15 January 2007

# Channel Islands – Constitution of Sark

## JOINT OPINION

It is convenient for us to set out in this Opinion our conclusions about some of the important, and immediately relevant matters, raised with us: -

1. At its 4 October 2006 meeting Chief Pleas decided in favour of Proposition 2 (to have prepared for its consideration a draft *projet du loi* changing the composition of chief Pleas to accord with Option A). As explained below the decision was based on a fundamental mistake about the result of the opinion poll undertaken in September 2006.

2. At its 9 August 2006 meeting Chief Pleas had agreed that it would feel bound by the result of the poll (which it then authorised) if voter turnout exceeded 60% (as it did) and there was at least a 20% majority for one of the polled options. The voting was 44% for one option and 56% for the other (i.e. for Option A), giving Option A a 12% majority. Electoral Reform Services, who conducted the poll, reported this as a 1.27 **ratio**; we understand that this was represented to Chief Pleas at the 4 October 2006 meeting (treating it as a 27% majority) as achieving the minimum 20% majority for Option A, and Chief Pleas when

considering the matter appear to have understood that the minimum 20% majority had been achieved for Option A. But that was a mistake. The majority was only 12%. The decision to go ahead with preparations for Option A was based on a fundamental misunderstanding and, if our understanding is correct, what was a factual misrepresentation of the poll result.

3. It was also assumed – at the August and October meetings – that the Lord Chancellor would not advise the Queen to give Royal Assent to a *projet du loi* introducing a change in the membership of Chief Pleas which was not Option A; and that this was because the Lord Chancellor and his DCA had formed a view that only Option A would provide compliance with ECHR Protocol 1 Article 3. But in forming that view the Lord Chancellor and DCA were, in our considered and definite opinion, mistaken; and this constitutes another flaw undermining the decision at the October meeting.

4. The decision at the October meeting was that a draft *projet du loi* should be prepared for further consideration at a further meeting of Chief Pleas; and, because of the flaws referred to above, it cannot be right to regard Chief Pleas as already bound to proceed with Option A. There is no binding decision to that effect and nothing to stop any other Option being preferred.

5. The membership of Chief Pleas, historically comprising only tenants, has of course changed; and there is a feeling amongst all of the islanders that further change is appropriate. It also appears that there has been in Chief Pleas a strong impression that Sark is **required** to make a further change in the membership of Chief Pleas. In our opinion, however, there is no obligation requiring Sark or its Chief Pleas to make any such change. The Lord Chancellor's letter of 7 May 2006 to the Seigneur refers to

> "the level of criticism that is faced by **Sark** and UK for the apparent failure to resolve the fundamental criticisms that the constitution of Chief Pleas is in breach of ECHR".

The same letter says –

> "As Privy Counsellor with responsibility for the Channel Islands I would like to be able to demonstrate to the Privy Council that **Chief Pleas** is doing everything that it can to meet the December target and to give Sark the ECHR compliant reform which is must have. **It is the UK** which is vulnerable to an ECHR challenge".

6. Sark is not, and the Bailiwick of Guernsey (which includes Sark) is not, part of the UK. The UK government is not the government of Sark (or of Guernsey). The Queen is the sovereign of Sark but not as part of the sovereignty of the United Kingdom. The UK Government committed **itself** to the ECHR Treaty obligations and has, in its assumed role of representing Sark in its international relations, committed **itself** on Sark's behalf. Chief Pleas has, over the years, consented to the incorporation of ECHR treaty obligations into the

law of Sark, but it is the UK Government **and not Sark** that is a High Contracting Party with the consequent treaty obligations.

7. Sark – Chief Pleas for Sark – might therefore, **without breach of any obligation binding on it**, refuse to make any change in the membership of Chief Pleas as "required" by the Lord Chancellor and DCA, and might, for example, insist that any change which it will contemplate is in the form of a variant of Option C, probably Option D, representing a continuation of the constitutional development which produced the present combination of Tenants and Residents in the membership of Chief Pleas. What would be the consequences, or the probable reaction of the Lord Chancellor, if Chief Pleas were to adopt that position?

8. Our first observation is that we would expect the Lord Chancellor to treat that situation as requiring reconsideration of his established attitude; and, in that reconsideration, we would expect him to be persuaded that Option A is not the only ECHR-compliant Option; that for the special circumstances of Sark Option D is ECHR-compliant; and that accepting Option D is therefore acceptable and much better than a continuing impasse and "political" friction. We ask those instructing us to note that both Option C and Option D can properly be considered to be "universal suffrage" in the sense that everyone who has the right to vote has the ability to vote for all of the candidates.

9. In our opinion, for much the same reasons as those expressed by Nigel Pleming QC (in his opinion of 9 June 2006), the special circumstances of Sark provide good reasons to retain the inclusion of Tenants in the membership of Chief Pleas so that Option C – or, as we prefer, Option D with residents as the majority of its members – will be ECHR-compliant. These special circumstances can be summarised as follows: -

(1) For over 3 centuries, Tenants, as members of Chief Pleas, have been closely and continuously involved in the government of, and law-making for, Sark under the Royal Charter of 1565 and Letters Patent of 1611.

(2) As independent members of Chief Pleas, elected by all the voters but specifically required to be Tenants, the Tenant members of Chief Pleas can provide a bulwark against any one group, employer or company being able to achieve effective control of Chief Pleas.

(3) Tenants are long term residents of the island, closely concerned with and involved in the administration and government of the island and contributing more of their time and energy than other islanders who work outside the island. Tenants carry out a wide variety of work for the

island, much of it voluntary, in the absence of a paid civil service.

(4) Their experience, as Tenants, in the running of the island, when new laws are being considered in Chief Pleas is of special value. So too is their political awareness and long familiarity with the working of Sark government. Their accumulated knowledge and experience of the running of Sark and of its history and their informed reaction to, or sponsorship of, proposals for change are of special value when any proposals for change are under consideration. Residents voting for, or sitting as, members of Chief Pleas may be more influenced by short-term or temporary considerations than Tenants.

(5) Tenants, as members of Chief Pleas, can function, in the unicameral Chief Pleas, as providing a sort of equivalent for the revising or tempering opinion which is provided in the UK by the House of Lords; but the population of the island is too small to make it practical to have, and incur the cost of running, a second chamber.

(6) The Tenants have played, and will continue to play, a vitally important part in the evolutionary development of

Sark; its political and constitutional development as well as its economic development in the modern world.

10. In the situation canvassed in paragraph 7 above, we do not consider it likely that the Lord Chancellor will be advised that the UK government has legal authority or constitutional power without the consent of Chief Pleas, to impose upon Sark constitutional change involving an Option A reform of the membership of Chief Pleas. The formal arrangement of such imposition would require inventiveness. An Act of the UK Parliament would not be suitable; because Sark is not part of the UK. An Order in Council could not logically be by statutory instrument authorised by an Act of the UK Parliament. An Order in Council made in the name and on behalf of the Queen as Sovereign of Sark would be an antique curiosity and itself a curiously inconsistent mechanism for imposing supposedly ECHR-compliant constitutional change: inconsistent because the Council involved does not include a representative of Sark and in practice is not convened with any Counsellor(s) in attendance except the Lord Chancellor.

11. Interestingly, a challenge to the electoral qualification for voters in New Caledonia, a French colony, was challenged in the European Court of Human Rights in 2005 (see *Py v France (Application No. 66289/01, final Judgment delivered 6 June 2005).* In that case it was held that the particular electoral qualification (requiring 10 years' residence) was justified and was not disproportionate in the

circumstances where the residence requirement had been a key factor in appeasing previous conflict. There were 'local requirements' warranting the restriction and therefore no violation of Py's rights by barring him from voting in the referendum on self-determination, as he did not satisfy the special residence requirement established for the referendum. His not being qualified to vote in the referendum was not a breach of his rights under the ECHR.

12. The appropriate Court procedure to challenge

* either the Lord Chancellor's refusal to advise the Queen to give Royal Assent to, for example, Option D,

* or the Lord Chancellor's view that only Option A will provide ECHR-compliant reform of the membership of the Chief Pleas,

is, in our opinion, by judicial review in proceedings in London. There is, of course, some risk that the challenge might be unsuccessful; but, as our considered and definite opinion is that in the special circumstances of Sark Option D clearly provides compliance and Option A is not the only ECHR-compliant choice, our assessment is that the challenge ought to, and would, succeed.

13. The Lord Chancellor might perhaps adopt the view that, even if other Options are, or can be regarded as, ECHR-compliant, he will only

support Option A and Royal Assent will therefore be available only for Option A. If so, and if that view is clearly and firmly asserted, our opinion is that in a judicial review it ought to be, and would be, declared that this view as adopted by the Lord Chancellor cannot properly frustrate the legislative preference of Chief Pleas (and Sark) for Option D. The Lord Chancellor, like the UK government of which he is a member, is not part of the government of Sark and in such circumstances his declared political partisanship for Option A cannot provide a rational basis for refusing to advise Royal Assent for Option D.

14. If the Lord Chancellor were to carry his partisanship as far as securing an Act of the UK Parliament or an Order in Council to impose Option A, how would the Sark opponents of this mount a legal challenge and in what forum? In an earlier Opinion leading counsel referred to the possibility of petitioning the Privy Council. But Sark opponents would not want to appear to be providing any sort of recognition or acceptance that the Privy Council has any legislative role or function over Sark, particularly as in relation to the Queen's authority over Sark the only Privy Counsellor who in practice exercises any advisory function is the Lord Chancellor (with assistance from his UK Government department, the DCA). It therefore now appears to us that the challenge to any such Act of Parliament or Order in Council would appropriately be in Sark: by proceedings in the Court of the Seneschal claiming that the particular Act (or Order in Council) is not

part of the law of Sark. Appeal would be to the Royal Court in Guernsey with a possible further appeal to the Queen in Council (i.e. to the Judicial Committee of the Privy Council).

15. The dual position of Seneschal, as head of the judiciary and chairman of the Chief Pleas, is itself, in our opinion, unlikely to survive a challenge under the principles established by the European Court of Human Rights. The Lord Chancellor's own position in the UK has, in recent years, been the subject of considerable debate and as a result the UK Government has made significant changes to that position. In essence, the argument is that a person with power in the legislature or executive branches of the Government should not at the same time be an active member of the Judiciary. There are respectable arguments that can be put to defend the status quo, but in our opinion, the Lord Chancellor is unlikely to accede to those arguments in the light of his acceptance that his own position, as speaker in the House of Lords and head of the judiciary is untenable and has accepted reform that removes from him both of these roles, leaving him solely as a party politician. It may be appropriate for any reform of Chief Pleas to include a requirement that the members of Chief Pleas elect a speaker or chairman from amongst their number and for the judicial role to be separated from the role of speaker or chairman of Chief Pleas.

16. Faced with a legislative initiative from Westminster as canvassed in paragraph 14 above, Sark might expect a sympathetic reaction from

Guernsey and Jersey where the independence or near-independence of each of the Channel Islands is greatly prized as part of a special constitutional birthright which is to be jealously guarded against attack and erosion.

17. We add that in a written answer (see HL Official Report 3rd May 2000, Col 180WA) to a question raised by Lady Strange in the House of Lords on the circumstances in which the UK Government might intervene in Dependencies, Lord Bach maintained that "the Crown" was responsible for good government in those Crown Dependencies and that if there was a 'grave breakdown or failure in the administration of justice or civil order', then "the Crown" could use its "residual prerogative powers" to intervene in the internal affairs of the Dependencies. Were Chief Pleas to reject Option A, could it be properly be claimed that there had been a 'grave breakdown or failure in the administration of justice or civil order'? Our answer is, "No".

18. The legislative process in Sark is somewhat surprising and merits debate with a view to change. At present, after a proposed change in the law has been approved by Chief Pleas, a *projet du loi* is drawn up by the Attorney General's office in Guernsey. It is submitted to the DCA in the UK. The DCA then submit it to the Privy Council which submits it for Royal Assent. At each stage of this process, reports and opinions are expressed by the body making the submission. No representative from Sark is a party to the reports and opinions. The

committee of the Privy Council that considers the matters on behalf of the Council is formed by the Lord Chancellor, his representative in the House of Commons, currently Harriet Harman MP, and the Lord President of the Council. Startlingly, the reports and opinions expressed at each stage of the process have no input from Sark and are not put before the Chief Pleas for them to consider.

19. We have already set out that Sark is not a part of the UK; we believe that the DCA has no constitutional position or power in respect of Sark. In addition, while Sark has permitted and continues to permit the Bailiwick of Guernsey to legislate in the area of criminal law, Chief Pleas has retained for itself the power and right to legislate in the area of civil law. As a result, our view is that where the *projet du loi* concerns civil law, the Bailiwick of Guernsey is properly regarded as having no constitutional power in respect of Sark.

20. In our considered opinion, the position of the UK's Lord Chancellor in relation to Sark is that of a member of the Queen's Privy Council; and not as Lord Chancellor of England or as a member of the UK Government. On that basis his letter of 7 May 2006 to the Seigneur (document 13 with our instructions) was, in our considered opinion, inappropriate. Its inappropriateness is highlighted by the sentence quoted in paragraph 5 of this opinion:

"It is <u>the UK</u> which is vulnerable to an ECHR challenge"

The letter is saying, in effect, that the UK Government has made a treaty commitment and is vulnerable to challenge for what the Lord Chancellor and his DCA regards as failure to meet that commitment in respect of Sark and the membership of Chief Pleas. Since Chief Pleas selected Option C the Lord Chancellor has been pressing for Sark to help him – and the UK Government – to avoid failure to meet the UK Government's treaty commitment. There is an obvious conflict between what the Lord Chancellor wants done in order to protect the UK Government and any tendency by Sark (Chief Pleas) to refuse co-operation. His advocacy of Option A, and only Option A, is for UK Government advantage (or avoidance of disadvantage) and not for the advantage or interest of Sark. If there were to be an impasse, with the Lord Chancellor refusing to advise Royal Assent for an Option – Option D – acceptable to, and chosen by, Chief Pleas (and, we say, ECHR-compliant, notwithstanding DCA's apparent view to the contrary) this conflict of interest would feature in the judicial review process of the Lord Chancellor's decision to support Royal Assent only for Option A.

21. We are invited to consider whether any, and what, arrangements might be made in an attempt to entrench the rights of Tenants to have as members of Chief Pleas, deputies who, though elected by the whole electorate, must be Tenants. A *projet du loi* to give legislative effect to, for example, Option D could include an express "constitutionally entrenching" provision to the effect that any subsequent variation of

Chief Pleas membership and in particular a variation which reduced the proportion of elected members who must be Tenants or the rights, power and qualifications of individuals who are properly described as Tenants shall not be part of the laws of Sark unless, before or within 3 months of the vote in Chief Pleas to make that variation, it receives the support of an independently conducted poll of Sark electors and in that poll at least 75% of qualified voters cast their vote and at least 75% of those who cast their vote support the variation.

22. We comment that the removal of Tenants as members of Chief Pleas, as under Option A, leaving every qualified resident with one vote for a single category of deputies would not necessarily achieve in the small island of Sark, with its (relatively) tiny population and tiny number of electors, the advantages reasonably expected from such a "democratic" arrangement. For example, a group of residents might engineer the election of a sufficient number of Chief Pleas members to enable that body to pass laws of apparent but temporary economic advantage (for example, in relation to the management or conduct of investment sales or management). The specific element of Tenants in the membership of Chief Pleas ensures – or, at least, provides the basis for hope – that the long-term interest of the island is not left out of account. We add that, with a single category of elected members in Chief Pleas and (as in Option A) none required to be Tenants, there could soon be pressure for payment of members and for government of Sark to become more expensive than hitherto. If so, the modern

prosperity of the island and its attraction for internationally operating investment and financial business could easily be impaired.

23. In the very special circumstances of Sark we are inclined to favour the view that changes in the operating political and constitutional arrangements should not be made without compelling cause, but some attention may be needed to govern: -

(1) what is the quorum of Chief Pleas;

There may be members, whether Tenants or more probably just residents, whose work is largely outside the island. Presumably the quorum for business should under Option D require the presence of a specified number of Tenants and a specified number of Deputies who are not Tenants.

(2) qualification for voting in elections to Chief Pleas;

We would not be surprised if a longer minimum period of residence (now one year) were thought appropriate as qualification for voters.

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