

# **REVIEW OF SHIPPING SERVICES BETWEEN GUERNSEY AND SARK**

**Report to His Excellency the Lieutenant - Governor of the  
Bailiwick of Guernsey**

**By**

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**November 2007**

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## **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

S1 The relevant 1951 Law is Sark (and Alderney) Law. For the purposes of this review, it should be operated principally with the interests of Sark in mind. The fact that it creates a licensing power over shipping services between Guernsey and Sark indicates that unbridled competition is to be constrained. The approach taken in this review is therefore to presume against granting additional licences unless positive advantages can be demonstrated which outweigh risks to the objectives for the service. The competition provisions of the Treaty of Rome do not apply. All other relevant statutory and regulatory requirements are taken as given, notably the Bailiwick wide marine safety legislation (paragraphs 2.1-2.7).

S2 The general objectives for lifeline shipping services in the British Isles, and specifically between Guernsey and Sark, are the provision of reliable, year round, all weather services with specified minimum service levels, minimum capacity levels (for summer), coupled with sustained financial viability (paragraph 2.12).

S3 The consequences of the award of a licence to Trident, linked to a year round service level agreement and conditional on the acquisition of a new vessel suitable for all weather services in the seas around Sark could well be

- Increased service levels to Sark, though not adding materially to the already good service frequency available from the IOSS service (the comfort and speed of the Trident 7 service could represent improvements, though these aspects of the proposal were not defined in any detail).
- Cheaper fares, at least for a period, to the benefit of both Sark residents and visitors to the island.
- Some potential additional harbour congestion in the Sark harbours, especially at peak times in the summer, though a combination of negotiation over schedules and limited improvement in the management of the harbour facilities should be able to mitigate this problem.
- Significant losses by IOSS, potentially running to several hundred thousand pounds per year, depending on the market share lost, the prices at which the continuing business was secured, and the extent to which costs could be cut (some potentially from service level reductions); and potentially by Trident too if its market share objectives were not met. The losses would be particularly acute in winter. But at least one of the operators would probably make a loss in the peak months too, and possibly both.

- A requirement for significant subsidy from Chief Pleas for IOSS if it was to continue in operation, even after cost reduction measures. For as long as Chief Pleas were determined to retain the IOSS operation in these circumstances, and provide the necessary subsidy, a prolonged war of attrition could follow with Chief Pleas contributing subsidies and Trident benefiting from the low external financing costs if the project were largely internally financed, but returning low or possibly negative returns to its owners on the capital invested without pushing the company into insolvency.
- Pressure on both companies to revert to a single operator by some means, either through withdrawal of one or other, or through a merger of the operations, and leading to a service and pricing pattern probably little different from the one now available. The longer term gains could be a more modern principal vessel, and some improvements in the efficiency of the continuing operation compared with the status quo (paragraph 3.15).

S4 The higher cost of providing additional vessels, crew and duplicated infrastructure seems intrinsically unlikely to be offset by sufficient efficiency gains arising from the operation of competition and/or additional traffic stimulated by lower prices or other means. Such an outcome, for as long as it persisted, would ultimately result in higher fares, not lower, and/or increased subsidies to the service(s), neither of which would benefit Sark residents or visitors to the island, nor would meet the objectives for the service set out at paragraph S2 above. This analysis and the experience elsewhere around the coast of the British Isles (including the service from Guernsey to Herm) indicate that a competitive service provision would not be likely to survive for very long. Other sections of this review consider alternative ways of securing the benefits of competition for this service while also securing the objectives for the service associated with a single service provider (paragraph 3.17).

S5 The Trident application should therefore be rejected on two independent grounds (paragraphs 4.1-4.3). First, the overwhelming weight of expressed Sark opinion was opposed to the application. Second, the benefits do not outweigh the risks to the achievement of the objectives set out in paragraph S2 above. The application fails the tests set out in paragraph S1.

S6 The licensing regime for vessels carrying 12 and under passengers should be relaxed in a number of ways set out in paragraph 4.4 and Annex 4 below. In particular, the licensing authority (i.e. Your Excellency) should be prepared to grant up to 8 licences in the immediate future, with less restrictive conditions attached than now. This would provide a better service for residents and visitors without jeopardising the objectives set out in paragraph S2 above.

S7 I make a series of further recommendations about the future of the shipping service more generally, set out in paragraphs S8 – S12 below, which are for practical purposes addressed to the Chief Pleas of Sark (and in some cases IOSS) and not to Your Excellency, and which you may therefore wish to transmit to the Chief Pleas for their consideration.

S8 Up to date objectives for the provision of shipping services between Guernsey and Sark should be drawn up and agreed by Chief Pleas during 2008. A first draft is at paragraph 5.2.

S9 Also during 2008

- Chief Pleas should enter into a new long term agreement with IOSS along the lines set out in paragraphs 5.8 – 5.9; and which should
- include provision for an annual business plan approval process along the lines set out in paragraphs 5.10 – 5.12, covering timetables, tariffs, capital expenditure and funding.
- The structure of relationships between Chief Pleas, its Committees and IOSS should be clarified along the lines set out in paragraphs 5.5 and 5.11, with the elimination as far as possible of any individuals playing multiple roles.

S10 A review should subsequently be undertaken by IOSS in consultation with Chief Pleas of the company's capital structure and of the possible desirability of a capital reconstruction (paragraph 5.15).

S11 In the medium term (most likely in 2010), Chief Pleas should undertake a fundamental review of the provision of the lifeline services from Guernsey to Sark, in the light of the progress by then made in restoring IOSS to a sound financial position, and in the light of fresh assessments by Chief Pleas of Sark's appetite for financial risk in the provision of lifeline shipping services on the one hand, and of the options for securing reliability and continuity in the provision of these services on the other. This review should draw on, but not necessarily be limited to, the options summarised in para 5.17 below, including periodic competitive tendering for the IOSS managing agency; contracting out the entire service provision; splitting IOSS into an infrastructure business and an operating business, with the latter being competitively tendered; sale of a stake in IOSS; and (subject to negotiability) some form of merger with Trident to rationalise overheads on the Herm and Sark services (paragraphs 5.17 - 5.18).

S12 In parallel with this review, Chief Pleas should also review the 1951 Law with a view to bringing forward proposals for removing the role of Your Excellency as the licensing authority; including explicit licensing objectives;

clarifying the definitions used to make clearer when licences are required and when not; modernising the penalties and enforcement regime; and providing an explicit appeals mechanism (paragraphs 5.19-5.21).

S13 In the meantime, any further licensing applications coming before Your Excellency under the 1951 Law should be dealt with in the light of the approach taken in this report, in particular the draft objectives for the services set out at paragraph 5.2, the analysis and conclusions relating to the Trident application in sections 3 and 4, and the approach recommended at paragraph 4.4 in relation to 12 and under applications; and supplemented by the advice of Chief Pleas or its relevant committee on the particular application in question (paragraph 5.23).

## 1. INTRODUCTION

- 1.1 Under the Alderney and Sark (Licensing of Vessels) Law, 1951 ('the 1951 Law'), Your Excellency is the licensing authority for the provision of shipping services between Sark, Alderney and Guernsey. Under the 1951 Law, Trident Charter Company Limited 'Trident' applied in December 2006 to you for a licence to operate a passenger and freight service between the islands of Guernsey, Herm and Sark in addition to the service between Guernsey and Sark currently provided by the Isle of Sark Shipping Company Limited 'IOSS'.
- 1.2 In order that the application by Trident should receive the fullest possible consideration, Your Excellency appointed me in July 2007 to conduct an independent review of the licensing of shipping services between Guernsey and Sark. My terms of reference are: **"To consider the application by Trident Charter Company Limited for a licence to operate a shipping service between Guernsey, Herm and Sark under the Alderney and Sark (Licensing of Vessels) Law, 1951, and to conduct a more general review of shipping services between Guernsey and Sark, reporting my findings and recommendations to His Excellency"**. It should be noted that my terms of reference do not cover services between Guernsey and Alderney, or between Guernsey and Herm, though consideration of the Guernsey/Sark service cannot proceed without at least some consideration of the Guernsey/Herm service.
- 1.3 My review has taken the form of an independent public inquiry, involving two rounds of written submissions from interested parties (published on the review website to be found at both [www.gov.gg/ccm/navigation/government/inquiries-and-investigations/](http://www.gov.gg/ccm/navigation/government/inquiries-and-investigations/) and [www.sark.gov.gg](http://www.sark.gov.gg), and including both the Trident and IOSS submissions (except some withheld financial detail), and at oral hearings in both Guernsey and Sark between 25-28 September 2007. Those who made oral submissions were open to questions from me and from other parties present at the hearings. I also invited respondents to provide answers to a series of questions about the present pattern of services, their purposes and their future in relation to the licensing powers held by Your Excellency (see Annex 1 for the official notice announcing the Inquiry and setting out these questions). I am grateful to all those who took the trouble to participate in the Inquiry as well as Trident and IOSS, which has helped me to reach better informed conclusions than would otherwise have been the case. I am also grateful to Crown Advocate Richard McMahon and his colleagues at St James' Chambers, Pat Prout and Dawn Robinson, for their advice and

general support. The conclusions and recommendations in this report are however my own.

1.4 In considering the issues thrown up by this Inquiry, I have at all times been concerned to try to find proposals that are proportionate to the size of the communities involved, and their capacity to implement recommendations I may make. In particular, the Sark jurisdiction and the legislature from which it is drawn are exceptionally small for the breadth of responsibilities held, and solutions that work well in other larger jurisdictions may not be feasible there.

## BACKGROUND

### Bailiwick Law

- 2.1 The 1951 Law is the principal legislation governing the provision of shipping services between Guernsey and Sark. Apart from certain exemptions, it requires acts of trade (as defined in the legislation) in Sark or Sark territorial waters to be carried out only by vessels licensed by Your Excellency. Your determination of licence applications, and the period, terms and conditions of such licences are unfettered by further statutory requirements under the 1951 Law, or by any explicit statutory statement of the objectives for the use of the licensing power.
- 2.2 Nonetheless, some guidance can be inferred from the structure and content of the 1951 Law to assist the determination of licence applications.
- 2.3 First, the preamble to the 1951 Law makes clear that the Law was passed at the behest of the Chief Pleas of Sark (and the equivalent in Alderney), and operates in Sark – but not in Guernsey. In other words, although the licensing power is vested in Your Excellency, the 1951 Law is Sark law, and needs to be operated principally with the interests of Sark in mind, both as expressed politically in Sark, and from the standpoint of economic or financial analysis. Conversely, considerations of what might be in the interests of Guernsey (or Herm) are of lesser import. This is also consistent with simple economic assessment. The service from Guernsey to Sark self-evidently exists for two distinct purposes: to transport the residents of Sark to and from the island, together with their freight requirements; and to transport tourists and other visitors to and from Sark. These purposes are both central to the well being of the residents of Sark – the first is their lifeline to the wider world, and the second is the engine of the major economic activity on the island. In contrast, the first of these is of marginal interest to Guernsey, and the second is a helpful adjunct to tourism in Guernsey; but ‘hostelry and recreation’ is now a no more than a second rank economic activity there, accounting for around 5% of Guernsey GDP and employment.
- 2.4 Second, the fact of a licensing power, and the background to the introduction of this Law as shown in the Preamble to the repealed and replaced 1949 Law on the same subject, suggests that it is there to be used to constrain unbridled competition. It is however noteworthy that the Law does not prescribe a *monopoly* service provision. In particular, ensuring reliability and continuity of service is presumed more important than the normal presumption in favour of the promotion of competition as such, and

the user benefits this can usually be expected to bring in terms of variety of provision, price competition and efficiency gains. This emphasis on reliability and continuity is commonplace in lifeline services to relatively remote locations elsewhere in the UK, notably the Scottish Northern and Western Isles, Lundy, Scilly Isles, English mainland to the Channel Islands, and others, though the precise methods used to achieve it vary (see below). The approach taken in the present review is therefore to presume against granting additional licences, unless positive advantages can be demonstrated which outweigh any risk posed to reliability and continuity. If an applicant can demonstrate net benefits in these terms to the type of service proposed, then - but only then - there is a presumption in favour of granting the specific licence sought unless good reason can be shown for rejecting it on grounds particular to that application.

2.5 For the purposes of this review, it is also necessary to interpret or develop some of the terms of art used without further definition in the 1951 Law. These interpretations are set out at Annex 2, and can be summarised as follows:

- Non- exempt vessels must be licensed for acts of trade in Sark or Sark territorial waters.
- Acts of trade involve the embarkation or disembarkation of passengers or the loading or unloading of cargo AND
- *Either* a payment made directly in respect of the carriage of people or goods involved, *or* the carriage involves an indirect commercial element (eg an indirect payment or other commercial obligation).
- Exempt vessels are yachts and other small vessels being used exclusively for pleasure, and for which the owner(s) receives no reward; and fishing vessels not being used for non-fishing purposes.
- Every infringement carries a maximum fine of £100.00.

## **Competition Law**

2.6 The competition provisions of the Treaty of Rome do not apply in the Bailiwick. Local competition law in Guernsey is in contemplation; the Guernsey Commerce and Employment Department advised the Inquiry that if the law is enacted as envisaged, a monopoly or market dominant position in the provision of sea links to Sark would not of itself invite sanctions under that law, but abuse of that position could do so. Effective regulation of service provision and pricing can demonstrably prevent such abuse, and is widely used in utility regulation in the UK. This is also the case in eg the largely monopoly sea links to the Western Isles, and where the

restructuring of the service provision has been driven as much by the need to comply with EU State Aid rules as expressed in the EU Maritime Cabotage Regulation – which also do not apply here, but which may provide some helpful pointers for longer term policy (see paragraph 5.17 below).

### **Other legislative and regulatory requirements**

2.7 For the purposes of this review, it is assumed that all other relevant statutory and regulatory requirements operate on all vessels and services working between Guernsey and Sark and in their territorial waters, notably the safety, crewing, captaincy, seaworthiness, harbours and pilotage requirements. As the Guernsey Harbourmaster made clear to the Inquiry, all vessels operating in Bailiwick waters are required to be licensed in conformity with the relevant Bailiwick-wide marine safety legislation. In some cases it will be appropriate for service licences to be explicitly conditional on adherence to these requirements; and some of the proposals I make later on may have implications for enforcement. No evidence was submitted to the Inquiry that suggested that these other requirements needed to be changed in relation to services to Sark.

### **Lifeline Services to islands and other remote communities: objectives for such services**

2.8 The British Isles include a number of island and other remote communities which rely on regular, reliable and reasonably priced transport links of adequate capacity at all times of year and in all weathers. In some cases, the volumes of traffic are sufficiently large that the normal operations of a competitive market provide a fully adequate service to meet these needs and with sufficient competition to avoid any risk of abuse of a dominant position. Although the remoteness criterion hardly applies, the shipping services between Great Britain and Ireland fall into this category. But in many other cases, the unfettered operation of the market has been found to be insufficient – notably the shipping links between the mainland and the Western Isles, Orkney/Shetland, Lundy, Scilly Isles, and the Channel Islands.

2.9 The nature of the government intervention varies. In the Scottish Islands, where the traffic volumes on both groups of routes are larger (several million passenger journeys per year, plus freight and vehicles), the operators receive substantial annual subsidies each year, of the order of £30m per year each to ensure all season, all weather services of an appropriate quality and cost. Competition is not precluded, but in the face

of the service level agreements in place and the subsidy available, alternative timetabled services operate only on a small minority of the routes. In the case of Lundy and the Scilly Isles, monopoly shipping service provision prevails (though there are air services to the Scilly Isles from a number of regional airports). The main Condor shipping service to the Channel Islands from Portsmouth/Poole/Weymouth is subject to a minimum service level agreement in return for an undertaking by the Channel Island authorities that any rival service (of which there is at present none) would be subject to a requirement to provide an acceptable minimum level of service, and could provide an adequate level of service should the existing operator withdraw.

2.10 These arrangements follow no single pattern. But they all provide a principal operator with some degree of protection from cherry picking competition, either through subsidy or a restriction on competition, in return for undertakings on capacity, frequency, seasonality, and price. In some cases, notably the Scottish Island services, where subsidy is given to a state owned business, attempts have been made to secure some of the efficiency benefits of competition through a tendering process for the operator rights, though the main capital assets have stayed with the state.

2.11 The post-war history of shipping services from Guernsey to Sark clearly falls into this pattern. In the immediate post war years, a free-for-all took place, but the resulting service pattern proved unstable, and mainly summer only. Restrictive licensing laws were introduced in 1949, and revised in 1951, and since then the service has run essentially as a regulated monopoly – in the 1950s and 1960s on a commercial basis (but with inappropriate and unreliable vessels, and a weaker timetable than now) which ultimately proved unprofitable and led the operator to withdraw; and since then in the hands of IOSS. IOSS was initially set up as a joint venture between Sark (technically senior office holders in Sark as Trustee-shareholders on behalf of Chief Pleas) and the Drake family, a local Guernsey shipping firm, who operated the service from the company's formation in 1969 until they withdrew in 2005. The business has been run since 2005 by hired-in professional managers, the second set of which were appointed in June 2007.

2.12 The last major review of the pattern of service provision took place in 1997-8, involving both an external study by Alex Picot chartered accountants – ‘the Picot review’, and the negotiation of the trilateral 1998 Agreement between Chief Pleas, IOSS, and Peter Drake – ‘the 1998 Agreement’ (copies of these documents were submitted to the review). Both the Picot review and the resulting 1998 Agreement sought to set out

comprehensive objectives for the service and the company. The Picot review identified as many as ten key objectives (attached at Annex 3), which the schedule to the 1998 Agreement boils down to five:

- To provide an effective ‘lifeline’ transport link between Guernsey and Sark for passengers and freight all the year round
- To provide a minimum of four passenger and two freight voyages per week in the winter
- To provide daily (except on Sundays) passenger services in the summer, that is between Easter and October, with a view to carrying during that period all those persons who want to travel between Sark and Guernsey
- To use the profit from summer passenger services to subsidise freight services and winter passenger services, but only to such a level as is financially viable in the long term
- To promote summer tourist business for the benefit of Sark and IOSS

As stated, these objectives are somewhat IOSS-centric. But they do embody – in a more direct way than the Picot version – the commonly found principles for regulating lifeline services (not just IOSS as one single quasi-monopoly service provider) around the British Isles – reliable, year round, all weather services, with minimum service levels, minimum capacity levels (for the summer), coupled with sustained financial viability. In addition, the Agreement itself explicitly subjects passenger fares and freight rates to the agreement of Chief Pleas. Since these general principles are both effectively approved by Chief Pleas (and have not been rescinded since 1998), and are common elsewhere, I have been broadly guided by them in elaborating the approach to the interpretation of the 1951 Law set out in paragraphs 2.3 and 2.4 above, and in reaching conclusions on the award of licences.

2.13 Later in this review, I also consider how these principles should be expressed for the future, both in relation to the totality of Guernsey – Sark shipping service provision, and in relation to individual service providers such as IOSS and/or Trident, and the ‘12 and under’ operators. See paragraph 5.2

2.14 In this connection, two general conclusions are worth recording here. First, the Picot analysis, which looked at a number of models of service provision but in effect concluded in favour of the joint venture model then operating with the Drakes, is now overtaken; and the consequential 1998 Agreement is now also out of date in a number of respects. Following the withdrawal of Peter Drake from his participation in IOSS, the Agreement is now

between the Chief Pleas and its wholly owned company IOSS only, with no other participant, so that a number of its provisions are redundant or for all practical purposes unenforceable. The 1998 Agreement therefore needs to be remodelled for the future. Second, the objectives, and the 1998 Agreement, contain an inherent tension between the natural desire of a remote community for a high quality, frequent, reliable, low cost service on the one hand; and the simultaneous desire for the service (however provided) to be fully viable financially over long periods to avoid a call on the taxpayer, on the other. This tension, which contributed to the withdrawal of the Drakes, needs to be better managed in future.

### **Present Pattern of Service Provision: IOSS**

2.15 The present pattern of service provision by IOSS, looking to the winter 2007/8 timetable and the summer 2008 timetable – both of which reflect recent past practice with minor modifications – contain the following features. The winter passenger timetable has two return journeys per day on Monday, Wednesday and Friday; a single return journey on Tuesday and Thursday mornings (limited to a maximum of 12 passengers in each direction as the vessel will be carrying cargo as well), and a mixture of one or two return journeys per day on Saturdays, taking account of seasonal requirements around Christmas and the New Year. Where traffic requires, a third cargo service will operate on Fridays also. From mid March (Easter) to end October, the service is reinforced to two return journeys 7 days a week, with additional early morning sailings on two or three days. In high season (late May – late September), the service is further reinforced to five return journeys per day every day except Sundays, where there are two return journeys only. Additional cargo only services are also operated according to demand in summer. The vessels are harboured in Guernsey, since the Sark harbour is not suitable for overnight mooring, so the first crossing is always from Guernsey, and the last always from Sark (at 16.00 in winter, 18.00 in spring, summer and autumn). At busy times in summer, some of the late sailings are doubled (i.e. two vessels operate them) to meet passenger demand; and casual hires are made of Trident 6 on known peak demand days.

2.16 The basic fare structure is £22.00 adult return, with half price for children; around £20.00 for day returns and the like; and a range of special offers for Sark originating passengers, for senior citizens, for groups, and for selected off peak crossings. IOSS produced evidence for the Inquiry showing that their fares for the Guernsey/Sark route were broadly in line with fares on the Guernsey/Herm, UK mainland/Lundy and UK mainland/Scilly Isles, after allowing for the different distances involved. I do not attach much

weight to this material, since there are many other relevant differences between these various operations. The most that can be said is that the Guernsey/Sark fares do not appear to be markedly out of line with those elsewhere.

2.17 From the evidence provided, it is clear that the reliability record of the IOSS service at all times of year is exemplary.

2.18 The overwhelming weight of both written and oral submissions to the Inquiry was to the effect that this present pattern of service provision – both passenger and cargo - met the needs of both residents and visitors very well, and that further reinforcement/choice was unnecessary. Furthermore, it was felt that the additional security offered by a service provider wholly owned by Sark was well worth the additional financial risk this represented as compared with an independent or contracted out service under obligation to provide a defined minimum level of service. This line of argument was most cogently put by Mr Michael Beaumont, the Seigneur of Sark, who said that the present arrangements had not been arrived at by accident; that IOSS was a public service operator whose mission was to provide a service, not to make money, though it needed to perform financially at a level to ensure survival; fares and freight rates were kept low, consistent with this requirement, by Chief Pleas, which ensured that no abuse of a dominant position by IOSS could occur; and that ownership of IOSS by Chief Pleas ensured the continued provision of a reliable, cost-effective lifeline service for Sark residents and visitors. Introduction of a competitor would put these arrangements in jeopardy. This view was broadly endorsed by all but one of the Chief Pleas Committees (the Shipping Committee was unable to come to a clear view until after the hearings), and by the great majority of individual submissions. The dissenting minority pointed principally to the benefits of competition in driving out inefficiency both in running costs and in the acquisition and deployment of capital assets.

### **The Trident Proposal**

2.19 In their original application and in oral submission to the Inquiry, Trident described their proposal as follows. They envisaged a year round operation, and would expect to be bound by a service level agreement with the Sark authorities laying down minimum levels of service. In 2008, the service might be operated by Trident 6 (which had been chartered to IOSS for a number of years up to 2005 to assist with peak season services); but Trident envisaged that an all weather/all season service would in practice require a new purpose built vessel, Trident 7, to cope better with sea conditions around Sark and to give passengers the levels of comfort they would

expect. It would probably be a monohull vessel, up to 20m long, and carrying 100 or so passengers at a cruising speed a little faster than the current vessels on this route, able to access the Creux harbour on Sark as well as the Maseline, and costing in the region of £1-2million (Trident subsequently advised a more precise figure of around £1.25m). Trident 6 would be used as a back up vessel and for peak summer loads. No decision had been taken on whether to start a service with Trident 6 in 2008, if a licence were granted, or to delay the start of the service until 2009 when Trident 7 ought to be available. The services envisaged would have to be fitted into the overall schedule of services operating to the Sark harbours, which can be very busy in good weather during the peak season (and accommodating a number of other vessels besides the timetabled Guernsey/Sark services). Other submissions to the Inquiry indicated that the biggest problem was congestion at certain times on the quay rather than in the water; and the Sark Harbours Committee, while not supporting the Trident proposal, indicated that priority would be given to timetabled services in the face of excess demands for capacity.

2.20 Trident envisaged operating a winter passenger service on three days per week, possibly on days when IOSS did not offer a full service; and with two return sailings on each of these days (not one, as the written submission indicated), i.e. about 2/3 of the existing IOSS level of service. This would rise to four returns per day in the peak season, a little less than the IOSS level of service. Trident said that they were primarily a passenger operator, not a cargo operator, but would wish to offer a cargo service to complement their passenger offering on the Sark route. This would initially be achieved on a subcontract basis; initial discussions had been held with two local cargo operators (one named as Brecqhou Warrior, the other unnamed), and Trident were confident they would be able to offer a cargo service at an early point. The financial feasibility study supporting the application is silent on possible cargo volumes, revenues, costs or profits.

2.21 Trident proposed a lower level of passenger fares with a basic adult price of £16.00 return, with children half price; and with an option of a triangular Guernsey/Herm/Sark service in the summer season. Trident hoped to grow the Guernsey/Sark market, partly through lower fares, partly through their prominent position on the St Peter Port waterfront, and partly by appealing more strongly to a domestic Guernsey visitor clientele. However, their submissions contained no projections about the potential scale of market growth anticipated.

## **‘12 and unders’**

- 2.22 A quite separate category of services and licences applies to vessels carrying 12 and under passengers. It is a separate category because the underlying safety, crewing, harbour regulations are different from, and less demanding than, those applying to larger capacity boats. They can however still be caught by the licensing scheme in the 1951 Law, unless the exemptions apply (see paragraph 2.5 above). Practice for many years has been to issue six licences in this category, three to Guernsey based operators, and three to Sark based operators. In recent years, two have been for all weather operators (one Sark based, one Guernsey based) that provide and adjunct to the main IOSS service for bespoke and emergency journeys, one for a vessel on occasional charter to IOSS (the ‘Isabella’), and three for angling and diving operators for whom it is convenient to be able to drop or pick up clients on Sark, mainly in the summer season.
- 2.23 This practice does not derive directly from the 1951 Law, but as a consequence of a provision (clause 9.2 (c)) in the 1998 Agreement between Chief Pleas, IOSS and Peter Drake. The 1998 Agreement imposes the 3 Guernsey/3 Sark vessel limit; the requirement that they do not carry more than 12 (different) passengers on any one day; that they may not carry cargo; nor be licensed for more than 12 months at a time. And they are not allowed to charge fares below those charged for the time being by IOSS (in practice, IOSS publish a minimum per voyage fares schedule for these vessels each year). At the time, these arrangements were capable of being sanctioned by another provision in the Agreement which allowed IOSS (and so Drake) to withdraw from the Agreement if Your Excellency failed to impose these restrictions when awarding licences to the 12 and unders. With the withdrawal of Peter Drake, the significance of a threat of IOSS withdrawing for this reason from an agreement with its 100% shareholder/Chief Pleas would appear to be limited.
- 2.24 In contrast, 12 and under traffic from Jersey is subject to no licensing restrictions of any kind.

### 3. ANALYSIS

#### **IOSS financial performance and seasonality**

- 3.1. As noted above, the Guernsey - Sark shipping service, especially the passenger component, is highly seasonal. Taking the IOSS accounts data provided to me for 2006 (the last full year for which audited financial data is currently available, and an average to good year in terms of financial performance), the net revenue from all sources, after harbour taxes etc ('Total gross margin' in the P/L summary account) of £1.31m breaks down into 23% derived from the 6 winter months (October – March), 27% from the 3 shoulder months of April, May and September; and fully 50% from the peak months of June, July and August. Indeed some 60% of passengers were carried in the peak season. NB the IOSS financial year runs from October to September, so the 2005-6 financial year ended in September 2006.
- 3.2. It is a widely repeated mantra that in so seasonal a service, substantial profits are needed in the summer peak to offset inevitable losses in the winter months. In 2006, the winter losses (adjusted for some exceptional items subsequently capitalised, and for a spreading over the year of management and professional fees charged to the closing month in the financial statements) amounted to some £215k, the shoulder months made a small profit, and the summer peak was profitable to the tune of some £250k, yielding a pre-tax profit for the year as a whole of £66k.
- 3.3. These figures arguably overstate the seasonality of the financial performance in economic terms. The size of the IOSS operation, in terms of fleet capacity and on-shore overheads, is significantly determined by the peak season capacity requirement. If the main direct operating costs (direct labour cost, fuel etc) are taken as fairly reflecting the day to day costs of running the service, but the overheads (including insurance), maintenance, depreciation and financing costs are attributed pro rata to net revenue (as a proxy for activity levels), the adjusted winter loss comes out at around £75k, the shoulder months return a small profit, and the summer peak generates an adjusted profit of some £130k. These figures roughly equate to an average cost basis for service provision. A marginal cost approach would reduce the winter losses further, and similarly reduce the summer profit.
- 3.4. All this said, the minimum capacity required to provide an all weather service to Sark for both passengers and freight will always be one principal, dual purpose, vessel, plus a back up and relief vessel to ensure service when the principal vessel is out of service for whatever reason, and to ensure that

peak summer demand is substantially met. At present, IOSS operates with two wholly owned vessels – Bon Marin and Sark Venture – of similar sizes; the two together can deal with peak summer demand except on high days and holidays when a casual hire of a Trident vessel is undertaken, and in winter only one boat is required on any given day. Various alternative options are possible around this pattern. For example, the principal vessel could be large enough to handle peak passenger demand (summer evening returns from Sark) unaided, and able also to handle freight services as well as passengers; in this case, the back up facility could be stand by charter only, though any reduction in capital costs would be at least partly offset by higher operating costs, especially out of season, and by more problematic access to the Sark harbours in poor weather conditions. Whatever solution is chosen, the total required capacity of the fleet is largely driven by the peak summer passenger demand.

- 3.5. The picture will change in the next few months when the much delayed Sark Viking is introduced into service. IOSS plan initially to use the Bon Marin as the primary passenger vessel, the Sark Viking as a specialist freight carrier (but capable of carrying up to 12 passengers as required), and the Sark Venture as a back up vessel for both, and a supplement for the Bon Marin in peak summer season. It is unclear whether all three vessels will be retained in the medium/long term.
- 3.6. The advent of the Sark Viking is bound to put some upward pressure on the IOSS cost base. Quite apart from the initial commissioning costs (which could legitimately be capitalised), the initial depreciation charge will not be less than some £25k per year, plus maintenance costs. Even if the number of round trips remains as currently planned for 2008, the crew, fuel and insurance costs of a three vessel configuration are bound to increase at least marginally. Charter work around the Channel Islands may be possible, but cannot be assured. That said, the P/L account is already bearing the interest and repayment costs of the 10 year Lombard loan (initially for some £650k) incurred principally for the capitalised costs of the recent major refurbishments of the Bon Marin and Sark Venture, and in cash flow terms the repayments are broadly covered by the existing depreciation charges. So in a year such as 2006, the profits earned of £60-70k (in future less any net excess costs of having the Sark Viking in commission) would be available to strengthen the very weak current balance sheet as retained profits, or to begin to service and repay the £850k loan from the Chief Pleas, two thirds of which represents the capital cost of the Sark Viking.
- 3.7. Looking forward from 2006, 2007 is projected to show a pre-tax loss of £125-135k, the turnaround from 2006 being attributable to further

unexpected major repairs to the Sark Venture, but to a larger extent to weak revenues in a poor summer for both passenger traffic and freight.

3.8. By comparison with Trident's figures for 2006, the IOSS operating cost structure (i.e. EBITDA – Earnings Before Interest, Tax, Depreciation and Amortisation) was a few points higher as a percentage of net revenue (approximately 85% cf 80% for Trident), and as a measure of operating cash flow, comfortably able to support the servicing of the Lombard loan (interest and capital repayment). But if the 2007 results, which are likely to show a small EBITDA deficit, is at all symptomatic of the future pattern of business, IOSS will have to reduce its cost structure substantially – by some 10% to restore the 2006 level of EBITDA as a percentage of revenue, and by 15% to match the Trident performance for 2006, and to put the business in a position to bear the cash flow requirements of a refinancing of the Chief Pleas loan (assuming for these purposes that all three vessels are retained). It is common ground between IOSS and its new managers that IOSS overheads are too high and must be reduced.

3.9. IOSS has historically been operated as a public service operator, with minimal shareholders funds, and with service and pricing obligations designed to benefit users rather than the IOSS balance sheet. It is therefore poorly placed to weather poor trading conditions, brought about either by reduced volumes/poor weather (as in 2007), or exceptional costs (eg major unplanned repairs) without recourse to external funding, in addition to the external funding associated with major capital investment; hence the recourse to Lombard and Sark borrowings in recent years to cover major vessel refurbishments, and the acquisition of the Sark Viking.

### **Financial implications of the Trident proposal**

3.10. By contrast, Trident is a well regarded family business of long standing in Guernsey, which has been consistently profitable in recent years, principally as a result of its now de facto monopoly of the Guernsey/Herm passenger service (in competition economics terms, the service is contestable, but not at present contested). Assisted by the combination of low current capital investment, an efficiently managed operation to Herm, and low withdrawals by the directors either of salary or dividends, the company has developed a strong balance sheet which could now readily support a substantial capital investment project. The financial feasibility study on the proposed Sark service assumed that the new Trident 7 vessel would be entirely debt financed, and develops projections for profitability and cash flow on this basis. In practice, Trident would have a range of options open to it for the split between internal equity finance and external debt finance, which then

give a range of breakeven, cash flow and internal rates of return outcomes in relation to assumed traffic volumes.

- 3.11. The financial feasibility study shows the Trident service to be profitable and cash positive at all levels of passenger usage from a base case of 35k passengers per year upwards – substantially so on a Trident 6 basis, and still so after depreciation, financing and capital repayment cost for a new Trident 7 vessel (and with the capital expenditure repaid over 10-15 years, and depreciated over 20).
- 3.12. Although not covered by the financial feasibility study, the break-even point, after depreciation and financing costs of a new vessel and on the cost bases assumed in that study, appears to be about 25-30k passengers per year if the project is mainly debt financed (depending on vessel costs, payback periods for the loan finance, and the child/adult passenger mix), or around 20-25k passengers if the project is largely funded internally, against a total passenger volume of 48k in 2006 (less in 2007). In addition, the costs to Trident of providing the Sark service along the lines proposed (on an incremental basis to the existing Herm service, and taking account of the level of existing Trident overheads) look to be on the low side, though Trident are confident they are realistic. The new service would approximately double the turnover of the business on the volumes assumed. No provision is made for Sark harbour costs (which cost IOSS some £50k per year for passengers and freight together, over and beyond the per capita landing tax); the assumed fuel costs look low alongside the IOSS and Trident/Herm levels; and the fixed costs of crew and staff, and other incremental administrative costs look to be at the bottom end of, if not below, the plausible range of possibilities. Were the costs of operating the service to be £100k higher than assumed, which seems to me well within the range of possibilities, the break-even point for the service would rise by around 7k passengers to between 27– 37k passengers per year depending on the other assumptions used.
- 3.13. Trident argue that total passenger volumes could be increased by more imaginative marketing, coupled with the additional volumes that could be expected to flow from the price cut to £16.00 proposed (assuming some price elasticity of demand especially in the tourist market), and the additional capacity that the new service would supply in circumstances where Trident produced anecdotal evidence of some potential passengers being turned away at peak times since the withdrawal of the Trident 6 charter by IOSS after 2005. Trident in particular saw scope for developing increased business from day trips for Guernsey residents. It is difficult to judge how much impact such developments would have, since no quantified

forecasts or other evidence was produced by any of the parties on this point. Empirically, one might reasonably make the following assessment:

- Price cuts of 20 - 30% (which IOSS would probably have to match) both for individuals and families could be expected to have little effect on usage by Sark residents, whose requirement for transport to Guernsey is likely to be relatively price inelastic, but a rather greater effect on tourist demand. It is less clear that the elasticity of demand would be sufficient to generate sufficient extra business to offset the loss of revenue per head arising from the price cut, since holiday makers in Guernsey may not be especially price sensitive
- The relatively intensive service already offered by IOSS in the summer season suggests that relatively little extra business would be generated as a result of the greater service frequency deriving from the additional trips/ wider choice of crossing times. The data on passenger volumes in recent years submitted by IOSS (chart 3 of their main submission) shows flat passenger volumes in 2004, 2005 and 2006, which suggests that the removal of Trident 6 from the peak summer schedule did not materially affect IOSS' ability to meet peak demand through use of its own (smaller) vessels
- Without any breakdown of existing passenger flows into Guernsey originating and visitor to Guernsey originating segments, and no quantified forecasts or research of potential additional Guernsey originating traffic, it is hard to assess the potential of the local Guernsey market. But the severe constraints that Sark has placed on Sunday traffic for essentially social policy reasons (one morning and one afternoon return service during the summer 6 months), and which do not appear likely to change in the foreseeable future, must cast doubt on the scope for major increases in traffic from local Guernsey sources: Sunday would probably be the preferred day for additional day trips of this kind.

In summary, some limited additional traffic could be expected to arise from the reduction in prices, but little further increment from the other potential upside factors.

With these considerations in mind, and allowing both for the more prominent position the Trident booking office has on the St Peter Port harbour front, and for the prospect that Trident would have a much newer principal vessel, it would nonetheless be a challenge for Trident to take the nearly 50% of the passenger business needed to break even on the most optimistic assumptions, and up to 70% on a more cautious view (I assume that IOSS would make a conventional pricing response to Trident's plans).

## Consequences of awarding Trident a licence

3.14. The consequences of the award of a licence to Trident, linked to a year round service level agreement and conditional on the acquisition of a new vessel suitable for all weather services in the seas around Sark could well be

- Increased service levels to Sark, though not adding materially to the already good service frequency available from the IOSS service (the comfort and speed of the Trident 7 service could represent improvements, though these aspects of the proposal were not defined in any detail)
- Cheaper fares, at least for a period, to the benefit of both Sark residents and visitors to the island
- Some potential additional harbour congestion in the Sark harbours, especially at peak times in the summer, though a combination of negotiation over schedules and limited improvement in the management of the harbour facilities should be able to mitigate this problem
- Significant losses by IOSS, potentially running to several hundred thousand pounds per year, depending on the market share lost, the prices at which the continuing business was secured, and the extent to which costs could be cut (some potentially from service level reductions); and potentially by Trident too if its market share objectives were not met (or at the least a poor return on the very substantial equity investment in the new Trident 7). The losses would be particularly acute in winter. At least one of the operators would probably make a loss in the peak months too, and possibly both.
- A requirement for significant subsidy from Chief Pleas for IOSS if it was to continue in operation, even after cost reduction measures. For as long as Chief Pleas were determined to retain the IOSS operation in these circumstances, and provide the necessary subsidy, a prolonged war of attrition could follow with Chief Pleas contributing subsidies and Trident benefiting from the low external financing costs if the project were largely internally financed, but returning low or possibly negative returns to its owners on the capital invested without pushing the company into insolvency.
- Pressure on both companies to revert to a single operator by some means, either through withdrawal of one or other, or through a merger of the operations, and leading to a service and pricing pattern probably little different from the one now available. The longer term gains could be a more modern principal vessel, and some improvements in the efficiency of the continuing operation compared with the status quo.

- 3.15. If a licence were awarded to Trident with no conditions requiring year round service or for prescribed minimum service levels at any time of year (but NB this is not what Trident have sought), it would be open to Trident to run a summer only service based on Trident 6, and without the need to invest in a new vessel. This would be a much less risky option for Trident, as no capital commitment would be needed, and withdrawal would be almost costless if it were not a success; furthermore, the break even level of business is much lower, probably no more than 20k passengers per year, and possibly as low as 10k passengers in Trident's view (though the service itself would be less attractive to passengers, with an older vessel, and some risk of cancellation in poor weather even in summer). But the price reduction envisaged by Trident, coupled with loss of traffic on this scale or more, would still seriously risk unsustainable (if not quite so heavy) levels of losses at IOSS for a year as a whole, with consequent risk to the all seasons/all weather service it currently provides through a period of disruption before reversion to some modified single service provision.
- 3.16. More generally, the higher cost of providing additional vessels, crew and duplicated infrastructure seems intrinsically unlikely to be offset by sufficient efficiency gains arising from the operation of competition and/or additional traffic stimulated by lower prices or other means. Such an outcome, for as long as it persisted, would ultimately result in higher fares, not lower, and/or increased subsidies to the service(s), neither of which would benefit Sark residents or visitors to the island, nor would meet the objectives for the service discussed at paragraph 2.12 above. This analysis and the experience elsewhere around the coast of the British Isles (including the service from Guernsey to Herm) indicate that a competitive service provision would not be likely to survive for very long. Later sections of this review consider other possible ways of securing the benefits of competition for this service while also securing the objectives for the service associated with a single service provider.

### **'12 and under' services**

- 3.17. The considerations applying to the provision of services by vessels carrying 12 and under passengers are rather different. As noted at paragraph 2.22 above, practice for many years and currently deriving from clause 9.2(c) of the 1998 Agreement has been to issue six licences in this category, three to Guernsey based operators, and three to Sark based operators. In recent years, two have been for all weather operators (one Sark based, one Guernsey based) that provide an adjunct to the main IOSS service for bespoke and emergency journeys, one for a vessel on occasional charter to IOSS (the 'Isabella'), and three for angling and diving operators

for whom it is convenient to be able to drop or pick up clients on Sark, mainly in the summer season.

- 3.18. Notwithstanding the restrictive provisions in the 1998 Agreement, there is no suggestion in the evidence submitted to the Inquiry that these services, as they currently operate, undermine to any material extent the viability of the IOSS main service. The angling and diving vessels are not primarily in the business of direct passenger services between Guernsey and Sark; the ability to land or take on passengers on the island is essentially an adjunct to their main business. The two all weather operators (both run by Bailiwick mariners of long standing) see their role as complementary to IOSS, providing a direct service tailored to the needs of their clients; as with IOSS 50-60% of their business comes in the three peak months of summer, but the operators are dedicated to providing an all weather service, including in emergencies or when conditions are too adverse for the main service boats.
- 3.19. Looking ahead, IOSS say they would not want these services to develop into full blown water taxi services to Sark, on a possibly regular schedule, as this could potentially begin to erode their own revenue base, though no such development has occurred on the Herm route, which is unlicensed. The two main 12 and under providers themselves do not wish to see additional providers licensed, as this could erode *their* (summer in particular) business. There was some evidence submitted to the Inquiry of unfulfilled local demand for auxiliary licences. It is also anomalous that when Trident 6 is chartered to IOSS, it appears on the main list of permitted IOSS vessels; but when the 12 and under 'Isabella' is similarly chartered, it does not, and IOSS is given a wholly separate licence for its use, even though the licences are awarded in all cases to the service operators, not to vessels regardless of the operator.
- 3.20. It is not clear that all these restrictions continue to be in the interests of Sark residents or visitors as assessed against the objectives discussed at paragraph 2.12 above, or the updated objectives discussed in section 5 below. To the extent that other Bailiwick businesses would find it of value to offer landings or pick ups to/from Sark as an adjunct to other principal purposes – whether further angling or diving firms, or eg wider eco-tourism businesses – there would appear to be little potential damage to either the large or small all weather services, and a gain in total business coming through Sark. Relaxing the minimum price control is unlikely to lead to major price reductions, since the cost of operating the all weather boats in particular is relatively high, but would legitimise the flexibility that the existing operators already appear to offer on occasion to small groups, and would benefit users. And a relaxation in the no more than 12 a day rule for

the all weather operators (but not those offering landings on Sark as incidental to their main business) would allow them to develop a more rounded service if they wished without material risk to the main operator, to the benefit of both Sark residents and visitors, and without risking a free for all with lower operating costs but less seaworthy craft.

3.21. IOSS, commenting on suggestions for liberalising the present under 12 regime, did not object in principle, but saw an increase in licence numbers beyond 8 as needing the approval of the Sark authorities, and with a commitment to minimum year round levels of service or availability; and also saw some threat to its own operations from a fully fledged water taxi service should one be proposed. IOSS also saw the problem of setting fares for its competitors inherent in the present arrangements, and suggested that if any such control were required in future, it should be vested in the Sark authorities. The best way of dealing with these concerns, and the concerns of the two existing all weather operators, might be to establish a clear distinction for licensing purposes between those for whom the ability to land or embark passengers on Sark was incidental to their main business (with restrictions to ensure compliance with this expectation), and those for whom a Sark service was a main purpose, for whom the number of licences would remain limited (eg to two or conceivably three), but with more freedom for them to develop their business if they wish, and more input from the Sark authorities on the service requirements.

## 4. CONCLUSIONS ON LICENSING

### The Trident application

- 4.1. As noted above, the 1951 Law concerns Sark (and Alderney), but not Guernsey and Herm. The views of Sark residents, as expressed through the advice of the relevant Chief Pleas committees, of the Seigneur, and all those individuals who took the opportunity (open to all) to make representations to the Inquiry in writing or orally, therefore have weight. Against this background, and in the light of the analysis set out in section 3 above, **I recommend that the Trident application should be rejected** on two grounds, either of which would be sufficient on its own.
- 4.2. First, the overwhelming weight of expressed Sark opinion, including that of the relevant representative bodies, favoured the retention of broadly the present arrangements, with Sark Chief Pleas ultimately both owning and regulating a single main service provider; and therefore rejecting, at least at present, the introduction of any additional main, competitive, service provider. The security and reliability of service offered by these arrangements was seen as significantly outweighing the potential exposure to financial losses deriving from ownership of a commercial enterprise. I therefore conclude that the application fails the test set out in paragraph 2.3 above.
- 4.3. Second, the economic and financial analysis set out above, and the experience of other lifeline shipping services around the UK, broadly confirms the long standing empirical view that award of a licence to Trident on the all year/new vessel basis put forward (summarised at paragraphs 2.17-2.19) would lead to limited improvements to the quality of the service provided, coupled with a reduction in price – but to a level which would almost certainly not be sustained in the medium to longer term. Furthermore, the Trident proposal is as attractive as any proposal of this type could readily be – with an established and well regarded local operator, able to provide the service in an incremental fashion to other existing services, and with a willingness to enter into a Service Level Agreement and provide a new purpose built vessel. These gains would be offset by inevitable uncertainties over viability of the new service, and the substantial losses and consequent subsidy requirement for IOSS. In my judgement, and set against the objectives for the service discussed at para 2.12 above and paragraph 5.2 below, the risks to the continuity and reliability of the service in all weathers and at all seasons arising from these uncertainties and from the financial costs to Chief Pleas/ the Sark community more than outweigh the benefits that could be expected to accrue from the award of a licence of

the type sought by Trident. I therefore conclude that the application fails the test set out in paragraph 2.4 above.

## **12 and under vessels**

4.4. Separately, and in the light of the analysis at paragraphs 3.20-3.22 above, I **recommend that the approach** taken by Your Excellency towards applications for 12 and under licences should be amended as follows:

- Clause 9.2 (c) of the 1998 Agreement between Chief Pleas , IOSS and Peter Drake should be deemed set aside following Mr Drake's withdrawal.
- All vessels licensed to operate between Guernsey and Sark only when operated by IOSS should be included in a single 'all sizes' IOSS licence from 2008.
- Licences should continue to be awarded only to operators/vessels which meet local requirements for crew, seaworthiness and safety, and whose characteristics are appropriate for the type of service proposed (eg more rugged vessels are required for an all weather all seasons operator than for casual hires in summer), taking account of the advice of the harbourmasters in Guernsey and Sark as necessary.
- The minimum list pricing of 12 and under voyages by IOSS should be abolished.
- Subject to demand, Your Excellency should be prepared to grant up to 7-8 licences for 2008, after allowing for the reduction of one in the number of licences required to accommodate existing operators/vessels, and potentially more than 7-8 in later years if there is demand.
- Two, and no more than three if there is demand, all weather operators who enter into an all seasons/all weather availability service level agreement with the Sark authorities should be freed from the requirement to carry no more than 12 passengers per day, but not the other licensed operators for whom the ability to land or embark on Sark is incidental to their main business.
- Licences should in principle be issued for periods of more than one year, subject to review in the event of breaches of licence conditions.
- Your Excellency should publish a statement of policy on licence awards; a draft for this purpose is at Annex 4 which should be the subject of consultation with Chief Pleas before adoption, and which could if necessary be supplemented by more detailed criteria in due course.

- The scope for further relaxations should be reviewed by the Sark authorities in conjunction with Your Excellency as the licensing authority no later than 2012.

These changes should provide a better service for residents and visitors without jeopardising the objectives for the service set out at paragraph 2.12 above.

## 5. FUTURE DEVELOPMENTS

5.1. Whether or not my recommendations on licensing are accepted, a number of further steps should be taken to bring up to date the regulatory and ownership relationships concerning the shipping services between Guernsey and Sark, some of which can and should be accomplished during the next year or so, others of which, including a replacement of the 1951 Law, will probably and appropriately take rather longer.

5.2. Apart from the final recommendation in paragraph 5.23, all the recommendations that follow in this section are for all practical purposes addressed to the relevant Sark authorities (Chief Pleas, its committees, IOSS), and not to Your Excellency; you may therefore wish to transmit them to Chief Pleas for their consideration.

### Objectives

5.3. **First**, an up to date mission statement and objectives for the provision of shipping services between Guernsey and Sark should be drawn up, and agreed by Chief Pleas. These should cover services in general, not limited to those currently provided by IOSS. Drawing on the material in the 1997 Picot report and in the 1998 Agreement (see paragraph 2.12 above), I recommend the following as a first draft for consideration:

**Mission** *To ensure the sustainable provision of safe, reliable, friendly and efficient passenger and freight shipping services between Guernsey and Sark for the benefit of residents of Sark and visitors to it.*

### Objectives

- To provide safe, reliable and low cost year-round all-weather shipping services between Guernsey and Sark for passengers and freight
- To provide a minimum of [four return passenger voyages and two freight voyages] per week throughout the year, including the winter months, together with a facility to provide emergency voyages as needed [NB the 4 plus 2 formula is taken from the 1998 agreement, and should be reviewed. It is not intended necessarily to be the actual level of service provision with any particular operator, though it does indicate the minimum to be included in any SLA with IOSS or any other service provider. The emergency facility could be provided by one or more 12 and under operators]
- To provide daily passenger services during the tourist season from Easter to October, with a view to carrying all those who wish to travel

between Guernsey and Sark [but with a more limited service on Sundays], and to satisfy the demand for freight transport

- To achieve sustained financial viability and so to avoid the need for subsidy from the Sark authorities (or elsewhere).

## **Relations between Sark and IOSS**

- 5.4. I take it as given that the Sark authorities (Chief Pleas, the Shipping Committee, the Sark Harbours Committee, the General Purposes and Advisory Committee, the Finance and Commerce Committee, and the Trustees of the IOSS shareholding) in discharging their responsibilities seek to apply the Seven Principles of Public Life now very widely adopted by members of public bodies, including Parliament itself, in the UK. These are selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. Against this background, the relationships between IOSS as a company, its appointed managers, and the Sark authorities would benefit from being clarified. Clarity together with separation of roles is desirable because there are inevitable differences of interest between the various parties. For example IOSS managers with a profit share incentive will – quite legitimately - have a greater interest in IOSS profitability than the Shipping Committee whose priority may well be lower tariffs.
- 5.5. The new management agreement drawn up this year between IOSS and the new managers, Ship and Fly, which I have seen, represents a good start in respect of the relationship between the Board of Directors (all non-executive) and the professional managers of the business.
- 5.6. It needs to be matched by similar clarity elsewhere, and by as much separation of separate roles as is feasible in so small a community as Sark. In particular there should be a clearer articulation between the role of the Sark authorities as owner of the business (for as long as that remains the case), and their role as regulator of the service provision (which is not an automatic monopoly under the 1951 Law, and indeed is not so today when the contribution of the 12 and under operators is taken into account); and between Chief Pleas as owner/regulator and the Board of Directors of the company responsible for its operations and the other duties of Directors.
- 5.7. As its terms of reference make clear, the Shipping Committee of Chief Pleas currently has the responsibility on behalf of Chief Pleas, amongst other things, for approving the IOSS annual timetable and fare/freight rate structure, and for overseeing the overall quality of service. This should continue, and should be extended over time in relation to the 12 and under

services, and the overall structure of shipping service provision (see paragraphs 5.16-18 below).

5.8. As ultimate owner of the IOSS business Chief Pleas has a legitimate interest in its financial performance; in the last resort, were the company to fail, Chief Pleas would at least be morally responsible for the debts of the company, and possibly contractually also, as well as at present having outstanding debts due directly from the company. There therefore needs to be a suitable framework for relations which allows the Directors to exercise their proper responsibilities, while allowing the 100% shareholder (I leave aside for now the position of the Trustees) appropriate access and comfort. There is plenty of experience in the UK and elsewhere of effective shareholder oversight of state owned businesses which provide this access and comfort while avoiding micromanagement by the shareholder. This includes appointment of the Directors by the shareholder; and an annual business planning process in which the company proposes and the shareholder approves (possibly after agreed modification). The principal ingredients of the latter are a robust projection of business performance, including analyses of revenues and costs; profit; cash flow; and balance sheet; all including sensitivity analyses in particular against downside risks, and all provided by the business. The shareholder, after whatever discussion is needed, notes the projections; must approve any major capital expenditure (i.e. above a predetermined threshold), and sets an external finance limit (EFL), which is a cap on total externally provided finance whether equity or debt, and whether provided by the shareholder or by the private sector (and if the latter, whether guaranteed by the shareholder or not). An EFL can of course be either positive or negative, as additional finance is acquired or repaid. This latter arrangement provides a protection for the shareholder; it cannot be entirely immutable in a commercial environment, but has been operated as an appropriate discipline in the UK for many years, in fields as diverse as the nationalised steel industry, The Post Office, and NHS hospital trusts.

5.9. Some aspects of this approach are already in place in relation to IOSS. But it would help to codify them, at two levels. The upper level would be a long term Agreement between Chief Pleas and IOSS, replacing the 1998 Chief Pleas/ IOSS/Drake agreement, and incorporating the features of a Service Level Agreement. It would remove all the provisions relating to the 50/50 venture with the Drakes, but could include

- Arrangements for the appointment and removal of Directors, who should not if possible be members of Chief Pleas or any of the committees dealing with IOSS business
- Minimum service level obligations

- Requirements for the annual approval of timetables and tariffs
- Requirements for Sark harbour operations and obligations on the part of the Sark harbours (if appropriate)
- Requirements for the approval of major capital expenditure, above a defined thresh-hold
- Requirements for the approval of an annual business plan, including the setting of an EFL (see paragraph 5.8 above).

5.10. Such an agreement could also include provisions governing the sale of some or all of the shares in the company, and/or for winding up; but in their absence the general law applicable to such a Guernsey-registered company would operate. The agreement should not however include any conditionality in relation to licensing of services to IOSS or any other operator – such provisions were understandable while a third party commercial operator was involved, but not with 100% Sark ownership. Nor should it seek to define the relationship between the company and its staff or managing agents (if any).

5.11. Within this high level agreement, the annual business plan (which might be a summarised version of material developed within the company for internal management purposes) could cover

- A narrative account of planned developments in the service to be provided over the forthcoming 1-3 years
- Passenger and freight capacity, together with proposed timetables and tariffs
- Forward financial projections for one year in detail and the following two in more general terms, and covering revenues, costs, profits, cash flow and balance sheet development, with narrative on notable changes from previous trends
- Sensitivity analysis of downside risks
- Proposed major capital expenditure (if any)
- Funding requirements on a one and three year perspective, together with proposed external finance limit.

5.12. It is for consideration whether advice to Chief Pleas on the approval of the financial aspects of the annual business plan (especially capital expenditure and funding requirements/EFL) should come from the Shipping Committee or from another committee (most likely Finance and Commerce, or General Purposes and Advisory). The argument in favour of the Shipping Committee is that that would ensure that any trade off between service standards and financial performance was dealt with in a single place. The argument against is that the Shipping Committee should ideally, over time,

become more concerned with the optimisation of service performance by all operators into Sark (12 and unders, services from other islands, restructuring of IOSS, other operators), and less with the ownership relationship with IOSS. But it is desirable that any decision is taken consciously, and mindful of the need in the near term to restore IOSS' financial health; and the outcome should be reflected in the mandate of the relevant Committee. It is also desirable that the involvement of Chief Pleas and its committees concentrates on the strategic regulatory and financial issues and not on matters of relative detail for which the directors should remain responsible. Provided individuals of sufficient capability and willingness are available to serve as directors, the proposal to bar members of Chief Pleas and the relevant committees from simultaneously serving as IOSS directors should support this objective, as well as conforming to the separation principle set out above.

5.13. At present there is the further complication that the shareholding in IOSS is not held directly by Chief Pleas, but by three Sark office holders (plus one other, normally a Director of the company) as Trustees on behalf of Chief Pleas. Although I found it somewhat surprising, it was explained to me during the Inquiry that this arises because Chief Pleas is considered not to have legal personality to hold property directly. However, the proposed Reform (Sark) Law 2007, if and when it is enacted, would establish unequivocally that Chief Pleas had legal personality. In that circumstance, it would probably be a further useful simplification to utilise this development and have the IOSS shareholding held directly by Chief Pleas.

5.14. To summarise, **during 2008**

- **Chief Pleas should agree new objectives for shipping services to Sark generally, along the lines suggested at paragraph 5.2;**
- **Chief Pleas should enter into a new long term agreement with IOSS along the lines set out in paragraphs 5.9-5.10; and which should**
- **Include provision for an annual business plan approval process along the lines set out in paragraphs 5.11-5.13, covering timetables, tariffs, capital expenditure and funding.**
- **The structure of relationships between Chief Pleas, its Committees and IOSS should be clarified along the lines set out in paragraphs 5.6, 5.12 and 5.13 with the elimination as far as possible of any individuals playing multiple roles.**

## The longer term

- 5.15. Partly for reasons of history, IOSS has always been very lightly capitalised; issued share capital is £2000, and shareholders funds at 30 September 2006 were around £0.25m (and almost certainly substantially less at 30 September 2007) in balance sheet totals approaching £2m. This leaves it exposed to the vagaries of the tourist traffic or exceptional expenditures, and without the internal resources to fund major capital projects. Hopefully, stability will be restored to IOSS' operating revenues and costs over the next year or two, and decisions will have been taken and implemented on the medium term configuration of the IOSS fleet (including decisions on whether all three vessels be retained, and if not, which should be sold or otherwise disposed of, and whether some or all of the non-interest bearing loan from Chief Pleas can be refinanced on a commercial basis). Once these tasks have been completed, there would be benefits in considering the future capitalisation of the company, and in particular whether any of the current non-interest bearing loan that is not refinanced should be converted into equity to give the company a more normal balance sheet, and to reduce the risk that company could require further emergency funding direct from, or guaranteed by, Chief Pleas in future. **Such a review should be undertaken by IOSS in consultation with Chief Pleas, with proposals being brought as necessary to Chief Pleas for their agreement.**
- 5.16. The restoration of a sound financial position at IOSS is likely to take at least two years, including the measures proposed above. It would then be appropriate for Chief Pleas (which by then may well have the changed composition envisaged in the proposed Reform (Sark) Law 2007) to undertake a wider review of the provision of the lifeline shipping service. The last such review was the Picot review in 1997, which in effect confirmed the then preferred option of a 50/50 private sector/public sector joint venture in the context of a conclusion in favour of a licensed monopoly. Picot considered the 100% pure public ownership alternative now in place, and noted a number of hazards that would have to be avoided including putting quality pricing of services ahead of financial viability, insufficient resources for investment, and inadequate pressures for managerial performance.
- 5.17. Such a wider review would logically need to start with a further look at the scope for competition in the service, both for the main timetabled service and in the 12 and under supplementary services (taking account of experience in the light of any changes introduced in the latter in the shorter term). The underlying analysis set out in section 3 above may well

nonetheless hold good, especially in relation to the main timetabled services. But even if there continues to be advantage in a licensed and regulated monopoly service provider, there are a number of alternative ways in which the benefits of competition for efficiency and service quality can be introduced, and which would achieve varying degrees of risk transfer away from Sark and the Sark taxpayer; and which would therefore merit consideration and comparison:

- Periodic competitive tendering for the managing agency for the IOSS, as was recently introduced in a fairly simple form with the competition that led to the appointment of Ship and Fly in 2007. This directly affects the managing agency fee, and helps to keep the agents on their toes during their contract period as well as retaining the benefits to security of a wholly owned operation, but does not of itself reduce the financial risk to which the owners are exposed.
- Contracting out the entire service provision on a commercial basis, with tenders being sought on the basis of prescribed minimum service levels for a defined multi year period, but in the expectation that bids would be received from two or more operators each offering a combination of service frequency and tariffs (and potentially investment in vessels) thus allowing Chief Pleas a choice. This approach would need to include protective arrangements against worst case scenarios (eg operator withdrawal or insolvency, and Sark agreement to any change of ultimate ownership), of a kind that is familiar elsewhere, eg in UK railway franchising; and a full specification of minimum requirements not only for service levels but also for eg vessel capability to ensure all weather reliability. In such an exercise, it would be normal but not obligatory to allow the incumbent (i.e. IOSS) to bid; it would clearly be open to other operators in the Bailiwick, and further afield, to put in rival proposals. The terms of the competition would have to be set to ensure that they were attractive enough to attract alternative proposals. This would both secure efficiency gains through the tendering process, and could potentially transfer financial risk away from Sark (depending on the outcome), but in a controlled manner.
- An intermediate option would be to split IOSS into two parts: a company owning the vessels and any related infrastructure (eg the booking office in Guernsey, and possibly the harbour facilities in Sark), and a separate company to operate the service. The facilities company would remain Sark owned. The operating company going forward would be appointed by competitive tender for a fixed period, and could be ‘son of IOSS’ or a commercial alternative; it would be contractually bound to lease the Sark vessels (though without precluding the use of other vessels available to it) and use the related facilities, and would be chosen on the basis of the quality of service offered, pricing etc as before, with some or all of the

same safeguards. The risk transfer would be less than with the fully contracted out version described above, but would offer some additional security to Sark, both in terms of the suitability of the vessels, and in terms of the ability to sustain the service should the contractor withdraw/fail. This in outline is the model used in the Scottish Executive owned services to the Western and Northern Isles mentioned at paragraph 2.9 above, where the current operator is in fact the publicly owned successor to the previous publicly owned business. It is also a model that operated at one time, I was told at the hearings, on the Guernsey/Sark route in the 1950s and 1960s; as that experience apparently demonstrated, it requires effective communication between the two businesses when investment in new vessels is being considered.

- A variant on all of these options, and of the status quo, would be to sell a stake in IOSS or ‘son of IOSS’ (which could be a minority, 50%, or 100%), either as a trade sale or through an auction. As with options 2 and 3 above, this would necessitate putting the regulatory controls over the business on to a more arms length and formulaic basis once the terms of the sale had been determined. And as before, some of the benefits of competition could be obtained through the sale process; and the financial risk to Sark would be reduced, coupled with some loss of control/security.
- A specific variant of several of these options would be a partial or complete trade sale and or contractorisation to Trident, or a merger of the two companies if terms could be agreed. As the proprietor of Herm, Mr Adrian Heyworth, pointed out to the Inquiry, the most direct way to minimise overheads in services from Guernsey would be a merger of the Herm and Sark services, since in the longer term this would permit a reduction in the total number of vessels required to run the combined services, probably to one dedicated mainly to the Herm service, one dedicated to the Sark service, and one spare back-up/relief vessel to cover both routes against breakdowns and peak requirements in summer. This is not to propose a service pattern in which more than a small minority of services ran to Sark via Herm, but rather an optimisation of the total fleet requirement. But NB that the licensing of a Trident service to Sark *in competition* with IOSS would not lead to this outcome; in the short term at least it would in fact lead to more vessels operating on the Sark and Herm routes (three Trident vessels, and two/potentially three IOSS vessels too) – i.e. this outcome could only be achieved with the active agreement of both Chief Pleas and Trident.

**5.18. In the medium term (most likely in 2010), Chief Pleas should undertake a fundamental review of the provision of the lifeline services from Guernsey to Sark, in the light of the progress by then made in restoring IOSS to a sound financial position, and in the light of fresh**

**assessments by Chief Pleas of Sark’s appetite for financial risk in the provision of lifeline shipping services on the one hand, and of the options for securing reliability and continuity in the provision of these services on the other. This review should draw on, but not be limited to the options summarised in paragraph 5.17 above.**

## **Legislation**

5.19. The Advocates for both Trident and IOSS were critical of the 1951 Law, as were some of the other respondents to the Inquiry. I agree. The Law is open to criticism principally in five areas:

1. The identity of the licensing authority. It was argued that it was anachronistic for the Crown’s representative in the Bailiwick to have the executive responsibility for determining applications for shipping licences. Opinions were divided on where responsibility should reside in future – possibly with Chief Pleas, since the 1951 Law is already Sark law and intended to operate in the Sark interest, or possibly with the Office of Utility Regulation, which has Bailiwick-wide responsibilities, to ensure an objective and non-political approach to decisions.
2. As with much old law, the 1951 Law contains no statement of objectives or explicit criteria to guide decision making. Most recent UK and Bailiwick regulatory law does embody guidance of this kind, and any successor to the 1951 Law should also do so, so that applicants, licence holders, and decision makers can have the benefits of greater predictability in decision making.
3. The key definitions, notably of ‘act of trade’, ‘passenger’, ‘cargo’ ‘vessel’ and ‘yacht’ are imprecise, and could with benefit be clarified, in particular to set out more explicitly on the face of the statute in what circumstances licences are required, and what circumstances an exemption from the licensing requirement applies, to the benefit of vessel owners, operators and users.
4. The enforcement provisions, and in particular the penalty provisions, are weak. The penalty for unlicensed operations was set at £100 in 1951, and has not been caught by the 1989 Bailiwick legislation on the uprating of penalties by reference to the uniform scale of fines. No regulatory scheme is effective if it is easily or cheaply flouted.
5. The 1951 Law lacks any explicit arrangements for appeals against Your Excellency’s licensing decisions. In practice, anyone with sufficient interest to challenge such a decision would currently have to institute proceedings for relief by way of a judicial review conducted through the appropriate Bailiwick courts. Any regulatory scheme

needs appropriate and proportionate appeal arrangements, as a matter of natural justice, and also as an incentive to good quality first instance decision making.

5.20. Since the 1951 Law is Sark (and Alderney) law, it must be for Chief Pleas to propose any changes. A review leading to possible proposals for changes might most appropriately run alongside the review of the options for the services themselves, summarised at paragraph 5.18, since the prior question must be whether any continuing state intervention is required in this area, and if so whether it is best achieved by a licensing regime broadly along present lines (unless some unanticipated event made reform of the legislation more urgent). If the answers to these questions were ‘no’ and ‘no’, then all that would be needed is repeal of the 1951 Law without replacement.

5.21. If a successor to the 1951 Law is required, my preliminary observations on the five areas where improvements are most needed are as follows:

1. In principle it is now inappropriate for Your Excellency to be the licensing authority. Any successor to the 1951 Law should be Sark law, probably in the form of an expanded Sark Harbours Ordinance defining the circumstances in which vessels using the Sark harbours required licences. Chief Pleas would most naturally delegate individual licensing decisions to the Shipping Committee: it would alternatively be open to Chief Pleas to seek agreement from the Office of Utility Regulation, or any other competent regulatory body, to take on this responsibility, and to legislate accordingly.
2. Any new legislation should include appropriate statutory objectives, a starting point for which would be the first and fourth of the objectives for the service proposed in paragraph 5.2 above (the second and third are too specific for inclusion in statute). Note that if, as is likely to be the case, the definitions caught some or all smaller vessels (12 and under etc), the objectives would need to cover them in an appropriate way also.
3. The definitions of ‘act of trade’ etc should be developed drawing on relevant post 1951 legislation, summarised at paragraph 2.5 above and set out in more detail in Annex 2, to clarify which types of movements in or out of the Sark harbours are caught by the licensing regime, and which not.
4. The penalties for non-exempt unlicensed traffic should be subjected to the general scheme set out in the Uniform Scale of Fines (Sark) Law 1989. Consideration should be given to providing a plain language

guide to the licensing regime, and the associated enforcement arrangements.

5. In order to provide greater certainty, any new legislation should include full provisions for appeals relating to licensing decisions to go to the Court of the Seneschal of Sark, or if preferred to another appellate body. They should include the grounds on which an appeal can be made, and the procedure to be followed. In the usual way, provision should be made for further levels of appeal on matters of law only.

**5.22. Chief Pleas should undertake a review of the 1951 Law in parallel with the proposed fundamental review of lifeline shipping services, with a view to bringing forward proposals for reform, and drawing on the suggestions set out in paragraph 5.21 above.**

**5.23. In the meantime, any further licensing applications coming before Your Excellency under the 1951 Law should be dealt with in the light of the approach taken in this report, in particular the draft objectives for the services set out at paragraph 5.2, the analysis and conclusions relating to the Trident application in sections 3 and 4, and the approach recommended at paragraph 4.4 in relation 12 and under applications; and supplemented by the advice of Chief Pleas or its relevant committee on the particular application.**

**JONATHAN SPENCER**

**NOVEMBER 2007**

## **ANNEX 1**

### **REVIEW OF SHIPPING SERVICES BETWEEN GUERNSEY AND SARK**

#### **Alderney and Sark (Licensing of Vessels) Law, 1951**

Under the Alderney and Sark (Licensing of Vessels) Law, 1951 His Excellency the Lieutenant-Governor is the licensing authority for the provision of shipping services between the islands of the Bailiwick. Under the Law, Trident Charter Company Limited has applied to the Lieutenant-Governor for a licence to operate a passenger and freight service between the islands of Guernsey, Herm and Sark in addition to the service between Guernsey and Sark currently provided by the Isle of Sark Shipping Company Limited. Trident's application may be viewed at <http://www.gov.gg/ccm/navigation/government/inquiries-and-investigations/> and at [www.sark.gov.gg](http://www.sark.gov.gg)

#### **Independent Review**

In order that the application by Trident Charter Company Limited will receive the fullest possible consideration, His Excellency has appointed me to conduct an independent review of the licensing of shipping services between Guernsey and Sark. My terms of reference are as follows: "To consider the application by Trident Charter Company Limited for a licence to operate a shipping service between Guernsey, Herm and Sark under the Alderney and Sark (Licensing of Vessels) Law, 1951, and to conduct a more general review of shipping services between Guernsey and Sark, reporting my findings and recommendations to His Excellency".

My review will take the form of an independent public inquiry. I will consider the views put to me by interested parties and others before submitting a written report to His Excellency. Those views may be put to me in the first place in the form of written representations and subsequently at oral hearings in Guernsey and Sark.

#### **Submissions**

Anyone who wishes to submit an initial written representation to me should do so by the deadline of 4pm on Thursday 9 August 2007. Submissions will then be published on the Guernsey and Sark government websites mentioned above. Thereafter, anyone wishing to respond with further representations may do so by 4pm on Thursday 6 September 2007. Those submissions will similarly be published on the same websites. Submissions should be addressed to: Dr Jonathan Spencer, C/O St James' Chambers, St Peter Port, Guernsey, GY1 2PA and/or by email to [shippingreview@gov.gg](mailto:shippingreview@gov.gg). It would be helpful if initial representations could address some or all of the issues set out in the annex to this notice (which is not however intended to be exhaustive), as well as any other material anyone wishes to submit for the Inquiry's consideration.

#### **Public Hearings**

Public hearings in Guernsey will start on Tuesday 25 September 2007 and will be held in Court 6 in the Royal Court. The public hearing in Sark will be held on Thursday 27 September 2007. Further hearing details, including the location of the public hearing in Sark, will be published closer to the date. All persons making representations are entitled to be heard at the public hearing(s), but can indicate in their representations that they do not wish to

do so. Those who wish to make oral representations are to either appear in person or use their advocate to appear in their place; however, I reserve the right to request anyone who has made a written submission, but elected not to appear, to attend at a suitable public hearing for the purpose of assisting me further with my review.

## **Review Report**

I expect to report in the autumn. My report will then be published along with His Excellency's decision.

## **Dr Jonathan Spencer Reviewer of Shipping Services between Guernsey and Sark**

### **Annex**

The Alderney and Sark (Licensing of Vessels) Law, 1951 ('the 1951 Law') gives the Lieutenant-Governor very considerable discretion in the award of licences for shipping services between Guernsey and Sark (also between Guernsey and Alderney, but that is not directly at issue in this Inquiry).

1. What should be the policy objectives underlying determinations of licence applications?
2. Whose needs should licensees seek to serve?
3. How should the interests of users of the service be reflected in the decision making process (residents of Sark, residents of Guernsey, Herm and Alderney, visitors to the islands)?
4. What impact if any will current or prospective Bailiwick or EU law have on licensing decisions?
5. Where licences are granted, what if any conditions should be imposed and why? (For example, provision of a year round service, provision of a direct service between Guernsey and Sark, frequency of service, policy on fares/fare structures, specification of ships, availability of alternative ships, notice period should the licensee wish to withdraw from the service.)
6. In what if any circumstances should applications for licences be refused? Why?
7. If it were decided to limit the number of licences to be made available and there were to be more applicants than available licences, on what criteria should licensees be selected? (For example, capacity of services compared with current or prospective demand.)
8. In what if any circumstances should financial support for this route be contemplated? If such circumstances existed, how should the level of support be determined, and how should the beneficiaries be selected? And who would pay?

9. In the light of answers to the preceding questions, should the Lieutenant Governor adopt a policy for licensing these services under the 1951 Law, and if so what in outline should it contain?
10. Against this background, how should the Lieutenant Governor determine the current application from Trident Charter Company Limited?

Please give explanations and reasons for all answers.

## ANNEX 2

### Legal definitions and interpretations

#### *Act of trade*

1. The 1951 Law prohibits unlicensed acts of trade in connection with a vessel at, or in the territorial waters of, Sark (section 2). Such an act, or indeed contravening a licence condition, can be committed by one or more of the owner, charterer, person having control over, or master or other person in charge of, a vessel (section 5).
2. Section 6(b) defines what is prohibited by section 2. It describes an “act of trade” as “(i) the embarkation of passengers or the loading of cargo at, or in the territorial waters of, [Sark] in a vessel bound from Sark to Guernsey or Herm or to Alderney; or (ii) the disembarkation or the unloading at, or in the territorial waters of, [Sark] of passengers or cargo carried in a vessel between Guernsey or Herm or Alderney and Sark”, subject to a proviso about transshipment of fish. It deals with the embarkation or the loading of cargo at a Sark harbour (or in its territorial waters, which are currently out to 3 miles only: the relevant provisions of the Territorial Sea Act 1987 increasing the UK’s territorial sea to 12 miles have not been extended to the Bailiwick of Guernsey) where the vessel is going to Guernsey, Herm or Alderney and the disembarkation of passengers or the unloading of cargo in the same places from a vessel arriving from the same Islands.
3. Usage in 1951 of the drafting term of art “act of trade” was consistent with legislation then in force in Guernsey. For example, the Harbour Dues (St. Peter Port and St. Sampson) Law, 1947 used the term and defined it “in respect of a vessel or aircraft” as “the embarkation or disembarkation of passengers or the loading or unloading of cargo”. (This Law was repealed and replaced by the Harbour Dues (Saint Peter Port and Saint Sampson) Law, 1957, which contained an identical definition until 2001, when an Amendment Law substituted a new definition containing a third limb, namely “the obtaining of customs clearance or the making of a customs declaration in territorial waters” – primarily designed to enable cruise ships to “clear” customs in a non-EU territory without having to offload anyone or anything.)
4. Each occasion on which a vessel carries out one or more of the two activities specified (i.e., it could embark passengers or it could load cargo or do both, or it could disembark, unload or do both) constitutes an act of trade for the purposes of the Law. As section 8 applies the Interpretation

(Guernsey) Law, 1948, it covers a single passenger as much as multiple passengers, so the offence could be committed by embarking or disembarking a single passenger or loading or unloading cargo without a licence (or contrary to any conditions imposed on the licence).

5. The 1947 Law replaced a 1910 Order in Council introducing a new tariff for the Guernsey harbours, in which reference is made to an “acte de commerce” covering “tout navire qui embarque ou débarque des passagers ou qui y charge ou décharge des marchandises”. In turn, the 1910 Order in Council replaced a similar measure dating from the mid-19<sup>th</sup> century with an identical use of the notion of “acte de commerce”.
6. In short, the concept of ‘an act of trade’ is of long-standing in Guernsey (and so Bailiwick) legislation. [None of these measures have attempted to define “passenger” or “cargo”].

*“passenger”*

7. There is a definition of “passenger” in section 4 of the Merchant Shipping Act (Guernsey) 1915, as amended, in particular, by paragraph 33 of the First Schedule to the Merchant Shipping Safety Convention (Guernsey) No. 1 Order, 1935 (SR&O 1935/562), which is a Bailiwick-wide measure and provides some assistance towards construing the word in the 1951 Law, particularly as any vessel to be licensed under the 1951 Law must have a passenger certificate issued from Guernsey under the Passenger Vessels (Bailiwick of Guernsey) Ordinance, 1970, as amended, made under powers contained in the 1915 Act:

“The expression ‘passenger’ shall include any person carried in a ship other than the master and crew, and the owner, his family and servants and persons on board the ship either in pursuance of the obligation laid upon the master to carry shipwrecked, distressed or other persons or by reason of any circumstances which neither the master nor the owner nor the charterer (if any) could have prevented or forestalled”.

8. The 1970 Ordinance repealed and replaced a 1953 Ordinance of similar effect. There was also an earlier Ordinance made permanent in 1932 about licensing passenger boats, other than those with a passenger steamer’s certificate under the 1915 Act, where the word “bateau” was expressed as applying to “tout bateau moteur, bateau à voiles et bateau à la rame, mis en location ou portant passagers’ moyennant paiement”. At that time, therefore, the passengers had to be carried in return for payment.

9. By way of a further example, which is an international measure included in merchant shipping legislation, in the Convention relating to the Carriage of Passengers and their Luggage by Sea, “passenger” means “any person carried in a ship (a) under a contract of carriage, or (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by this Convention”. Again, the reference to a contract implies that there would be consideration passing from the passenger to the carrier, which would mean that a gratuitous carriage of a friend would be outwith the definition.
10. By contrast, in the Harbour and Lights Dues (Jersey) Law 1947, as amended, which of itself has no direct bearing on the construction of the 1951 Law “passengers’ includes all persons carried in a ship, whether gratuitously or for reward, but excludes the master and crew, and members of the Armed Forces on active service”. That Law provides that “goods’ includes merchandise, baggage and live animals, but excludes ships’ stores, the personal baggage, carried free of charge, of the passengers and crew of a ship, and mails”.
11. Moving away from statute to case law, the general thrust of the jurisprudence is first to distinguish between those who are effectively crew and those who pay a fare. For example, a person who pays a fare but then renders some assistance is not “engaged in any capacity on board the ship” (for the purposes of the definition in section 26(1)(a) of the Merchant Shipping (Safety Convention) Act 1949) and does not, as a result, stop being a passenger (*The Biche* [1984] 1 All ER 464). In *The Lion* LR 2 PC 525, the wife and father-in-law of the captain of the vessel, travelling to a place they wanted to go to, but being carried at the invitation of the captain (albeit without the knowledge of the owner) rather than under any other arrangement, were not passengers.
12. That decision makes it plain that the payment of a fare for being carried (provided the person is not an officer or crew on the ship) makes the person a passenger, but it is also clear that the Privy Council did not draw an absolute distinction between payment and non-payment, explaining that, where a person is carried under some form of obligation or duty imposed on the carrier, the person is a passenger, even if no fare is paid. In *Hay v Trinity House* 65 LJQB 90, payment by a voyager of subsistence money to the master, which did not have to be accounted for by the master to the owner, did not of itself make the voyager a passenger.
13. The problems with the definition in the 1951 Law arise if the person being carried is not paying any fare and cannot be shown to be paying in some

other form, for example, that a hotel operating its own launch and providing “free” passage to those staying at the hotel, would still be carrying persons for reward. If the person being carried benefits for it being a pure friendship arrangement, i.e., no obligation exists that could be used to turn the person into a passenger, then embarking/disembarking such a person would not be an act of trade. There needs to be a direct or indirect commercial element (remembering the old French term that preceded it being anglicised) before the person becomes a passenger. However, as soon as there is evidence of the person being carried under such an obligation, even without a fare having to be paid, the person becomes a passenger.

“cargo”

14. Similar issues arise with the meaning of “cargo”, which the courts elsewhere have tended to regard as being what is loaded as goods on to a ship and so is largely synonymous with “freight” (*Borrowman v Drayton* 2 Ex D 19). In the now repealed Dock Workers (Regulation of Employment) Act 1946, section 6 defined “cargo” as including “anything carried or to be carried in a ship or other vessel”.
15. In *Miller v Borner & Co* [1900] 1 QB 691, the issue of what constitutes cargo was held to be a question of fact. Channell J added that a “very small quantity of goods in proportion to the carrying capacity of the ship could not be called a cargo. It must, to some extent, approach the carrying capacity”. If this principle were applicable to the use of the word in the 1951 Law, it would potentially remove those trips where a private person carried something (small) for someone else or someone who is more of a commercial operator only carried something (significantly) less than the full load of the vessel.
16. A more extensive description came in *Kreuger v Blanck* (1870) LR 5 Exch 179:

“What ... does the word ‘cargo’ mean? It means the cargo of the ship, that is what is put on board the ship, or what the ship carries ... I find in Webster’s Dictionary cargo defined as ‘the lading of freight of a ship, the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel’; and Richardson gives its meaning as ‘the freight or lading of a ship’. The question as to the meaning of the same word also arose in the case of *Sargent v Reed* (1745) ... It was there argued that the word was uncertain and might mean only a small parcel of goods on board, but the court said that the word ‘cargo’, as referred to a ship, was very intelligible, and must mean the whole loading ... This case was

referred to in *Houghton v Gilbert* (1836), where the question as to the meaning of the word was left to the jury; but that was an action on a policy of insurance on cargo, which would not necessarily be on the whole, and it would therefore be a question for the jury what part of the cargo was insured ... Here, however, on my own reading of the word, and upon authority, I think it means the whole cargo.”

17. As a result of these cases, it is possible to construe the word “cargo” in the context of the act of trade that is prohibited without a licence under the 1951 Law, as something more than the carriage of a small quantity of goods. It is implicit in the context that there must be a commercial carrying, not just a gratuitous favour, which would be consistent with allowing a *de minimis* argument, where what is being carried is not a commercial voyage (i.e., because the cost of the voyage would be incurred anyway or is greater than the value of the goods being transported, etc.).
18. Where the voyage is a commercial one, but without passengers (which would make it an act of trade anyway on embarkation/disembarkation), but the ship stops off in Sark to pick up something extra or offload less than the whole of what is being carried, then that may well not involve loading or unloading (the ship’s) cargo. That said, shipping companies will not often call into Sark for such a purpose since most voyages are directly between that Island and elsewhere, so the cargo will always be the entire freight carried and the principal issue of interest would be whether or not the carriage is (like for passengers) in return for payment or satisfying some other obligation, making it commercial, or something lacking that commercial touchstone, in which case it may well not be an act of trade.

#### ‘Vessel’

19. Section 7 explains those vessels that are not caught by the prohibition against unlicensed acts of trade. The most relevant exclusions appear to be those attaching to “any yacht *bona fide* used exclusively for pleasure” and “any fishing vessel not carrying passengers or merchandise other than fish”.

#### ‘Yachts’

20. A yacht is seen by the 1951 Law as a type of vessel that is not a vessel for the purposes of the 1951 Law licensing regime (section 7 refers to “any yacht *bona fide* used exclusively for pleasure”). The “pleasure yacht” exemption covers “private” acts. This means that a non-commercial arrangement by someone to carry a friend/relative, etc. “for fun” and

including carrying that person's belongings, is not caught by the prohibition on unlicensed acts of trade.

21. It is reasonable to assume that any vessel which carries more than 12 passengers will not qualify as a pleasure vessel. Likewise, a vessel carrying cargo/freight commercially is not being used for pleasure. Consequently, the exception should apply to relatively small vessels, but these can be sailing or motor-driven vessels.

22. On the basis of exempting those vessels that clearly operate as pleasure vessels under more modern definitions, the definition in the Merchant Shipping (Categorisation of Registries of Relevant British Possessions) order 2003 (SI 2003/1248) (which may be rather long and cumbersome but which arguably applies as part of Guernsey law) is:

"pleasure vessel" means –

(a) Any vessel which is –

(i) wholly owned by an individual or individuals and used only for the sport or pleasure of the owner or the immediate family or friends of the owner, or

(ii) wholly owned by a body corporate and used only for sport or pleasure of employees or officers of the body corporate, or their immediate family or friends,

and is on a voyage or excursion which is one for which the owner is not paid for or in connection with operating the vessel or carrying any person, other than as a contribution to the direct expenses of the operation of the vessel incurred during the voyage or excursion, or

(b) any vessel which is wholly owned by or on behalf of a members' club formed for the purpose of sport or pleasure which, at the time it is being used, is used only for the sport or pleasure of members of that club or their immediate family; and for the use of which any charges levied are paid into club funds and applied for the general use of the club;

and no payments other than those mentioned above are made by or on behalf of users of the vessel, other than by the owner, and in this definition, 'immediate family' means, in relation to an individual, the husband or the wife of the individual, and a

brother, sister, ancestor or lineal descendant of that individual or that individual's husband or wife”.

23. The implication is that the focus should be on the use to which the vessel is put and whether or not money accrues to the person owning the vessel. If a vessel is chartered for use by the charterer for pleasure, the payment under the charterparty to the owner may mean that the owner is caught by the prohibition on carrying out an act of trade as his use of the vessel is commercial. Consequently, to avoid prosecution, the owner might need a licence although a charterer using the vessel purely for pleasure would not. This does not seem to be the mischief towards which this legislation was intended to be directed.

### *Penalties*

24. Section 5 of the 1951 Law refers to every infringement carrying a maximum fine of £100. This penalty still applies and has not been overtaken by the introduction of uniform scales of fines in the Bailiwick in 1989, because the transitional arrangements in the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989 applies to *inter alia* Laws “applicable in, and registered on the Records of, the Island of Guernsey”, which the 1951 Law is not (as it does not apply in Guernsey) and the Uniform Scale of Fines (Sark) Law, 1989 applies to a penalty provision of “a Law applicable only in Sark and registered on the Records of the Island of Guernsey” (the Alderney legislation is similar *mutatis mutandis*), and the 1951 Law is applicable in both Alderney and Sark. The 1989 Law seems to have overlooked the possibility of a Law applying in both Alderney and Sark, but not Guernsey.
25. By way of background, has the uniform scale of fines regime applied to the 1951 Law as a Sark-only Law, the £100 penalty would have been replaced by a fine up to level 2 on the Sark uniform scale (at that time £100 and, since a 2006 Ordinance, this has been replaced with £1,000). (The Sark uniform scale of fines is now in line with that applying Bailiwick-wide.) There is a case for recommending that steps be taken to bring this Sark (and Alderney) offence into the otherwise generally applicable uniform scale of fines regime.
26. There is nothing explicit about there being a higher maximum penalty for a second or subsequent offence. However, each act of trade is a separate offence attracting a separate penalty so, for example, off-loading passengers/cargo in Sark and collecting some for the return journey appears to constitute two separate offences, each attracting up to the maximum penalty. It would be legally possible to introduce a second or subsequent

offence penalty at a higher level than a first offence; there are numerous examples in other areas.

### *Appeals*

- 27 The 1951 Law lacks any explicit arrangements for appeals against licensing decisions by His Excellency. In practice, anyone with sufficient interest to challenge such a decision would currently have to institute proceedings for relief by way of a judicial review conducted through the appropriate Bailiwick courts.

### *Summary*

- 28 To summarise
- Non- exempt vessels must be licensed for acts of trade in Sark or Sark territorial waters
  - Acts of trade involve the embarkation or disembarkation of passengers or the loading or unloading of cargo AND
  - *Either* a payment made directly in respect of the carriage of people or goods involved, *or* the carriage involves an indirect commercial element (eg an indirect payment or other commercial obligation)
  - Exempt vessels are yachts and other small vessels being used exclusively for pleasure, and for which the owner(s) receives no reward; and fishing vessels not being used for non-fishing purposes
  - Every infringement carries a maximum fine of £100.00.

## ANNEX 3

### Objectives proposed in the Picot review

- The island's only transport link with the outside world is its shipping service and so this must provide certain minimum levels of both passenger and freight voyages in order for the island to survive as a viable and modern community. This minimum level of service which is **needed** should be clearly defined and distinguished from the level of service which might be **wanted** or only **nice to have**, although these levels of service would also benefit from being defined.
- The island needs and wants a certain level of freight transported to the island, which should be defined.
- The island needs and wants a regular winter passenger service to the island, which should be defined.
- The island needs and wants a certain level of tourist business transported to the island, which should be defined.
- On whatever basis of funding is proposed, the future shipping service must be financially viable in the long term.
- The financial strength of the shipping service must be sufficient to be able to withstand the troughs of economic cycles, the unpredictable potential effects of summer seasons which suffer bad weather, and the performance of the Guernsey tourist economy (which provides the bulk of the Sark tourist market).
- Freight charges should not be so high that the economy of the island is destabilised or becomes non-viable, this might involve some kind of subsidy, but there is necessarily a limit to the extent that tourist pricing can be used to provide such subsidies.
- The island can only cope with a certain volume of passengers and freight being discharged onto the quay at any one time and so ships of appropriate capacity should be used together with timetables with appropriate frequencies.
- The Sark harbours are of limited size and so ships used should be of appropriate specification (manoeuvrability etc) and restricted size so that they are not prone to cancellations in rough weather, unless the island is prepared to accept an increased level of cancellations, or enlarge its harbours. The acceptable level of cancellations should be considered and preferably specified explicitly.
- The island will want its required level of shipping service, once defined and agreed, to be provided consistently over a period of many years, with appropriate allowance made for changing requirements and changes in its operating environment (regulations etc) over time. This will require the shipping service to be financially stable in the long term.

## ANNEX 4

### Draft policy statement on the licensing of 12 and under vessels

1 The **purpose** of licensing the operators of 12 and under vessels between Guernsey and Sark is

- To supplement the main ‘over 12’ services between Guernsey and Sark without materially damaging their financial viability
- To give Sark residents a wider choice, albeit in all likelihood at higher prices, especially in emergencies and in bad weather
- To give visitors to, and residents of, the Bailiwick a wider range of choices for leisure activities incorporating a visit to Sark.

### Detail

2 Up to [8] licences for 12 and under services between Guernsey and Sark will be awarded in future. The total number of licences awarded will be kept under periodic review in the light of the demand for licences, and the pattern of usage that emerges; increases in the number awarded above 8 would be the subject of consultation with Chief Pleas.

3 All vessels licensed to an individual operator will be covered by a single operator’s licence (in particular, all vessels licensed to IOSS will appear on a single all-sizes licence).

4 Licences should normally be awarded on a multi-year basis, subject to review in the event of evidence of breaches of licence conditions or other safety/regulatory requirements, or in the event of non-usage of the licence;

5 Licences should be awarded in two categories:

- Two, and not more than three, licences should be awarded to operators for whom the carriage of passengers between Guernsey and Sark for reward is a principal purpose of their business, and who are prepared to commit to the provision of all season/all weather operations, using vessels with suitable characteristics to meet this undertaking safely and reliably [i.e. the present Ray Lowe/ Buz White type of operations]. The terms of this class of licences should not restrict the total number of passengers these operators are permitted to carry in any one day.
- Up to five, and not more than six, licences may be awarded to operators for whom embarkation and disembarkation of passengers on Sark is incidental to the main purposes of their business (eg angling, diving, marine observation). These operators should, as now, be

limited to embarking and disembarking no more than a total of 12 individuals in any one day.

6 No restrictions should be retained on the tariffs for voyages between Guernsey and Sark, whether per voyage or per head.