

KS/MH/021

PRIVILEGES AND PROCEDURES COMMITTEE

(26th Meeting)

14th January 2016**PART A (non-exempt)**

All members were present, with the exception of Connétable C.H. Taylor of St. John and Deputy S.M. Brée of St. Clement, who were conflicted by virtue of being members of the Corporate Services Scrutiny Panel and Senator P.F.C. Ozouf, who had recused himself from consideration of this matter.

Connétable L. Norman of St. Clement, Chairman
 Connétable D.W. Mezbourian of St. Lawrence
 Deputy J.A. Martin of St. Helier
 Deputy S.Y. Mézec of St. Helier

In attendance -

M.H. Temple, Q.C., H.M. Solicitor General
 L.M. Hart, Deputy Greffier of the States
 Advocate J. Kelleher, representing the States of Jersey Development Company
 L. Henry, Managing Director, States of Jersey Development Company
 S. Neal, Finance Director, States of Jersey Development Company
 M. Burton, Managing Director, Camerons Limited
 J. Marshall, Head of Legal, UBS AG
 Deputy J.A.N. Le Fondré, Chairman, Corporate Services Scrutiny Panel
 Advocate D. Benest, assisting the Corporate Services Scrutiny Panel
 S. Spottiswoode, Scrutiny Officer, Corporate Services Scrutiny Panel
 K.L. Slack, Clerk to the Privileges and Procedures Committee

Note: The Minutes of this meeting comprise Part A only

Challenge to summons served by the Corporate Services Scrutiny Panel: Managing Director of the States of Jersey Development Company. 450/99(5)

A1. The Committee, with reference to its Minute No. B3 of 8th December 2015, and with H.M. Solicitor General in attendance, received Advocate J. Kelleher of Carey Olsen on behalf of his client, the States of Jersey Development Company (SOJDC) in connexion with its challenge to a summons, dated 12th August 2015, served on its Managing Director, Mr. L. Henry, by the Corporate Services Scrutiny Panel (CSSP). The Committee simultaneously received Deputy J.A.N. Le Fondré, Chairman of the CSSP and Advocate D. Benest, who was assisting the CSSP in relation to this matter.

The Committee considered a bundle containing the following documentation:

1. Letter from Carey Olsen to the Greffier of the States, dated 28th August 2015
2. Letter from the Chairman of CSSP to the Chairman of PPC, dated 13th November 2015
3. Letter from Carey Olsen to the Chairman of PPC, dated 5th January 2016
4. Submission by CSSP, dated 12th January 2016, in relation to human rights arguments raised in the Carey Olsen letter of 5th January 2016

5. States of Jersey (Powers, Privileges and Immunities) (Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006;
6. Summons of the CSSP to Mr. Henry of SOJDC, dated 12th August 2015;
7. Draft confidentiality agreement, dated 18th May 2015, prepared on behalf of SOJDC and forwarded to CSSP on or around 18th May 2015;
8. Letter from CSSP to SOJDC (enclosing a draft confidentiality agreement), dated 20th May 2015;
9. Letter from SOJDC to CSSP, dated 22nd May 2015;
10. Email from Advocate Kelleher to the Greffier of the States (enclosing a draft confidentiality agreement), dated 26th May 2015;
11. Letter of undertaking from Ernst & Young LLP to SOJDC, dated 15th July 2015;
12. Letter from CSSP to Cameron's Ltd (enclosing a draft confidentiality agreement), dated 12th August 2015;
13. Letter from CSSP to UBS Jersey (enclosing a draft confidentiality agreement), dated 12th August 2015;
14. Letter from HSBC to CSSP, dated 18th August 2015;
15. Letter from Cameron's Ltd to CSSP, dated 28th August 2015;
16. Letter from UBS to CSSP, dated 28th August 2015;
17. Proposition P.73/2010 – Property and Infrastructure Regeneration: The States of Jersey Development Company Limited;
18. Record of meeting of CSSP on 26th May 2015;
19. Entry into the Public Registry of the security provided by SOJDC to HSBC, dated 7th August 2015; and,
20. CSSP Financial Viability (Interim Report): Jersey International Finance Centre, S.R. 7/2015, presented to the States on 30th October 2015. This included the Ernst & Young Assessment of Potential Viability Report, dated 6th October 2015.

The Committee heard verbal submissions from Advocate Kelleher, Mr. M. Burton, Managing Director of Camerons Limited and Mr. J. Marshall, Head of Legal UBS AG, in respect of the SOJDC challenge to summons and then heard Deputy Le Fondré's submissions on behalf of his Scrutiny panel, followed by reply submissions from both Advocate Kelleher and Deputy Le Fondré.

Advocate Kelleher explained that the SOJDC challenged the summons issued by the CSSP on 4 grounds:

- 1) that Regulation 3(1)(c) of the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006 was not complied with before the summons was issued;
- 2) that the requirements of Regulation 4, of the above Regulations, was not complied with in respect of the summons;
- 3) that the documents described in the summons as required to be produced were not relevant or necessary to the matter that the CSSP was investigating; and
- 4) that the prejudice to the SOJDC (on behalf of whom Mr. Henry was summoned in his capacity as Managing Director thereof) that would ensue from producing the documents so far outweighed the usefulness of the evidence or documents to the CSSP that it would be unreasonable and prejudicial to require him to appear.

In relation to the first ground, Advocate Kelleher emphasised that the SOJDC would be prepared to provide documents to the CSSP provided that it was assured that the confidentiality of the commercially sensitive documents that had been requested could be maintained. He highlighted that the SOJDC had sought throughout to co-operate with the requests of the CSSP and, as far back as May 2015, had provided a draft non-disclosure agreement, whose clauses reflected the seriousness of any breach of confidentiality, to the CSSP. However, the CSSP had declined to enter into such an agreement and had offered up alternative wording, which the SOJDC deemed ineffective for its purpose.

Advocate Kelleher indicated that the SOJDC had been able to enter into an enforceable, and properly drawn up, confidentiality agreement with Ernst & Young LLP (E&Y), who had acted as independent expert advisers to the CSSP and had had sight of the material that CSSP had requested from SOJDC on a confidential basis. E&Y had had no issue with the terms of the confidentiality agreement and, as a company operating in the private sector, were accustomed to such agreements.

Advocate Kelleher referred to the letter of 13th November 2015, from the Chairman of the CSSP in which the latter indicated that by virtue of the provisions of Article 34 of the States of Jersey Law 2005 “[we] do not think that it would be appropriate or even possible for PPC to require a States Member to waive parliamentary privilege ... for the purpose of receiving documentation under Regulation 3(1)(c).”

Regulation 3(1)(c) of the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006 provided that:

“Before issuing a summons requiring a person to appear before it and to give evidence and produce documents to it, a scrutiny panel or the PAC must –

(c) where it would be appropriate to do so, having regard to the nature of the evidence or documents, undertake to hear the evidence in private or receive the documents in confidence.”

Although the foregoing conceived that it would be possible for the CSSP to offer enforced confidentiality, Article 34 of the States of Jersey Law 2005 stated:

34 Immunity from legal proceedings

No civil or criminal proceedings may be instituted against any member of the States –

- (a) for any words spoken before 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.*

Advocate Kelleher indicated that because Article 34 of the States of Jersey Law undermined the ability of the CSSP to enter into an effective confidentiality agreement, it was difficult to see how to proceed on an agreed basis and resolve the tension between the two pieces of legislation.

In relation to the second ground, which centred on the procedure for issue of a summons by a scrutiny panel, Advocate Kelleher indicated that the requirements of Regulation 4(4) were not complied with, as it prescribed 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.”*

He opined that the request in the summons for “*any side letters and other documentation*” was too imprecise to give a clear indication of what documentation was required, particularly as failure to comply with the summons rendered one guilty of an offence and liable to a financial penalty of up to £5,000.

In respect of the third ground, Advocate Kelleher queried the usefulness to the CSSP of the documents that it had requested. He indicated that the Panel’s stated reasons for wishing to receive the documents were generic. In the submission by the CSSP, dated 13th November 2015, it stated that “*It is therefore essential that to be able to fulfil its role and responsibilities, a Panel secures the necessary evidence on which to make soundly based judgments*”. However, the absence of the original documents had not prevented the CSSP from reaching its own damaging conclusions in its publicly available Interim Report on the Financial Viability of the Jersey International Finance Centre: inter alia that the overall project was not considered viable and that the development had been commenced on a speculative basis, against the undertakings of little or no risk to the public purse.

Conclusion 9 of the CSSP stated: “*As recommended by our advisers, the Treasury and Resources Minister as shareholder representative should seek an updated assessment of the viability of B4, taking full account of actual tenant incentives (agreed or proposed); applying realistic assumptions together with due allowance for all known and planned costs of delivery*”. On this basis, the SOJDC view was that it was for the Treasury and Resources (the Minister) to undertake the viability assessment with the data, not the CSSP.

In respect of the fourth ground of appeal, the SOJDC accepted that the States of Jersey had the right to review its work, but emphasised that this needed to be considered against the need of the SOJDC to operate and compete within the private sector. The potential release of confidential documents would place the SOJDC at a significant commercial disadvantage, albeit Advocate Kelleher accepted that he was not aware of any previous breaches of confidentiality agreements by the CSSP.

Advocate Kelleher emphasised that the SOJDC was established as a standalone legal entity to be the vehicle by which the Waterfront would be developed and it operated in a commercial world and competed in the private sector. It had its own board of directors who had a key duty to protect the shareholders’ interests. He highlighted the special nature of the role of the SOJDC in relation to the development at the Waterfront, which was a large site with multiple uses. The construction of Building 4, which was the first to be developed, was underway and planning permission had been sought for Building 5. Other development companies were in competition with the SOJDC, and this competition was all the more acute because of the States’ ownership of the SOJDC which, he alleged, gave rise to competitors endeavouring to hinder and oppose it at every opportunity. This made it much more difficult for the SOJDC to operate as a developer.

The SOJDC sought to attract sophisticated, well-funded, institutional tenants to occupy its development at the Waterfront, and anticipated leases of 21-30 years. In order to attract potential tenants they would have to offer attractive incentives of the type mentioned in the report by E&Y. Clearly, the details of any such deals would be extremely sensitive for both parties, particularly for the first tenant to sign up. If a rival developer were to become aware of the details of the agreement reached, it could affect the profitability of the whole project and impact on the ability of the SOJDC to fund the

development of the site. Advocate Kelleher advised that it was impossible to underestimate the damage that could be done to his client if confidential information were to fall into a rival developer's hands.

He referenced the Articles of Association of the SOJDC, which were set out in Appendix 2 of P.73/2010 and the Directions on page 48 of P.73/2010 which empowered the Minister to direct the SOJDC to act in a certain way. It was noted that the Directors of the SOJDC were required to prepare annual business plans and reports for the Minister and to respond in a timely manner to reasonable requests for information and reports from him. Whilst accepting that it was important that the SOJDC, as a wholly States owned company, should be open to effective scrutiny, this had to be considered against the contents of the Memorandum of Understanding between the Minister and the SOJDC, paragraph 4 of which related to sensitive information:

“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 would 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.”

The Panel subsequently heard from Mr. M. Burton, the Managing Director of Camerons Limited, who were the main contractors for Building 4 and had been on site since July 2015. Mr. Burton emphasised that in the highly competitive environment in which they operated, their intellectual property was their greatest asset. Their contract with the SOJDC contained specific, commercially sensitive information relating to such things as rates for labour, materials, sub-contractor quotes, overheads and profit recovery, in addition to innovative solutions in respect of alternative materials or building methods. This information would be extremely valuable for the company's competitors and it would be to Camerons' significant financial detriment if it became public. Mr. Burton highlighted that the information contained within the contract also belonged to a supply chain of local and non-local suppliers and sub-contractors and that Camerons had a duty to also protect their commercial interests. An extant non-disclosure agreement existed between Camerons and SOJDC, which contained standard clauses to protect the former's intellectual property. Had the SOJDC declared within the tender that the Form of Contract would be released at any time, Camerons would not have tendered for the project and Mr. Burton opined that it was unlikely that any other contractor would have done so in such circumstances.

Mr. J. Marshall, Head of Legal of UBS AG, echoed many of the views expressed by Mr. Burton. He stated that UBS was a large, private multinational company, which had entered into a lease agreement with SOJDC on a non-disclosure basis. He emphasised that UBS' interests would be significantly prejudiced if details of the lease were to become public as this would adversely affect any future negotiations with sub-lessees. He acknowledged that the non-disclosure agreement contained a 'carve-out' which permitted release of the details 'under compulsion by law'.

Deputy Le Fondré stressed that any confidential information provided by SOJDC to CSSP would absolutely remain confidential and that there was no question of it finding its way into the public domain.

He highlighted the formal role that Scrutiny had in respect of the SOJDC and its work, as set out in P.73/2010. Two of the primary objectives for the States of Jersey, set out on page 6 of that Proposition were –

- *to ensure the primacy of the States of Jersey in the governance of regeneration policy in Jersey and any associated property development agency; and,*

- *to ensure the effective participation of the appropriate Scrutiny Panel in effective oversight of such governance*

and, in relation to the structure and relationships between the States and the SODJC, it stated on page 8 that,

“It is important to note that all bodies involved in the proposed regeneration process will also be open to scrutiny by –

- *The Public Accounts Committee*
- *The Corporate Services Scrutiny Panel”*

One of the benefits of the proposed structure and process was highlighted on page 30 of P.73/2010 as *“transparency and accountability to the States Assembly throughout the development process”*.

Deputy Le Fondré emphasised that the SODJC was established to perform a role on behalf of the States of Jersey. Whilst accepting that the SOJDC had co-operated with the CSSP to a certain extent, for which the Panel was grateful, he found it inconceivable that the company sought to restrict what the Panel could receive and were denying it access to some fundamentally important documents.

The Deputy addressed the SOJDC’s challenges to the summons seriatim. In respect of the first ground of challenge, he indicated that parliamentary privilege (as provided for in Article 34 of the States of Jersey Law 2005) was a cornerstone of democracy and that he and his Panel could not waive that privilege. He was of opinion that it was inconceivable that the States of Jersey (Powers, Privileges and Immunities) (Scrutiny panels, PAC and PPC) (Jersey) Regulations 2006 had been drafted without the principle of parliamentary privilege being considered. He indicated that a breach of a confidentiality agreement by virtue of words spoken before or written in a report to the States, although ostensibly protected by parliamentary privilege would, nevertheless, have implications and would probably lead to a vote of censure or no confidence against the relevant member of the States. This could be extremely damaging to the reputation of the scrutiny function. He emphasised that he and his fellow Panel members were prepared to assure the SOJDC of the highest level of confidentiality that they were able to give in the light of the foregoing. Were the Privileges and Procedures Committee to decide to uphold the summons, his Panel would commit to receiving numbered hard copies of the information requested, which they would return to SOJDC upon completion of their review.

In respect of the second challenge, Deputy Le Fondré indicated that, notwithstanding that the CSSP believed the wording “any side letters and other documentation” to be sufficiently clear, it would be prepared to provide a more specific request in relation to the ancillary documents.

As regards the third ground of the challenge, the CSSP felt unable to reach its final conclusions on the project without seeing the documents on which E&Y had based their assessment of potential viability report. Deputy Le Fondré suggested that the confidentiality agreement between SOJDC and E&Y meant that the latter’s report was limited to a general commentary rather than specific analysis. He argued that the funding agreement with HSBC, pre-let with UBS and contract with Camerons contained key information relevant to the Building 4 project and that the CSSP would be failing in its duty to the public if it did not see the documents which, he opined, would enable the Panel to assess the viability of Buildings 4 and 5. Although he accepted that the Panel would not be able to make the documents public, he emphasised that it should receive them in order to assess the financial viability of the project and to see if the pre-lets had met the cost of the construction.

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In relation to the fourth ground of the challenge and the potential prejudice to the SOJDC, the Deputy stated that the only way in which the SOJDC could be prejudiced was if the confidential documents were in the public domain, but his Panel would give assurances not to release the documents. He indicated that the SOJDC's assumption of prejudice was offensive to his Panel, as it was based on a suspicion that its members would not keep the information confidential.

Advocate Kelleher reiterated the problem caused to the SOJDC by the provisions of Article 34 of the States of Jersey Law. Whilst in no way doubting the integrity of the CSSP members, he indicated that it was no reassurance in a commercial setting for the Panel to say '*you can trust us – we're States members*' because of the significant prejudice that would be caused to the SOJDC by any release of the confidential documents. He queried how, if the confidential documents were released to the CSSP, the Panel would be able to produce a final report without disclosing what it had learnt from those documents.

Deputy Le Fondré emphasised that oversight of the SOJDC was embedded in Scrutiny by virtue of proposition P.73/2010. The CSSP required access to real and actual information in order to produce an informed report. He argued that his Panel was capable of producing a report without revealing the confidential information from the SOJDC. If the summons were upheld, he undertook to send a draft copy of the final CSSP report to the SOJDC before releasing it and agreed that if the latter indicated that it contained a breach a confidence, the Panel would amend its report to remedy this.

Having heard the oral submissions from both parties, the Committee noted that Advocate Kelleher had submitted in his letter of 28th August 2015, that to force disclosure of documents and information amounted to an unlawful interference with the rights of SOJDC and the counterparties contrary to Article 8 and Article 1 (First Protocol) of the European Convention of Human Rights and Fundamental Freedoms, enshrined in Jersey law by virtue of the Human Rights (Jersey) Law 2000. The objection to the summons on Human Rights grounds was maintained by Advocate Kelleher. Accordingly, H.M. Solicitor General invited both parties to provide short written submissions on the issue of whether SOJDC was entitled to rely on Article 8 and Article 1 Protocol ECHR rights in the matter, or whether it was a governmental organisation such that it did not fall within the parameters of Article 34 of the ECHR.

Accordingly, the Committee deferred its decision pending receipt of the above-mentioned submissions.