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# STATES OF JERSEY



## **STATES OF JERSEY DEVELOPMENT COMPANY: CHALLENGE TO A SUMMONS DATED 12 AUGUST 2015 ISSUED BY THE CORPORATE SERVICES SCRUTINY PANEL – DECISION OF THE PPC**

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**Presented to the States on 13th May 2016  
by the Privileges and Procedures Committee**

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**STATES GREFFE**



**Before the Privileges and Procedures Committee**

**In the matter of:**

**STATES OF JERSEY (POWERS, PRIVILEGES AND IMMUNITIES)  
(SCRUTINY PANELS, PAC AND PPC) (JERSEY) REGULATIONS 2006**

**and**

**A CHALLENGE TO A SUMMONS DATED 12 AUGUST 2015 ISSUED ON BEHALF OF  
THE CORPORATE SERVICES SCRUTINY PANEL  
TO THE STATES OF JERSEY DEVELOPMENT COMPANY**

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**DECISION OF THE PRIVILEGES AND PROCEDURES COMMITTEE (“PPC”)**

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1. On Thursday 14 January 2016 the PPC heard a challenge by the States of Jersey Development Company (the “**SoJDC**”) in relation to a Summons dated 12 August 2015 (the “**Summons**”) issued by the Corporate Services Scrutiny Panel (the “**CSSP**”). This is the decision of the PPC in relation to the challenge to the Summons.
2. The Summons was issued by the Greffier of the States to Mr. Lee Henry of the SoJDC and provided that, pursuant to the [States of Jersey \(Powers, Privileges and Immunities\) \(Scrutiny Panels, PAC and PPC\) \(Jersey\) Regulations 2006](#) (the “**Regulations**”), Mr. Henry was required to attend before the CSSP to give evidence to it on Wednesday 2 September 2015. The Summons stated that it was served; “*in relation to the [CSSP’s] review ‘Jersey International Finance Centre’*”, and that Mr. Henry was required to produce the following documentation to the CSSP when he appeared: “*The pre-let agreement between SoJDC and UBS, the funding agreement between SoJDC and HSBC and the construction contract between SoJDC and Camerons, together with any side letters and other documentation pertaining to those agreements*”.
3. The Regulations are made pursuant to Article 49 of the [States of Jersey Law 2005](#) (the “**Law**”) and provide that a challenge to a Summons issued by a Scrutiny Panel is decided by the PPC. The Regulations do not contain a right of appeal from the decision of the PPC.

4. The members of the PPC hearing the challenge to the Summons were Connétable L. Norman of St. Clement (Chairman), Connétable D.W. Mezbourian of St. Lawrence, Deputy J.A Martin of St. Helier and Deputy S.Y. Mézec of St. Helier. The PPC was advised by H.M. Solicitor General M.H. Temple, who was in attendance at the hearing. SoJDC appeared through its lawyer Advocate John Kelleher of Carey Olsen (SoJDC's lawyers) who was accompanied by Mr. Lee Henry and Mr. Simon Neal of SoJDC. The CSSP appeared through its Chairman, Deputy J.A.N. Le Fondré of St. Lawrence, who was accompanied by Advocate David Benest. The other members of the CSSP, Deputy S.M. Bree of St. Clement, Connétable C.H. Taylor of St. John and Deputy K.C. Lewis of St. Saviour, were also present at the hearing. In addition, Mr. Jonathan Marshall, in-house counsel for UBS AG, and Mr. Marc Burton, the Managing Director of Camerons Ltd. ("**Camerons**"), were present at the hearing and addressed the PPC to support SoJDC's challenge to the Summons.
5. The hearing was a public hearing and the PPC are grateful for the assistance and contributions of all those who participated in the hearing.

### **Grounds of Challenge**

6. SoJDC challenged the Summons on the grounds summarised below which were set out in a letter from Advocate Kelleher dated 28 August 2015.
7. Firstly, the SoJDC argued that Regulation 3(1)(c) was not complied with by the CSSP before the Summons was issued in that an undertaking to receive documents "*in confidence*" must be clear and enforceable by the party providing the documents and that no enforceable undertaking as to confidentiality had been provided by CSSP. SoJDC also argued that at a hearing on 8 June 2015 CSSP had not made any request for what SoJDC termed the "**Ancillary Documents**" (i.e. the reference in the Summons to "*any side letters and other documentation pertaining to the primary agreements requested*") and that no form of confidentiality had been offered by the CSSP in relation to the Ancillary Documents ("**Ground One**").
8. The second ground for challenging the Summons was that SoJDC alleged that CSSP had not complied with Regulation 4 of the Regulations. Regulation 4(3)(b) required a Summons to "*indicate in general terms the issues on which the Scrutiny Panel or PAC propose to question the person*". SoJDC argued that the Summons had not identified the "*issues*" even in general terms. SoJDC also contended that Regulation 4(4)(b) was not complied with in that the words "*any side letters and other documentation pertaining to these agreements*" used in the Summons were too imprecise to give a clear indication of the documents which were required to be produced to CSSP ("**Ground Two**").
9. Further or alternatively SoJDC contended that the documents described in the Summons as required to be produced were not relevant or necessary to the matter that CSSP was investigating in that it had not been explained how the documents specified were relevant and in that such documents had not been correlated to the CSSP's Terms of Reference. Further, the documents had already been provided to the CSSP's appointed expert, Ernst & Young LLP ("**EY**") under terms of confidentiality acceptable to SoJDC. SoJDC therefore contended that it was not necessary or proportionate for CSSP to go behind the report already produced by EY ("**Ground Three**").

10. Fourthly, SoJDC argued that, in accordance with Regulation 5(1)(e) of the Regulations, the prejudice to SoJDC that would ensue from producing the documents so far outweighed the usefulness of the evidence of documents to CSSP that it would be unreasonable to require SoJDC to produce the documents. SoJDC contended that the documents required to be produced to CSSP pursuant to the Summons contained commercially sensitive matters which would be beneficial to SoJDC's competitors, that forced disclosure of the documents pursuant to the Summons was contrary to SoJDC's rights under Article 8 and Article 1 (First Protocol) of the European Convention on Human Rights ("**ECHR**"); that a non-disclosure agreement that had been offered by CSSP was in effect unenforceable; and that disclosure of the documents specified in the Summons would be contrary to the interests of the contract counter-parties namely, UBS, Camerons and HSBC ("**Ground Four**").

## **Background**

11. In response to a request for copies of the documents by the CSSP, on or about 18 May 2015 SoJDC's lawyers prepared a draft confidentiality undertaking which was sent to the CSSP. The draft confidentiality undertaking prepared on behalf of SoJDC contained provisions whereby the members of CSSP would agree to legal remedies in respect of any breach of confidentiality in respect of documentation provided to them. Such remedies were not limited to damages alone and included remedies of an injunction, specific performance and other equitable relief.
12. On 20 May 2015 Deputy Le Fondré wrote to Mr. Henry rejecting the draft non-disclosure agreement on the basis that it was entirely out of keeping with the expected voluntary compliance with a Scrutiny Panel's requests for information and the standard process by which they treat confidential information. However, he also stated that; "*in recognition of the particular sensitivity apparent in this matter, we are willing to go beyond the usual process (by which confidential information is provided with implicit trust and without requirement to enter signed agreements) and agree to sign the document attached. This is drafted in keeping with a rare precedent agreement signed during the previous Assembly*".
13. Deputy Le Fondré's letter enclosed a short agreement of confidentiality in the following terms: "*This documentation (insert titles) is being provided to the Corporate Services Scrutiny Panel, its advisers for the Jersey International Finance Centre Review Ernst & Young LLP and its Scrutiny Officers from the States Greffe on a strictly confidential basis on the understanding that it is for their information only. It will not be disclosed by any of those individuals under any circumstance and to any party by sight, verbally, orally, in writing or by copy.*" Deputy Le Fondré's letter referred to the PPC's powers of Summons under the Regulations but asked that Mr. Henry or another representative of SoJDC appear voluntarily before the CSSP on 26 May at 10 a.m. to provide the CSSP with the documentation requested. Deputy Le Fondré further stated that the meeting would be private and that the information would be treated on a confidential basis in line with the standard Scrutiny practice.
14. In reply on 22 May 2015 Mr. Henry expanded on SoJDC's concerns in relation to confidentiality and suggested a staged approach to disclosure and confidentiality whereby SoJDC would disclose part of the documentation which was least sensitive to CSSP under

cover of a “*less onerous form of confidentiality agreement*”. SoJDC would disclose separately to EY all of the documentation (including the more sensitive material) under a standard confidentiality agreement on the basis that it would be for EY only to review.

15. A meeting between SoJDC and CSSP took place on 26 May 2015 but an impasse was reached in relation to the issue of confidentiality and any non-disclosure agreement. At the meeting on 26 May 2015 SoJDC offered to show a shortened version of the undertaking to the members of the CSSP but, according to an email from Advocate Kelleher sent the same day, they declined to see the amended draft undertaking. Following that meeting, Advocate Kelleher sent a revised version of the non-disclosure agreement which removed those parts of the agreement which the CSSP had previously indicated were not acceptable. The amended version of the non-disclosure agreement contained none of the legal remedies that had appeared in the previous version but contained undertakings to keep any confidential information provided by SoJDC to CSSP confidential and a statement that; “*We recognise the contents of the Report [i.e. a report dated 14 March 2014 entitled the “Jersey International Finance Centre” prepared by BNP Paribas Real Estate] are commercially sensitive and that its disclosure (in whole or in part) may give rise to damage, loss and prejudice to SoJDC.*” A note of the meeting of the CSSP dated 26 May 2015 recorded that the CSSP declined to sign the alternative confidentiality undertaking as it contained a personal liability clause.
16. Whilst the impasse between CSSP and SoJDC apparently continued, on 15 July 2015 EY signed a confidentiality agreement addressed to SoJDC in relation to Ernst & Young’s review of the Jersey International Finance Centre and the Esplanade Quarter on behalf of CSSP (the “**EY Confidentiality Undertaking**”). The EY Confidentiality Undertaking included provisions whereby EY agreed not to disclose to the members of the CSSP any confidential information provided to it by SoJDC, but it did not include any of the wide-ranging legal remedies that had been included in the draft non-disclosure agreement dated 18 May 2015 referred to above. Deputy Le Fondré explained in the hearing before the PPC that the CSSP had agreed to EY entering into the EY Confidentiality Undertaking as a way of breaking the log-jam and in order that CSSP’s review of the Jersey International Finance Centre and the Esplanade Quarter could progress.
17. However, on 12 August 2015 the CSSP both caused the Greffier to issue the Summons and Deputy Le Fondré wrote to each of UBS, Camerons and HSBC requesting them to produce the agreements with SoJDC to which each were counterparties together with “*any associated side letters and other relevant documentation*”. CSSP’s letters to these parties contained reassurances as to preserving the confidentiality of the documents requested. The CSSP recognised and accepted that the documentation provided to the CSSP would be treated in confidence in accordance with paragraph 9.18 of the Code of Practice for Scrutiny Panels and the Public Accounts Committee. They offered the short confidentiality agreement in the same terms previously offered to SoJDC on 20 May 2015. Further, the letters stated; “*we are obliged, as elected members, to act with integrity, accountability and honesty, and to act in accordance with the public trust placed upon us as States members. Not only would disclosing confidential information constitute a breach under the Code of Conduct for Elected Members, for which there may be serious consequences, we also recognise that a breach of confidentiality of any form would seriously undermine the function of Scrutiny. It would render the process of Scrutiny valueless in the future if those with whom we need to engage*

*failed to trust us.” Deputy Le Fondré’s letters also confirmed that a report would be produced by CSSP; “which would include conclusions that, again, may or may not be informed by the information provided but would have no reference to the confidential parts of the information provided. It is these reports that would be made public and only their contents would be discussed in any States debate that may ensue”.*

18. On 28 August 2015 SoJDC’s lawyers wrote to the Greffier of the States to set out SoJDC’s 4 grounds of challenge to the Summons (as summarised at paragraphs 7 to 10 above) in accordance with Regulation 5(2) of the Regulations. CSSP replied to the grounds of challenge in a detailed letter dated 13 November 2015. SoJDC’s lawyers replied to CSSP’s letter in a further detailed letter dated 5 January 2016 which centred largely on human rights arguments and case law. The CSSP replied to SoJDC’s lawyers’ letter dated 5 January 2016 by written submissions dated 12 January 2016 which again focused largely on human rights case law. The arguments and submissions made by each of SoJDC and CSSP in these documents and in the hearing will be expanded on further below.
19. As regards the procedure followed at the hearing there was an agreed bundle of documents which included the correspondence referred to above together with –
  - 19.1 The proposition and report P.73/2010 lodged with the States Greffe entitled “*Property and Infrastructure Regeneration: the States of Jersey Development Company Limited*” which was lodged au Greffe on 7 June 2010 by the Council of Ministers (“[P.73/2010](#)”); and
  - 19.2 An interim report of the CSSP concerning the financial viability of the Jersey International Finance Centre presented to the States Assembly on 30 October 2015 under reference [S.R.7/2015](#). This attached a report from EY entitled “Proposed Jersey International Finance Centre: Phase 1A Building 4 Assessment of Potential Viability” dated 6 October 2015 (the “**EY Report**”). The EY Report was informed by the contents of the documents sought by the Summons but did not refer to them.
20. At the hearing each of SoJDC and CSSP made opening and reply submissions in support of their cases and the members of PPC had the opportunity to raise questions with both parties. The conduct of the hearing had previously been agreed between the parties and the Chairman of PPC. Following the hearing written submissions from each of the parties were provided to the PPC and H.M. Solicitor General on the legal question of whether SoJDC could rely on human rights arguments pursuant to Article 8 and Article 1 Protocol 1 of the ECHR or whether they were precluded from doing so by being an organ of the State.

## Summary of the Contentions of the Parties

### Ground One

21. SoJDC's first ground of challenge was that CSSP had not complied with Regulation 3(1)(c) which required that; before issuing a Summons requiring a person to appear before it and to give evidence and produce documents to it, a Scrutiny Panel must ... (c) "*where it would be appropriate to do so, having regard to the nature of the evidence or documents, undertake to receive the documents in confidence.*" On this ground, SoJDC first contended that an undertaking to receive documents "*in confidence*" must mean that the confidentiality is enforceable by the party providing the documents. SoJDC contended that the undertaking concerning confidentiality by SoJDC was deficient in that the undertaking offered did not contain any provisions as to legal remedies or consequences in the event that the undertaking was breached.
22. At the hearing SoJDC also took the position that to the extent that Article 34 of the Law was relevant to and affected an offer of a confidentiality undertaking by CSSP, it meant that any undertaking offered by CSSP could not override parliamentary privilege and was therefore also unenforceable. Article 34 of the Law had been first raised in writing in CSSP's response dated 13 November 2015 to SoJDC's grounds of challenge dated 28 August 2015 and in consequence SoJDC considered that no enforceable obligation could be provided by CSSP. Article 34 provides as follows –

*"No civil or criminal proceedings may be instituted against any member of the States – (a) for any words spoken for or written in a report to the States or a committee or panel established under Standing Orders; or (b) by reason of any other matter or thing brought by the member before or within the States or any such committee or panel by petition, proposition or otherwise."*
23. Accordingly, it appeared that Article 34 offered an absolute immunity against civil or criminal proceedings in the event either that, for example, a member of CSSP chose to include information derived from documents supplied by SoJDC in a report by the CSSP, or that a member of CSSP chose to make a statement in a debate in the States Assembly which disclosed confidential information derived from documents supplied by SoJDC. Whilst SoJDC had initially offered draft confidentiality undertakings to CSSP which had included sanctions in the form of legal remedies in the event of a breach, the position of SoJDC at the hearing was that as a result of Article 34 of the Law being raised by CSSP it was not prepared to accept any form of confidentiality undertaking from SoJDC.
24. An additional objection of SoJDC on this ground was that at a CSSP hearing with SoJDC on 8 June 2015 the CSSP had made no request for the "*Ancillary Documents*" and accordingly CSSP had offered no form of confidentiality agreement in relation to such documents.
25. In reply to SoJDC's contentions on Ground One, CSSP argued that Regulation 3(1)(c) did not provide that "*an undertaking*" as to confidentiality by the Scrutiny Panel had to be enforceable in a court of law. Further, it was inconceivable that the Regulations had been drafted without Article 34 of the Law in mind and this was an additional objection to the point taken by SoJDC that the undertaking had to be enforceable. CSSP had provided a form of



undertaking as to confidentiality both to SoJDC and to each of UBS, Camerons and HSBC. To the extent that such undertakings previously offered did not expressly refer to and encompass the Ancillary Documents (i.e. side letters etc.), CSSP confirmed that such documents would be received in confidence and CSSP was willing to provide an amended form of undertaking to include such documents either voluntarily or pursuant to PPC's power to alter the Summons in accordance with the power conferred on the PPC by Regulation 6(4)(b), which provided that the PPC could "*uphold the Summons with such alterations as it considers appropriate*". Deputy Le Fondré stated that a confidentiality undertaking from a States Scrutiny Panel had never been breached since the system of Scrutiny Panels was established in 2005.

26. As regards Article 34 of the Law CSSP accepted that it was not appropriate or even possible for CSSP's members to waive the parliamentary privilege expressly provided for by Article 34. The PPC could not require members of the CSSP to waive such privilege for the purposes of receiving documentation under Regulation 3(1)(c) as parliamentary privilege was a cornerstone of parliamentary democracy. Nevertheless, the CSSP also accepted that any undertaking offered can be enforced to the extent that there was a breach outside the terms of the protection contained in Article 34 of the Law. Members of CSSP were willing to give the highest level of enforceability that a States member could give. For example, they were prepared to offer assurances that they would not refer to confidential information supplied by SoJDC in their final report concerning the Jersey International Finance Centre and they were prepared to provide a draft of the report to SoJDC for comment in advance of its finalisation and publication. They were willing to review numbered hard copies of the documents sought and to return the documents when their review was completed.
27. Further, Deputy Le Fondré submitted that even if there were no legal sanction as regards a breach of confidence by a member of CSSP due to Article 34 of the Law there would nevertheless be importance practical consequences in that a breach would most probably be a breach of the Code of Conduct for Elected States Members and of the oath of office which would be likely to attract censure by the States Assembly, such as a vote of no confidence in the CSSP. A breach would damage the reputation of the individual member(s) concerned and the reputation of the States Assembly more generally.

## **Ground Two**

28. SoJDC's second ground to challenge the Summons was that the requirements of Regulation 4 had not been complied with by CSSP in respect of the Summons. The ground of challenge was twofold. Firstly, Regulation 4(3)(b) provided that a "*Summons shall... (b) indicate in general terms, the issues on which the Scrutiny Panel or PAC proposes to question the person*". SoJDC argued that the Summons did not "*identify the issues*" even in general terms on which the CSSP proposed to question Mr. Henry of SoJDC.
29. Secondly, SoJDC argued that CSSP had failed to comply with Regulation 4(4)(b) which provided that; "*the Summons may require the person to produce – (a) all documents; (b) specified documents; (c) documents described by reference to their subject matter or any other factor, which are relevant to the matter that the Scrutiny Panel or PAC is investigating.*" SoJDC argued that the words used in the Summons "*any side letters and other*

*documentation pertaining to these agreements*” were too imprecise to provide a clear indication of the documents which SoJDC was required to produce to CSSP. It relied on the case of **Tajik Aluminium Plant v. Hydro Aluminium AS (Practice Note) [2006] 1WLR** which concerned a witness Summons issued under Rule 34.2 of the English Civil Procedure Rules. Regulation 22 of the Regulations contained a penal sanction in the event of a breach as did Rule 34 of the Civil Procedure Rules so **Tajik Aluminium** case was relevant and analogous. In that case the Court had said; “*Justice demands, therefore, that the person to whom [the witness summons] is addressed should be told clearly when and where he must attend and what he must bring with him. Anything less is unfair to the witness; it also makes supervision and enforcement by the Court extremely difficult.*” The Court had further said that “*doubts about the adequacy of the description should be resolved in favour of the witness.*”

30. In reply CSSP argued that Regulation 4(3)(b) had been complied with in that CSSP had given an indication “*in general terms*” as to the issues on which CSSP proposed to question Mr. Henry of SoJDC. The Summons expressly stated that SoJDC would be questioned in relation to the Jersey International Finance Centre. As regards the **Tajik Aluminium** case the CSSP contended that this case was not relevant in that it concerned the procedural rules of another jurisdiction rather than the issue in this case which was that a Scrutiny Committee of the States Assembly (i.e. a democratically elected body) was enquiring into affairs of public administration and the use of public funds. The Regulations in this case had expressly empowered Scrutiny Panels to request all documents or specified documents or documents described by reference to their subject matter or any other factor. This was a broad jurisdiction which was different from a situation where a witness was being required to produce documents or evidence for use in civil proceedings pursuant to a witness Summons.
31. In any event, and in response to questioning at the hearing by members of the PPC, Deputy Le Fondré confirmed that CSSP only wanted to review the documents requested in the Summons and it did not want to obtain oral evidence from Mr. Henry. As regards the suggestion that the words in the Summons “*any side letters and other documentation*” were not sufficiently clear, CSSP considered that the wording was clear but that the CSSP was open to the PPC varying the wording so that if necessary the Summons provided a more specific request in relation to the Ancillary Documents. At the hearing and in response to questioning, Deputy Le Fondré confirmed that the CSSP wished to be provided with copies of the documents that were listed in a schedule to the EY Report and annexed to the EY Confidentiality Undertaking. In addition to the documents listed in the schedule to the EY Report, Deputy Le Fondré stated that the CSSP wished to receive a copy of the actual funding agreement between SoJDC and HSBC, not just the Heads of Terms. Further, CSSP wished to receive copies of any side letters to the pre-let agreement between SoJDC and UBS dated 22 May 2015.

### **Ground Three**

32. SoJDC contended that the documents required to be disclosed pursuant to Regulation 4(4)(b) must be relevant to the matter that the CSSP is investigating and that it was not clear how disclosure of the documents was relevant in this case. Moreover, disclosure of the documents was not proportionate or necessary. SoJDC had offered to answer all detailed questions put to them about the terms of the Agreements relevant to CSSP’s review. In addition, SoJDC had

provided all the documents to CSSP's appointed expert adviser EY under terms of confidentiality acceptable to SoJDC and the relevant counter-parties to the agreements – i.e. UBS, Camerons and HSBC. EY had produced a detailed report to CSSP which was included in the bundle for the hearing with the PPC. It was not proportionate or necessary for CSSP to have the documents sought in the Summons as the documents had already been reviewed by EY.

33. In reply the CSSP argued that it had been tasked with the review of the Jersey International Finance Centre by the States Assembly pursuant to Proposition P.73/2010. As regards why the CSSP needed to review documents which had already been reviewed by EY the CSSP stated that they had only agreed to EY entering into the Confidentiality Undertaking as a means of breaking the log jam and in the interests of progressing the review of the International Finance Centre. Expediency had allowed the CSSP to produce their interim report but they could not produce a final report without sight of the documents sought by the Summons. The CSSP was now placed in an absurd and wholly unsatisfactory situation in that it was unable to receive the full and open advice of its own advisers as EY were prevented by the terms of the EY Confidentiality Undertaking from discussing the contents of documents supplied by SoJDC to EY. CSSP was effectively being required by SoJDC to delegate its responsibility for scrutiny to EY.
34. Whilst CSSP had approved EY entering into the EY Confidentiality Undertaking, the CSSP had reserved the right to request the information provided by SoJDC at a later date if so required. The EY Report had conducted an analysis of tenant incentives based on market conditions (i.e. rent free periods) which could be agreed to secure tenants for the Jersey International Finance Centre. However, the EY Report could not refer to the tenant incentives specifically agreed in relation to Building 4 and had stated; *“therefore, should it be necessary to correlate [EY’s] analysis with the actual situation, it will be necessary to obtain this direct from SoJDC.”* CSSP contended that the documentation sought by the Summons were key components of the Building 4 project and was of fundamental relevance to the matter which it was reviewing. The public of the Island were the potential guarantor of last resort for the project and without the requested documentation the CSSP was being denied basic information required to perform work which it had been mandated to do by the States Assembly. CSSP further contended that it was not appropriate for a States owned company such as SoJDC to withhold evidence from a Scrutiny Panel which had been required by the States Assembly to review the International Finance Centre.
35. Deputy Le Fondré said that the Proposition and Report approved by the States Assembly in P.73/2010 had included at page 14 a number of risk management and mitigation measures. These included a measure concerning sales which provided that before committing to construction costs SoJDC had to have secured a sufficient level of legally binding pre-sales or pre-lets to fund the costs of constructing the first phase of the scheme to ensure that there would be no financial liabilities relative to a particular development’s construction costs. This was important and the CSSP needed to understand the consequences of any breaches of the Funding Agreement with HSBC as the States of Jersey was the ultimate guarantor in HSBC’s eyes. They needed to see copies of any side letters to the Funding Agreement as these might well contain details of the security taken by HSBC in the form of assets provided from the public purse and details of the recourse against the same. The Public Register identified that

guarantees existed in relation to the Funding Agreement but did not disclose the terms of the same.

36. Similarly, the CSSP needed to see the Pre-let Agreement with UBS as they needed to see the actual underlying data held by SoJDC as regards tenant incentives. The Pre-let Agreement might also contain a “take back” obligation on SoJDC which was ultimately a risk for the States of Jersey and the CSSP role was to assess the overall risk to the public of the development. The Construction contract with Camerons was also relevant to the financial viability of the project. All the documents sought by the Summons were both relevant and necessary to the CSSP’s role of scrutinising both the Building 4 project and Building 5 which was possibly due to start in September 2016.

#### **Ground Four**

37. SoJDC challenged the Summons on the basis that the prejudice to SoJDC that would ensue from the giving of evidence and/or producing the documents sought by the Summons so far outweighed the usefulness of the evidence or documents to the CSSP that it would be unreasonable to require the evidence or documents to be provided. SoJDC had explained in detail in correspondence with the CSSP why the information and documentation sought by CSSP was commercially sensitive and potentially very damaging to SoJDC in the event that it was disclosed either to commercial competitors or to the public at large. For example, SoJDC’s letter dated 22 May 2015 had stated as follows –

*“As you will appreciate, we are properly concerned about confidentiality. We are a trading company and operate in a highly competitive, commercial market. Negotiations with prospective tenants and ongoing relationships with existing commercial tenants are particularly sensitive. Without any exaggeration whatsoever, the inadvertent disclosure of confidential information could cause SoJDC to lose the possibility of a commercially attractive arrangement to the great prejudice of the public interest. Institutional tenants are understandably very sensitive about their business affairs. For them to apprehend that any commercially sensitive information as between them and SoJDC may be revealed in a public process sends out a very negative signal to the marketplace and simply drives prospective tenants into the arms of private developers who can be relied upon to keep sensitive information confidential. You will be aware how our competitors very actively approach every application we make and lobby States members with a view to securing a commercial advantage to themselves. These are very real concerns.”*

38. At the hearing Advocate Kelleher referred to paragraph 4 of a Memorandum of Understanding between the Minister for Treasury and Resources and SoJDC which provided that: *“nothing in this MoU shall be construed as requiring the inclusion in any business plan, annual report, financial statements or half yearly report of any information where the making available of the information will be likely to unreasonably prejudice the commercial position of SoJDC or that of the person who supplied or who is the subject of the information”*. This recognised the need to protect sensitive commercial information. Whilst SoJDC accepted the right of the States of Jersey to review its activities, the board of directors of SoJDC had been entrusted with the management and operation of the company. SoJDC had been incorporated as a separate legal entity with its own board of directors with a duty to act in the best interests

of the company. The CSSP and now the PPC needed to take into account the prejudice that might be caused if sensitive commercial information was released and obtained by commercial competitors.

39. SoJDC's commercial competitors vigorously opposed all applications for planning permission by SoJDC, appealed grants of planning permission and engaged in political lobbying. The International Finance Centre was aimed at institutional tenants who were generally sophisticated, well-funded and often international businesses. In order to secure such tenants the SoJDC had to offer the best package available. Typically the SoJDC was looking for a strong tenant covenant, typically over a 21 year term. Such tenants had to be incentivised which might take many forms, including rent-free periods or contributions to the tenant's fit out of the premises. The market was highly competitive and any deal struck with such tenants was very sensitive commercial information which would be valuable to a rival developer and which could well lead to adjustments to offers by rivals. Knowing such information would also give prospective tenants an advantage. The first tenant's deal was particularly important, as it would frequently be used as a bargaining tool by subsequent tenants. This could lead to a very substantial loss if that negotiation was successful which was why SoJDC insisted on enforceable confidentiality agreements. Further, in this case there were confidentiality agreements with third parties such as UBS, Camerons and HSBC and it was important to honour the sanctity of the provisions in those contracts.
40. Advocate Kelleher reiterated in relation to Ground Four of the challenge that it was not necessary or proportionate for the documents to be provided to CSSP in that the documentation had already been reviewed by EY pursuant to the terms of the EY Confidentiality Undertaking and that EY had provided a detailed report to CSSP which was informed by the contents of these documents. The EY Confidentiality Undertaking had not inhibited the EY Report which was published on 6 October 2015. CSSP had not explained the necessity or need for them to review the documents sought by the Summons save only on a generic basis which was, essentially, that it was because they were a Scrutiny Panel. CSSP appeared to be taking a position that they had a blanket right to disclosure of documentation whereas the Regulations required a balancing exercise.
41. Further, CSSP appeared to be arguing that they needed the information to reach informed conclusions in their final report concerning the International Finance Centre and that without the documentation they would not be able to reach conclusions as to the financial viability of the project. However, this was contrary to the CSSP's own interim report which had attached and published EY Report. Notably, the CSSP's interim report had drawn specific conclusions, including that the overall project for the delivery of the International Finance Centre was not considered viable, without having reviewed the documents sought by the Summons.
42. Thus, several of CSSP's conclusions in the executive summary of its interim report referred to EY's calculation that Building 4 may return notional profit of £3,040,000 assuming that the land was contributed at nil value but that this figure would reduce once site decontamination costs were known. Paragraph 9 of the executive summary of CSSP's interim report had stated that; *"The Treasury and Resources Minister as shareholder representative should seek an update and assessment of the viability of Building 4 taking full account of the actual tenant's incentives (agreed or proposed); applying realistic assumptions together with due allowance*

*for all known and planned costs of delivery*". There was an alternative means of review by the Treasury and Resources Minister which did not involve disclosure of the documentation sought in the Summons. It was not necessary for the CSSP to have access to the commercially sensitive data. Key finding 10 of CSSP's report had included detailed comments and evaluation of the financial viability of Building 4 of the International Finance Centre. The lack of the documentation sought by the Summons had not stopped the CSSP from reaching conclusions concerning the financial viability of the project. Advocate Kelleher stated that the interim report was already damaging for SoJDC in that the conclusion that the Jersey International Finance Centre was not viable was damaging. The uncertainty was increased by the CSSP asking for the confidential information sought by the Summons.

43. Mr. Marc Burton of Camerons explained that Camerons was the main contractor for Building 4. Intellectual property was Cameron's biggest asset. Camerons operated in a highly competitive market and the information contained in its tender for the role of main contractor was very sensitive in that it included detailed information concerning Cameron's rates for labour, wage costs, profit recovery, supply chain and relevant contact details which would be very valuable to Cameron's competitors. Camerons had a staff of 53 people and had relationships with many other contractors in the supply chain who were involved in the work on Building 4. The protection for Camerons in the form of a mutual confidentiality obligation in Cameron's contract with SoJDC was a very important protection. Camerons had also been the lead contractor on the Energy for Waste incinerator and had received many requests for information under the freedom of information law as recently as March 2015. The information had not been produced on the basis that it was recognised as sensitive commercial information. Mr. Burton stated that if SoJDC had disclosed in its invitation to tender documentation that the documents received would be disclosed to CSSP then Camerons would not have tendered for the contract to act as main contractor for Building 4.
44. Mr. Jonathan Marshall of UBS also confirmed that UBS was most concerned that its pre-let agreement with SoJDC was kept as confidential information for the reasons that had been expressed by Advocate Kelleher on behalf of SoJDC.
45. Deputy Le Fondré on behalf of CSSP focused on the role of CSSP in scrutinising the activities of SoJDC – a point which applied to all 4 grounds of the challenge by SoJDC. He referred in detail to the Report and Proposition P.73/2010 which was lodged by the Council of Ministers on 7 June 2010 and was entitled "Property and Infrastructure Regeneration: The States of Jersey Development Company Limited." The report accompanying the proposition contained statements concerning the importance and need for oversight by a Scrutiny Panel in relation to the activities of SoJDC. For example, one of the 6 primary objectives for the States of Jersey agreed by the Council of Ministers was "*To ensure the effective participation of the appropriate Scrutiny Panel in effective oversight of ... governance [of regeneration policy in Jersey].*" The Report had stated; "*It is important to note that all bodies involved in the proposed regeneration process will also be open to scrutiny by ... the Corporate Services Scrutiny Panel.*" The role of the States Assembly included ensuring "*that all elements of the process are open and responsive to scrutiny*". The Corporate Services Scrutiny Panel had an important role in delivering transparency and accountability to the States Assembly throughout the development process.

46. The Report and Proposition had been approved by the States Assembly and in requesting the documents specified in the Summons CSSP was acting within its role of scrutinising the activities of SoJDC in achieving the redevelopment of publicly owned land in Jersey which had been approved by the States Assembly when P.73/2010 was passed. There would be reputational damage to the CSSP and to the States Assembly if CSSP did not receive the documents specified in the Summons and if there was any suggestion that an undertaking concerning confidentiality provided by the CSSP was not effective.
47. The confidentiality of the documents requested in the Summons would be preserved by CSSP. There was no question of the documentation going into the public domain or into the hands of competitors. As regards Regulation 5(1)(e) the SoJDC had to prove that they would suffer prejudice and then they had to go further to establish that any such prejudice would “so far outweigh” the usefulness of the documents to the CSSP that it would be “unreasonable” to require SoJDC to produce the documents. Here the documents were vital to the role being performed by the CSSP and prejudice would only arise if the information went into the public domain. However, Deputy Le Fondré and the other members of the CSSP present at the hearing confirmed that the information would not enter the public domain so that prejudice did not arise or was purely hypothetical.

#### **Ground Four – Human Rights**

48. The parties relied on the following human rights law arguments which were set out in written submissions. SoJDC argued that the forced disclosure of the documents sought by the Summons amounted to an unlawful interference with the rights of SoJDC and the contract counterparties contrary to Article 8 and Article 1 (First Protocol) of the ECHR enshrined in the law of Jersey by the [Human Rights \(Jersey\) Law 2000](#).
49. A preliminary point was raised on whether SoJDC could be a victim for the purposes of the ECHR or whether it was itself an organ of the State. Article 34 ECHR provides that –

*“Individual applications*

*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The high contracting parties undertake not to hinder in any way the effective exercise of this right.”*

50. SoJDC submitted that it was not a governmental organisation for the purposes of Article 34 ECHR or, in the alternative, that it was a hybrid public authority and, in respect of the matters raised by CSSP, SoJDC was exercising a private function, namely the agreement of contractual relations with private third parties such that it has Convention rights in relation to those functions. It further submitted that, whatever the position of SoJDC, the CSSP had to comply with the Convention rights of UBS, HSBC and Camerons and that therefore the point did not require resolution.
51. CSSP argued that SoJDC was clearly a governmental organisation set up by the legislature and which carried out public functions. It was wholly owned by the States of Jersey and

development profits were payable to the Treasury. Accordingly, it was a governmental organisation without the protection of the Human Rights (Jersey) Law 2000.

52. The PPC (advised by H.M. Solicitor General) considered that SoJDC were correct in their submission that the CSSP had to comply with the Convention rights of UBS, HSBC and Camerons as regards the documents sought in the Summons and that, whatever the position of SoJDC, the preliminary point did not in fact require resolution. Accordingly, the PPC considered the respective claims in relation to Article 8 and Article 1, Protocol 1 ECHR.
53. SoJDC submitted that corporations were able to rely on Article 8<sup>1</sup> (respect for private and family life) and Article 1 First Protocol<sup>2</sup> (protection of property) ECHR. The right to a “private life” encompassed confidential business or commercial activities and information. Confidential information could also in its own right constitute a “possession” or “possessions” for the purposes of Article 1, Protocol 1. The Summons interfered with such rights and the question was whether the interference was justified in the sense of being necessary and proportionate. An interference with an Article 1 Protocol right will be disproportionate where the relevant property owner has to bear an individual and excessive burden such that the fair balance which should be struck between the protections of the right of property and the requirements of the general interest is upset. As regards the striking of a fair balance, SoJDC relied on all of the factors set out and arguments made in relation to Grounds One to Four of the challenge, but particularly that EY already had the documents sought by the Summons, that the CSSP had already reached interim conclusions on basis of the EY Report which was informed by such documents, and the lack of effective binding confidentiality provisions if the material were to be disclosed to CSSP.
54. SoJDC relied on the case of **R (on the application of Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council [2010] EWCA Civ 1214** in which the English Court of Appeal (at paragraph 113) recognised that even where restrictions on subsequent disclosure were in place; “*there is plainly a danger that once access is granted, even if only for the purposes of [an] audit, the security of any confidential information is threatened*”. In this case

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<sup>1</sup> Article 8

*Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>2</sup> Article 1

*Protection of property*

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”



no enforceable confidentiality provisions were being provided. As a minimum CSSP needed to establish the necessity of their seeing the documents and that absent necessity no disclosure should be ordered. Further, in the case of irreparable harm, even necessity could not suffice where the confidentiality obligation was not truly enforceable.

55. In reply CSSP sought to distinguish the case of **Veolia** relied on by SoJDC by arguing that the confidential sensitivity of the information in Veolia was much greater and the nature of the party requesting the information was entirely different. In Veolia the information included Veolia's financial model and profit margin in relation to a long term waste management PFI Contract and the party requesting disclosure of the information was merely an elector within the local government area of Nottinghamshire County Council rather than a States Scrutiny panel with responsibility for reviewing SoJDC's activities.
56. Deputy Le Fondré emphasised the CSSP's role of scrutinising the redevelopment of the States owned land at the Waterfront as set out in P.73/2010. On such matters the States Assembly could as a matter of constitutional principle enquire into the state of public affairs for any reason or none. The CSSP's written submissions dated 12 January 2016 cited the work of Walter Bagehot, *The English Constitution* (Second Edition) in which the author had described the role of the British Parliament in respect of any part of the public service as being a despot with infinite curiosity to exercise "*tyranny over public offices*".
57. The CSSP also submitted that a further key difference with the **Veolia** case was that the Regulations provided a dispute resolution process via a challenge to the PPC where the PPC could balance the public interest against the private interest(s) as expressly provided in Regulation 5(1)(e) and that it was entirely proper for the Regulations to do so. In the case of **Klass v Germany (1979-80) 2 EHRR 214** the European Court of Human Rights had held that in matters of obtaining information (including in that case sensitive information obtained by surveillance of mail and telephone calls), a system of purely legislative oversight may be appropriate.
58. As regards whether infringement of Convention rights was justified, CSSP relied on the proportionality test and the case of **Huang v Secretary of State for the Home Department [2007] UKHL 19** where the House of Lords in an immigration case approved dividing the proportionality test into 4 limbs, namely: whether (a) the legislative objective is sufficiently important to justify limiting a fundamental human right; (b) the measures designed to meet the legislative objective are rationally connected to it; (c) the means used to impair the right or freedom are no more than is necessary to accomplish the objective; and (d) a fair balance had been struck between the rights of the individual and the interests of the community where the severity and consequences of the interference are carefully assessed.
59. Applying these factors the CSSP submitted that any infringement was proportionate in this case. In particular, as regards (c) it was not correct that the CSSP should not be able to see the documents sought by the Summons, which was the position taken by SoJDC, as this would mean that the power of decision making in relation to a matter of Island wide significance was being transferred from the legislature to a private advisor. In summary, it was not appropriate for the CSSP to be prevented from exercising its investigative role subject to the supervision of the PPC in accordance with the scheme set out in the Regulations.

## Decision

60. After careful consideration of all the documents submitted by CSSP and SoJDC and of all the submissions made by them or on their behalf at the hearing, as well as the submissions on behalf of UBS and Camerons, the unanimous decision of the PPC in this matter is as follows.
61. In accordance with Regulation 6(4)(b) the Summons will be upheld with the following alterations. The words in the Summons –

*“to attend before it and to give evidence at: Blampied Room, Royal Court House, Royal Square, St. Helier on Wednesday 2<sup>nd</sup> September 2015 at 2.30 p.m. This summons is served in relation to the Panel’s review ‘Jersey International Finance Centre’. You are required to produce the following documentation to the Panel when you appear: The pre-let agreement between SoJDC and UBS, the funding agreement between SoJDC and HSBC and the construction contract between SoJDC and Camerons, together with any side letters and other documentation pertaining to these agreements”*

will be deleted and substituted with the following words –

*“to produce the following documents, or true copies thereof, for inspection and review by the members of the Corporate Services Scrutiny Panel which are relevant to their review ‘Jersey International Finance Centre’: the documents listed in Appendix D to the Report of Ernst & Young LLP dated 6 October 2015 entitled the ‘Proposed Jersey International Finance Centre: Phase 1A Building 4 Assessment of Potential Viability’ provided by SoJDC to Ernst & Young pursuant to an undertaking dated 15 July 2015 together with the Funding Agreement between SoJDC and HSBC and all and any side letters to the Agreement to Lease with UBS dated 22 May 2015 (together the “Documents”) on the terms and conditions set out in paragraph 62 of the Decision of the Privileges and Procedures Committee dated [ ] April 2016.”*

62. Without prejudice to the terms of Article 34 of the States of Jersey Law 2005 in recognition of the interests of SoJDC, HSBC, UBS and Camerons in preserving confidentiality the Documents are to be provided to the CSSP on the following terms and conditions –

62.1 The Documents or true copies thereof may be inspected by members of and officers to the CSSP at the offices of SoJDC or its lawyers during normal business hours from 7 days of the date of this decision until such date as the CSSP confirms in writing to SoJDC that the CSSP no longer requires inspection of the documents, such date not to exceed a period of 3 months from the date of this decision. A representative of SoJDC may be present in the room of each occasion that a member of CSSP attends to review the Documents.

62.2 The Documents are not to be reproduced, photographed or copied or removed from the offices of SoJDC or its lawyers by members of the CSSP save that members of the CSSP may take notes concerning the contents of the Documents and may discuss contents of the Documents with EY. In the event that EY have not previously reviewed any of the

Documents included within the amended wording to be used in the Summons as substituted by paragraph 61 above, and that EY require copies of the same for the purposes of any discussions with the CSSP, then SoJDC shall provide copies of such Documents to EY.

62.3 The Documents are provided to the members of the CSSP for the sole purpose of the preparation of the CSSP's final report concerning the Financial Viability of the Jersey International Centre and not for any other purpose.

62.4 Subject to the above, the contents of the Documents including any notes taken concerning the same pursuant to sub-paragraph 62.2 are to be kept strictly confidential by members of the CSSP and are not to be disclosed to any other person whatsoever other than the CSSP's 2 Scrutiny Officers (who will also keep their contents confidential) and as may be required to be disclosed by law.

62.5 The CSSP will provide a draft of its final report concerning the Financial Viability of the Jersey International Centre to SoJDC for comments by the SoJDC, such comments in respect of any references in such report to confidential information contained in or derived from the Documents to be provided in writing within 14 days of the provision of such draft to SoJDC.

### **Reasons for the Decision**

63 Before providing reasons in relation to each of Grounds One to Four of the challenge, the PPC provides the following comments which apply generally.

64 Firstly, the PPC accepts that SoJDC, UBS, HSBC and Camerons have legitimate concerns in relation to preserving the confidentiality of the contents of the documents sought by the Summons and it did not agree with the submission made by the CSSP that the commercial sensitivity of such documents was less than those involved in the case of **Veolia**. In particular, the PPC noted the comments made by Mr. Burton of Camerons that the information sought by the CSSP concerning the contract with Camerons included detailed information concerning Cameron's rates for labour, wage costs, profit recovery, supply chain and relevant contact details, and that if SoJDC had disclosed in its invitation to tender documentation that the documents received would be disclosed to CSSP then Camerons would not have tendered for the contract to act as main contractor for Building 4. For this reason it was appropriate to impose the protections set out at paragraph 62 above as regards inspection of the documents only at the offices of SoJDC or its lawyers, that the documents should not be copied and that a draft of the CSSP's report should be provided to SoJDC for comments.

65 However, the PPC also considered that the CSSP had sufficient need to review the documents sought in the Summons notwithstanding that copies of the documents had been reviewed by EY. The CSSP's need to review the documents arose from their role in scrutinising the redevelopment of publicly owned land at the Waterfront as set out in P.73/2010. Deputy Le Fondré had also provided specific explanations at the hearing as to why it was necessary for the CSSP to review the particular documents sought by the Summons. This was not a situation where a Scrutiny Panel was demanding information just because they are a Scrutiny Panel or because as a matter

of constitutional theory they could, in the words of Bagehot, act a despot with infinite curiosity to exercise “*tyranny over public offices*”.

- 66 On the contrary, P.73/2010 set out in detail the structure and respective roles of various entities that were involved in redevelopment of publicly owned land. Whilst these included detailed provisions concerning the establishment of SoJDC as a company with its own board of directors operating under a Memorandum of Understanding with the Minister for Treasury and Resources as described by Advocate Kelleher, P.73/2010 also included explicit statements about the role of the CSSP in relation to the projects.
- 67 Thus, at page 8 it stated: “*It is important to note that all bodies involved in the proposed redevelopment process will be open to scrutiny by the Public Accounts Committee and the CSSP. All scrutinising authorities will remain independent of the Regeneration Steering Group and the SoJDC in order that their respective positions will not be compromised.*” In the organogram on page 9 of P.73/2010 the box labelled “Scrutiny” stated that it “*will scrutinise all elements of the process (including the ministers) to ensure proper governance and effective delivery of agreed strategies.*” Further, the role of the States Assembly was inter alia to “*ensure that all elements of the process are open and responsive to scrutiny.*” It is clear from P.73/2010 as approved by the States Assembly that the intention of the Island’s legislature was to ensure that Scrutiny (which included the CSSP) had an important and wide-ranging role in ensuring the delivery of effective regeneration which was additional to the role of the Minister for Treasury and Resources set out in the Memorandum of Understanding. The ability of the CSSP to request documents from SoJDC for review was clearly consistent with the role envisaged for it by the legislature in P.73/2010.
- 68 As regards the CSSP’s need to see the specific documents sought in the Summons, P.73/2010 also stated that SoJDC was to “*deliver projects in the most beneficial and risk averse manner*” (page 13). One of the risk management and risk mitigation measures was the measure concerning sales which provided that before committing to construction costs SoJDC had to have secured a sufficient level of legally binding pre-sales or pre-lets to fund the costs of constructing the first phase of a scheme to ensure that there would be no financial liabilities relative to a particular development’s construction costs. The conclusion of the PPC was that each of the documents sought in the Summons do appear relevant and necessary for the CSSP to see in relation to this risk mitigation measure and in the interests of minimising financial risk to the public of the Island.
- 69 The Funding Agreement and any side letters to it are clearly relevant to this measure. Similarly, the Pre-let Agreement with UBS will contain details of the financial terms on which UBS is leasing the property which are relevant to the sales measure. As regards the construction agreement with Camerons, this would also contain specific details of the construction costs for Building 4 which would also be relevant to the sales measure. As to whether these documents would be relevant to the possible commencement of Building 5, the Pre-let Agreement with UBS might not be relevant as it might well be specific to UBS and Building 4, whilst the Funding Agreement with HSBC and the construction contract with Camerons might also not be applicable to Building 5. The PPC’s decision is therefore not made on the basis that the documents sought by the Summons are definitely relevant to Building 5.

- 70 As regards SoJDC's objection that the documents sought by the Summons have already been reviewed by EY, the PPC consider that the approach followed by CSSP in this area was not best practice. Whilst it may have been expedient for CSSP to allow EY to enter into a non-disclosure agreement with SoJDC as a convenient way of breaking the log jam on the issue of confidentiality this has created an unfortunate situation where EY as advisor is not able to discuss aspects of its report with CSSP its client. Further, CSSP has issued interim report S.R.7/2015 to the States Assembly in which it has drawn conclusions in trenchant terms based largely on the EY Report, albeit that CSSP did state in its interim report that it has not been able to conduct a review of financial viability based on actual incentives agreed with tenants such as UBS due to the terms of the EY Confidentiality Undertaking.
- 71 Despite this criticism, the PPC consider that the fact that EY have already reviewed the documents is rather a factor in favour allowing CSSP access to the documents sought in the Summons. It is not satisfactory for the CSSP, which is tasked with scrutiny of all aspects of the redevelopment programme according to P.73/2010, not to be able to discuss aspects of the EY Report with EY. Further, there was an express reservation of CSSP's rights to request the documentation notwithstanding the EY Confidentiality Undertaking. The EY Report confirms on page 14 that; *"We also confirm that the CSSP has approved our entering into an NDA directly with SoJDC but reserves the right to request this information from SoJDC at a later date if so required"*. Further, the EY Report confirms that the commercially sensitive information received from SoJDC (which includes the documents sought by the Summons) "is critical to our analysis" (underlining added) which is an additional factor in the PPC's decision that it is necessary and appropriate for CSSP to review the documents sought by the Summons.
- 72 As regards the scope and effect of Article 34 of the Law, the PPC consider that the Regulations must have been prepared and approved on the basis that they were subject to the terms of the Law as a whole and that the privilege contained in Article 34 is an absolute privilege which individual members cannot elect to waive due to the significance of the principle and potential consequences for other elected members. The PPC also consider that the existence of the parliamentary privilege in Article 34 is not an outright bar or reason against allowing access to the documents sought by the Summons to the CSSP. Rather, the privilege in Article 34 is a factor that the PPC has taken account of in its decision and it has sought to build in significant practical protections as to confidentiality around Article 34 of the Law. In any event, SoJDC, HSBC, UBS and Camerons should be assumed to be aware of the terms of the Law and of P.73/2010 before they entered into the relevant contracts.
- 73 Further, the PPC consider that the privilege contained in Article 34 is not a privilege that can be invoked with impunity in this particular case, without in any way suggesting that the members of the CSSP would do so in relation to the contents of the documents sought by the Summons. Whilst Article 34 might be an absolute defence to a claim for breach of confidence brought in a court of law, any breach of confidence as regards the contents of the documents sought by the Summons might well attract serious consequences for the States member concerned. Depending on the facts of the case, the breach could well amount to a breach of the Code of Conduct for Elected Members of the Assembly and could result in a vote of censure or no-confidence by the Assembly. Further, any such breach would have serious reputational consequences for the States member concerned.

- 74 Having provided general reasons in relation to the Summons, the PPC now also give the following specific reasons in relation to each of the 4 grounds of challenge raised by SoJDC.
- 75 As regards Ground One, the PPC does not consider that Regulation 3(1)(c) requires the Scrutiny Panel to provide an undertaking as to confidentiality which is enforceable in a court of law. Regulation 3(1)(c) should be viewed in the context of Article 34 of the Law and the protection of parliamentary privilege for States members in certain circumstances. However, a confidentiality undertaking can apply to acts done or to persons outside the scope of Article 34 of the Law and there is no reason why members of the CSSP could not agree to offer (or for the PPC to require) specific protections as to confidentiality such as agreeing to view the documents at the premises of another party, not taking copies of documents or returning copies of documents once the review of them has completed. Similarly, Article 34 would not prevent measures such as a vote of censure or of no confidence within the States Assembly itself.
- 76 The CSSP did offer undertakings as to confidentiality in its letter to SoJDC dated 20 May 2015 (which enclosed the draft confidentiality undertaking) and in its letters to HSBC, UBS and Camerons dated 12 August 2015. As regards SoJDC's point that the offer of confidentiality contained in the CSSP's letter dated 20 May 2015 did not specifically apply to the Ancillary Documents, CSSP's letter dated 13 November 2015 dealt with this by specifically confirming that the draft confidentiality undertaking enclosed with the letter of 20 May 2015 also applied to the Ancillary Documents. The PPC therefore consider that Ground One of the challenge by SoJDC does not succeed. Nevertheless, in view of the legitimate interest of SoJDC, HSBC, UBS and Camerons in preserving the confidentiality of the information contained in the documents sought by the Summons, PPC does consider it appropriate to include the safeguards specified at paragraph 62 above.
- 77 As regards Ground Two Deputy Le Fondré confirmed at the hearing that CSSP did not wish to question Mr. Henry so the issue of an alleged lack of specificity in the Summons on the issues on which the Scrutiny Panel proposes to question the person does not need to be decided. As regards the additional criticism by SoJDC that the words "*any side letters and other documentation pertaining to these agreements*" used in the Summons were too imprecise to give a clear indication of the documents which were required to be produced, the PPC does not consider that this criticism has merit. Regulation 4(4) provides that a Summons may require a person to produce (a) "all documents"; or (b) "specified documents" or "documents described by reference to their subject matter or any other factor". The PPC considered that the words used in the Summons did sufficiently clearly identify the documents on grounds 4(4)(b) or (c). However, to ensure that there is close alignment between the documents reviewed by EY and the documents reviewed by the CSSP the PPC considers it appropriate to include the amended wording to be substituted in the Summons as set out at paragraph 61 above,(which includes the additional documents sought by Deputy Le Fondré referred to in paragraph 31 above), as well as the additional provision at paragraph 62.2 above allowing further documents to be provided to EY in the event that EY had not previously seen such additional documents sought by Deputy Le Fondré.

- 78 The challenge in Ground Three to the Summons is also not successful for the reasons previously set out at paragraphs 64 to 69 above. To the extent that SoJDC included a challenge based on lack of proportionality within this Ground, the PPC's reasons in relation to proportionality are set out at paragraphs 84 to 88 below and are repeated for the purposes of Ground Three.
- 79 As regards Ground Four the PPC has carried out balancing exercises both for the purposes of Regulation 5(1)(e) and in relation to human rights protections under the ECHR.
- 80 Concerning Regulation 5(1)(e) the members of the PPC have given close attention to the language used therein. They were advised by H.M. Solicitor General that there is no caselaw of the Royal Court of Jersey concerning how the language used in Regulation 5(1)(e) was interpreted or applied and that other caselaw of the Royal Court concerning appeals based on unreasonableness under, for example, the [Planning and Building \(Jersey\) Law 2002](#) or the [Financial Services \(Jersey\) Law 1998](#) was based on differently worded legislation. The members of the PPC therefore considered that Regulation 5(1)(e) requires them to decide whether they themselves as members of the PPC believed that the prejudice of disclosure so far outweighed the usefulness of the documents that it was unreasonable to require disclosure, not that they had to decide that the decision of the CSSP to require the Summons to be issued was wrong to such an extent that that it could be categorised as objectively unreasonable or irrational. Whilst they noted that the language used in Regulation 5(1)(e) was that the prejudice must "so far outweigh" the usefulness and not just "outweigh" the usefulness, they considered that even if the words "so far" had been omitted from the Regulation it would not have made a difference to their decision.
- 81 The members of the PPC have carefully considered the prejudice to SoJDC, HSBC, UBS and Camerons of disclosing the documents sought by the Summons to the CSSP and whether disclosure of the documents was proportionate in this case. They accept that there is prejudice to these companies in that commercially sensitive information in relation to a valuable, high profile and controversial redevelopment project (a project which is challenged by and in competition with private sector developers) is sought to be disclosed to third parties outside these organisations. That in itself is prejudicial to each of their interests. Further, whilst the point was not made by SoJDC, the parties to whom the information is to be disclosed are elected States members who may be subject to political considerations such as that they may stand for re-election to the States Assembly in due course. Moreover, those States members have immunity to civil and criminal proceedings in certain circumstances as set out in Article 34 of the Law. The PPC did not agree with the submission of Deputy Le Fondré at the hearing that there was no prejudice to SoJDC or that the prejudice was purely hypothetical because the members of the CSSP had provided an assurance that they would not disclose any confidential information received. The PPC has sought to minimise the prejudice to each of SoJDC, HSBC, UBS and Camerons as much as possible by including the protections set out in paragraph 62 above but it accept that prejudice remains notwithstanding such protections.
- 82 The members of the PPC have considered the prejudice to each of SoJDC, HSBC, UBS and Camerons against the usefulness of the evidence to the CSSP of reviewing the documentation sought and concluded that such prejudice does not so far outweigh the usefulness of the evidence that it is unreasonable for the documents sought by the Summons (as amended by the PPC) to be disclosed to the CSSP. EY stated that the documents sought by the Summons were critical to their analysis and it is unhelpful that there is an inequality of information between EY as advisor

and the CSSP as client. The CSSP have to provide a final report concerning the financial viability of Building 4 and the members of the PPC consider that the documents will be very useful to them for that report. Their contents may, for example, change the conclusions drawn by the CSSP in their interim report. The members of the PPC were therefore also satisfied that disclosure of the documents sought by the Summons (as amended by the PPC) was proportionate in all the circumstances of this case between the interests of SoJDC, HSBC, UBS and Camerons on the one hand and the CSSP on the other hand.

- 83 As regards the alleged infringements of ECHR rights under Article 8 and Article 1, Protocol 1, the PPC has proceeded on the basis that disclosure of the documents sought by the Summons as amended by the PPC would amount to interferences with or infringements of the rights of each of SoJDC, HSBC, UBS and Camerons individually and collectively. However, such rights are qualified rights and interferences or infringements must be balanced against the interests of the public authority as set out in Article 8 and Article 1, Protocol 1 ECHR.
- 84 The PPC considered the proportionality test as regards whether infringement of ECHR rights was justified and applied the 4 limbs of the test approved by the House of Lords in **Huang v Secretary of State for the Home Department** in the context of P.73/2010, the Regulations and Article 34 of the Law. As regards whether the legislative objective was sufficiently important to justify limiting a fundamental human right, the PPC considered that the International Finance Centre is a significant re-development project for the public of the Island which may expose the public to some degree of financial risk or may benefit the public significantly in returns of development profits. Either way P.73/2010 envisaged that it was important for risk to be minimised and that the CSSP had an important role to play in scrutinising the redevelopment project. The PPC were therefore satisfied that the legislative objective of P.73/2010 was sufficiently important to justify limiting the Convention rights of HSBC, UBS and Camerons (and possibly the convention rights of SoJDC, even if SoJDC's ability to claim Convention rights did not fall to be decided for the reason set out at paragraph 52 above).
- 85 The PPC also considered that the measure of requiring disclosure of the Documents sought by CSSP was designed to meet the legislative objective of performance of the Scrutiny function and was rationally connected to it. The Documents were being disclosed to CSSP for the sole purpose of their Scrutiny function pursuant to P.73/2010 and not for any other purpose.
- 86 The PPC further considered that the means used to impair the Convention rights were no more than was necessary to accomplish the legislative objective of achieving effective scrutiny of the redevelopment project overall and specifically of Building 4. The PPC did not accept that the legislative objective could be achieved through limiting disclosure just to EY. The CSSP was specifically tasked with scrutiny of the redevelopment under P.73/2010 and it was not appropriate for this function to be delegated or contracted out to a private advisor such as EY. EY's contractual terms of engagement by CSSP as reproduced in the EY Report did not contemplate such a position. Such an arrangement was also not contemplated in P.73/2010. Further, the means used incorporated specific protections concerning confidentiality as set out in paragraph 62 above in favour of SoJDC, HSBC, UBS and Camerons. The right of challenge of the Summons contained in the Regulations to the PPC was also a protection for such parties.



- 87 Finally, the PPC considered that a fair balance had been struck between the rights of SoJDC, HSBC, UBS and Camerons on the one hand and the interests of the community or the public interest in the Scrutiny function on the other hand. Scrutiny was particularly important in relation to the redevelopment of the Waterfront as demonstrated by the provisions of P.73/2010. The consequences of interferences with the Convention rights of HSBC, UBS and Camerons (and possibly of SoJDC) were being carefully assessed by the PPC which had included the specific protections set out in paragraph 62 to protect their interests.
- 88 The effect of the parliamentary privilege contained in Article 34 of the Law was also carefully considered as a factor in the PPC's decision. That privilege was fundamental to the operation of the legislature and could not be overridden. However, the PPC remained satisfied that despite its existence the disclosure of the Documents to CSSP was still justified due to the public interest in the effective scrutiny of the Waterfront redevelopment. Further, whilst they were not enforceable protections in a court of law, the possibility of reputational damage or measures such as a vote of censure or of no confidence in the CSSP in the States Assembly were nevertheless significant deterrents to a breach of confidentiality by members of the CSSP which did amount to protections of the interests of SoJDC and the contract counterparties, notwithstanding the provisions of Article 34 of the Law.



Connétable Len Norman  
Chairman

10 May 2016