence basis only. An exception may be made in the case of very small agricultural plots that are enclosed by private land and to which no tenant has been attracted for a period of three years.

125. None of these paragraphs guaranteed that the land would be sold to the Applicant or could reasonably be construed as making a promise or representation to that effect.

126. I am satisfied that there was no procedural legitimate expectation created, by SHG's statements in the Policy or process, or in any pattern of previous sales of agricultural land that should have obliged sale of BG 0007 to the Applicant. Furthermore, there was no abuse of power in refusing the sale of the freehold by treating identical land purchases in a different manner. Any such difference of treatment was objectively justified.

127. I reject Ground 2.

*(iii) The decision of HP&H to refuse the sale of Parcel 0007 to the Applicant was Wednesbury unreasonable.*

128. This ground challenges the decision of HP&H, as communicated in the letter from Gina Henry on 2 September 2022, not to sell the Freehold to the Applicant but instead offer her the opportunity to purchase a 5 year lease. The rationality challenge involves considering the reasons relied upon or given by SHG at the time of its decision (rather than what is now relied upon in evidence) and whether it followed its own policy.

129. In paragraph 15 of his First Affidavit Mr John Holman gives an account of his reasons for declining to authorise sale of BG 0007. Once presented with the proposed sale of 0.44 acres for a price of £1,320, he states that he thought it was not value for money. In particular he notes that the plot borders other Crown land (BG005), which together may make a plot of some 2 acres. Mr Holman states such land is in a planning zone, near utilities provision and of a size and gradient to make a cohesive development capable of providing homes on the island. In such circumstances where such cohesive development would likely obtain a higher sale price Mr Holman did not consider it to represent Value for Money for the Crown Estate,

130. At paragraph 18, he lists in what respects he believed he was following the policy and he was allowed, to decline the sale as was done; in particular:

a. At page 7 of the policy the expression that 'nothing in this policy compels SHG to sell or lease any land' makes clear that SHG reserves the right not to accept an application which has not been deemed appropriate by the HP&H and or ESP

b. That if land is not on a register for disposal (and there is and was no such register) the in respect of land identified by is clear that 'the HP&H reserves right to determine whether the property will be of disposed at that particular time reference to the policy, individuals by ESP',

c. At paragraph 8 of Mr Holman's Affidavit he refers to (the first bullet point of Clause 2.0 'General Principles') and the policy there that 'The Head of Property and Housing (HP&H), in accordance with the Estates Strategy, has an obligation to appropriately release Crown Land and surplus or redundant built assets onto the market, applying a duty of care to demonstrate value for money. Mr Holman declined to authorise sale as, in his view, the proposed price of £1,320 for 0.44 of an acre bordering other Crown Land and potentially impinging on the development of use of that land also did not represent Value For Money.

131. Mr Garner submits that Mr Holman's view that the price of £1,320 for 0.44 Acres of land in the situation of BG 0007 did not represent Value for Money was not an unreasonable view; not so unreasonable that no other public officer exercising authority reasonably over the Crown Estate would reach that view. Standing back, he argues that the foreseeable prospect of this and neighbouring land being in future developed for housing at a higher rate was not an unreasonable view.

132. Mr Garner notes that the Applicant, at paragraph 17 of her Second Affidavit seems to accept that the highest price for the land would come from selling it from development (if ever that were to occur). To that extent, and to the extent that continued cultivation of the land could be enjoyed by the Applicant could be enjoyed by a lease (a period of 5 years was offered, later a period of 15 - 20 years was raised within the administration) then the greater price, the greater Value for Money and thereby the greater public interest served by the Crown Estate have been by declining sale, as was reasonably done.

133. Mr Garner relies on the fact that that Applicant, at paragraph 17 of her second Affidavit suggests that considerable emphasis has been placed on Value for Money. It was indeed the reason why the application for sale was declined. At page 5 of the Land and Buildings Disposal Policy it is the first point bullet of General Principles that the Head Property and Housing must apply a duty of care to demonstrate value for money. At paragraph 7 of his affidavit Mr Holman describes that he understood his responsibility in dealing with public assets and transaction to encompass s fiduciary duty of care towards public property.

134. Mr Garner submits that it is clear that the sale of Crown land will not always be on the basis of the highest bid but that the evidence of Mr Holman is that in his view the sale proposed did not represent value for money. At paragraph 12 of his affidavit Mr Holman describes that the rate used to value the land was that used for 'minor landscaping or incidental sales' and that this particular land, being 0.44 of an acre was of a significantly larger size than would usually apply.
135. I have considered Mr Holman's evidence and Mr Garner's submissions carefully.
136. Notwithstanding Mr Holman's evidence and Mr Garner's submissions, I am satisfied that the decision to refuse to sell the freehold of Plot BG007 to the Applicant, as communicated to the Applicant in the letter dated 2 September 2022 was *Wednesbury* unreasonable, and irrational. It was a decision that no reasonable decision maker properly instructed could have arrived at.
137. I have come to the conclusion for the following six reasons.
138. First, the conclusion in the letter dated 2 September 2022 states that the land 'cannot be sold' This is not accurate – SHG had the discretion to sell it under the relevant paragraphs Policy but had chosen not to. The conclusion communicated was misleading. The land could indeed be sold (either through a lease or freehold) but it is clear from the disclosure of the contemporary correspondence that August 2022, that despite the support of many within SHG for the sale, Mr Holman had decided the sale of the land did not constitute value for money or that it was better suited development.
139. Second, the reason for the decision was not communicated or explained in the decision letter. Despite all the evidence now given by Mr Holman, none of this was set out at the time (there is no reference to value for money or development value). In fact no reasons were given for the decision in the letter dated 2 September 2002. In particular, no reasons were given for the conclusion now relied upon that had been reached that it would not constitute value for money to sell the land.
140. Third, there was no statement of what if any policy applied when making the decision - even if SHG relied on general principle in section 2, it still had to decide whether the highlighted parts of 3.2 or 3.7 applied or did not apply and give reasons in coming to that decision.
141. Fourth it was not clear that Mr Holman had collated, reviewed and analysed any evidence that sale of the freehold would not constitute value for money in selling the lot at the time of the decision. There was no evidence or reasons given at the time why this would represent better value for money for SHG. There is no evidence that there was any documented assessment or consideration within SHG which provided support for an increased value for the land by development. There was no evidence of any existing or foreseeable plans for development being considered or proposed. Indeed, on 2 September

2022 there was an offer of a 5 year lease rather than the ending of the licensing arrangement (which would allow for development of the land). This is inconsistent with any alternative plan for development being pursued within any foreseeable time.

142. Fifth, there had been no opportunity given to the Applicant to offer a higher price or to negotiate the price for the sale of the land prior to the invitation to tender of 26 July 2022. The amount and value of the land was set by one department of SHG, ANRD – rather than the Applicant. That value, then offered by SHG, was accepted by the Applicant but then rejected on 2 September 2022 as not constituting value for money. This all occurred without the Applicant being given the opportunity to offer any other valuation which might be capable of meeting SHG’s concerns.

143. Sixth, there is no evidence that the decision maker (the HP&H) had taken into account the ANRD recommendation and history of the dealings with the Applicant between January and July 2022. This much is revealed by the August 2022 internal government email exchange. Even if SHG’s actions and communications to the Applicant between January and July 2022 did not give rise to a legitimate expectation in law, they did require taking into account by HP&H in making the decision. He did not give any reasons for his decision that demonstrated that he considered their supportive view and why he disagreed with it.

144. Ground 3 succeeds. I am satisfied that SHG’s decision dated 2 September 2022 to refuse to sell the freehold of plot BG0007 to the Applicant and alternatively offer a 5-year lease was *Wednesbury* unreasonable.

*(iv) The decision of the HP&H to determine that the transfer of BG0007 removed its agricultural classification rendered unlawful his subsequent offer of a 5 year lease for landscaping purposes.*

145. This ground for review is related to Ground 3. It is submitted that the proposal for a lease of the land to the Applicant contained in letter of 2 September 2022 (which lease for a renewable period of 5 years was proposed at an annual rent 'based on the revised landscaping value') was unlawful. The terms proposed included no covenant or limitation restricting the use of the land to agricultural cultivation.

146. Mr Garner submits that to the extent that the land had been passed to the Crown Estate department to manage disposal it was neither unlawful to offer it at a 'landscaping value' nor did it prevent use for agriculture. In any event, such lease was not pursued and is, he submitted, of no material relevance to this claim.

147. In light of my decision on Ground 3, there is no need to decide this ground because I have already decided that the decision of 2 September 2022 was unreasonable. However, I do note that basing the proposed annual rent for the 5 year lease on 10% of the landscaping

value appears inconsistent with it being proposed for agricultural use. It also calls into question the accuracy or reasonableness of the valuation.

*(v) His later decision, as indicated to the Applicant by letter dated 25th November 2022, that BG 0007 would be transferred back to ANRD for managing under their asset portfolio and that the application to purchase it would be cancelled is unlawful and unreasonable and a clear attempt to expunge everything that has taken place over the last 11 months and to defeat this application for judicial review by it no longer being with the Crown Estates so that it can be sold to the applicant.*

148. In reply to this ground of review the Respondent submits first that BG 0007 is still within ownership of the Crown Estate. Whether remitted to management of Agricultural department or managed directly by the Head of Property and Housing, no step has been taken to put the land out of the ownership of the Crown or otherwise to defeat the Applicant's application for judicial review.

149. Further, the Respondent submits that the Applicant's application to purchase BG0007 is not in any sense cancelled. The application is a matter of record. It was received, processed, considered and declined as conveyed to the Applicant by letter of 2nd September 2022.

150. The Respondent denies that, having clarified the agricultural department's continuing interest in the land, for agricultural purposes, that there was anything improper in remitting it to that department. So remitting the management of the land to that department does nothing to expunge anything that occurred in 2022 or as may be relevant to the application for sale.

151. While I accept that HP&H's actions may not have been designed to defeat the judicial review application, I reject the Respondent's substantive submissions. I am satisfied that the decision of 25 November 2022 was unlawful and unreasonable.

152. The fundamental problem for SHG is the complete lack of clarity or rigour with which it has treated the Applicant's application to buy the freehold of BG007. There is lack of clarity in: the policy being applied; the reasons being relied upon to refuse the sale or the absence of detailed evidence to support the reasons now relied upon; and most importantly, there have been numerous and inconsistent decisions in response to the Applicant's application to purchase the freehold of the land.

153. SHG appeared to support the sale of the freehold from January 2022 up to the letter of 26 July 2022; there was then a decision to refuse the sale but offer of a 5 year lease on 2 September 2022; then a long lease was proposed to be put forward to EXCO as at the meeting of ESP on 17 November 2022; then a long licence was considered by HP&H which he was advised against and then finally the continuation of the existing licence offered was

offered to the Applicant on 25 November 2022. It is still not clear if the land has been transferred back from Crown Estates to ANDR (who may offer such licences)

154. I am not satisfied that SHG was acting reasonably or rationally or in accordance with its own policies and procedures in making the decisions it did between 2 September and 25 November 2022. I consider that it was acting unreasonably and irrationally in its decision of 25 November 2022 to refuse the sale of the freehold but transfer the land back to ANDR and to continue to offer a licence. This was *Wednesbury* unreasonable.

155. I rely on the following six reasons.

156. First, the decision following the meeting with the Applicant on 14 November 2022 to refer the matter to the ESP on 17 November 2022 ‘for a second opinion’ was unreasonable and not in accordance with the policy. Paragraph 3.2 of the Policy does allow the HP&P to refer the decision at any time to the ESP in making his decision but not after a decision is made. This is all the more so in circumstances where it is to be used as a ‘second opinion’ in response to a meeting with the Applicant on 14 November 2022 and after a complaint about the decision of 2 September 2022. ESP could have been consulted before 2 September 2022 in making the original decision but was not.

157. Second, the procedure at meeting of the ESP on 17 November 2022 to include the HP&P as a participant and where the ESP was not fully constituted with the membership as required, was not according to policy and was not procedurally fair. No opportunity was given for the Applicant to make written or oral representations to the ESP before it made its decision. Despite, these procedural defects, ESP recommended a long lease being offered to the Applicant for agricultural purposes.

158. Third, in making his decision of 25 November 2022, the HP&P did not follow the ESP’s recommendation or put the recommended lease forward to ExCo for approval. It does not appear he followed through the recommendation of the ESP but instead disregarded it. Nor does it appear the HP&P had the power to disregard ESP or at least had the power to give no reasons given for disregarding ESP nor inform the body of his alternative course.

159. Fourth, in making the decision of 25 November 2022, the HP&H appeared to ignore the internal advice from the ANDR: either in respect of whether the freehold should be sold or whether a long licence could be offered. In any event, there was no reference to what policy and evidence and reasons were being relied on for the decision of 25 November 2022 to offer a licence.

160. Fifth, the lack of reasons contained within the 25 November 2022 letter by reference to any paragraph of the policy render the decision unreasonable. This is all the more so in light of the various changes of mind as to the decision recorded above (including the offering a

long lease or at least one of 5 years). Again, the justification of not selling the freehold based on value for money, which the HP&H now relies upon, was not subject to any negotiation or evidenced based analysis. It was undermined by the fact that a licence was continued to be offered by SHG in any event which would defeat the development alternative. No better 'value for money' alternative appears to be being pursued by SHG.

161. Finally, the offer of a continued licence to the Applicant in the letter of 25 November 2022 was not reasonable when the Applicant could not lawfully take it up as she was not resident on island and by that time her mother, the previous licence holder, had died. The absence of a freehold or lease and her inability to accept an annual licence meant that the Applicant was not restored to the original position but left in legal limbo. She was disadvantaged by the decision and the status quo ante was not maintained.

162. Ground 5 succeeds.

*(vi) Further, by taking the matter to the Estates Strategy Panel ('ESP') as indicated in the letter of 25th November 2022, long after he had determined the application by himself, he was clearly not following any proper procedure and the Applicant was given no opportunity to be heard by the ESP, rendering that part of the process unlawful and unreasonable. Again, it was an attempt to defeat this application.*

163. This Ground is related to Ground 5.

164. In reply to this Ground, the Respondent notes the chronology: that the decision to decline sale of the land was communicated to the Applicant in letter of 2 September 2022. This occasioned a reply from the Applicant requesting further information about the sale on 21 September 2022. A reply addressing certain of those points was sent on the 26 September 2022. On 16 October 2022 the Applicant sought an appointment to discuss the matter with the Head of Property and Housing. This appointment occurred on 14 November 2022. Subsequent to such exchange of correspondence, and of views, the subsequent meeting of the Estate Strategy Panel was held on 17 November 2022.

165. The Respondent denies there was anything improper about the Head of Property and Housing referring the matter to the Estate Strategy Panel. By established policy for land identified by individuals and not already on a register for disposal (such as BG0007) it is the HP&H who (by paragraph 3.2 of the Land and Buildings Disposal Policy, 2016) 'reserves the right to determine whether the property will be disposed of at that particular time, by reference to the ESP.' Mr Holman determined that it was not to be sold and, after exchange of correspondence and an appointment with the Applicant, informed the Estate Strategy Panel of his decision and reasons for it. The policy requires that he have reference to the ESP, and the panel concurred with his decision.

166. Further, the Respondent denies there was anything unreasonable about declining sale for the reasons given by the Head of Property and Housing, or that it was improper or



unlawful for reference to be had to the Estate Strategy Panel at that juncture. The Respondent denies that such action was (or could have been) an attempt to defeat this application.

**167.** I reject these submissions for the same reasons as set out above in relation to Ground 5. I do not repeat them. I am satisfied that the Respondent acted unreasonably and procedurally unfairly in not following the ESP recommendation of 17 November 2022 to offer a long lease to the Applicant. The HP&P gave the ESP and the Applicant no reasons at the time for not following the recommendation and for the matter being referred to ExCO. While the HP&P was always entitled to refer the matter to the ESP he only did so after he had already made the decision and after there had been a complaint. The ESP was not properly constituted and the Applicant was given no opportunity to make written or oral representations to it.

**168.** It is said that the land has now been transferred back to ANDR for a licence to be offered. However, the policy suggests that a licence can only be offered annually and the Applicant can benefit from such due to a lack of long residency. The Applicant has been left in a disadvantaged position, she not only has not been given the opportunity to buy the land or lease it but cannot now licence it. The Applicant has made investments on the basis she would have continued access to the plot for agricultural purposes.

**169.** There is no evidence or analysis that the plot is now available for development or SHG is pursuing any future development value or that it would provide SHG would provide greater value for money. There has been no assessment that nearby plot 5 owned by the Crown cannot be developed without plot BG0007. It is not evident what paragraph of the policy has been followed in the November 2022 decision – whether 3.2 or 3.7. There is missing evidence from the relevant officials within SHG who dealt with the application. There is a lack of contemporaneous recorded procedures or assessments to justify the decisions now relied upon.

170. I am satisfied that this renders the decision of 25 November 2022 Wednesbury unreasonable as set out above.

171. Ground 6 succeeds.

## **Conclusion**

172. The application for judicial review succeeds on Grounds 3, 5 and 6. In future the relevant SHG departments should ensure that they give clear, consistent decisions with rational reasons making transparent the policies that have been followed.

*Remedy*

173. I quash each of the SHG decisions that took place after 26 July 2022 in respect of the land at BG007, in particular the decisions of 2 September 2022 and 25 November 2022 to refuse to sale the freehold to the Applicant (and alternatively to offer a lease or a licence). This is on the basis that the decisions were unreasonable and also unlawful.
174. I order that the parties are to be restored to the position as at 26 July 2022 whereby Crown Estates held the land and had invited the Applicant to tender for the land on the terms set out in its letter.
175. I remit the matter back to the parties for the Applicant to respond to the invitation to tender afresh. She is entitled to rely on evidence in support of her application.
176. Thereafter Crown Estates are to re-consider the tender in line with the Policy and in line with the terms of their letter. Finally, SHG is to give a written response to the Applicant setting out its reasons for deciding whether or not to sell the freehold of BG0007 to her. Its reasons must include the policy and evidence relied upon.
177. The parties are to draw up an order to reflect this judgment.

Rupert Jones, The Chief Justice  
15<sup>th</sup> September 2023