

JERSEY / JUDGMENT

Bretagne Angleterre Irlande SA v Minister for Sustainable Economic Development

[2024] JRC 292 (24 December 2024)

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judgment

the COMMISSIONER:

Introduction

1. This is an application by Bretagne Angleterre Irlande SA whom I shall refer to as Brittany Ferries for permission to bring judicial review proceedings against the Minister for Sustainable and Economic Development, whom I shall refer to as the Minister. Brittany Ferries is the 51% shareholder in Condor Ferries Limited ("Condor Ferries"), Condor Ferries has the benefit of the current contract which expires on 25 March 2025. 2. The application arises out of the decision of the Minister to grant another ferry company a long-term contract for the provision of ferry services between Jersey, the United Kingdom and France. The contract was awarded to another operator referred to as DFDS A/S, a Danish company ("DFDS"). Advocate Williams appeared for DFDS and was permitted to observe the application by Brittany Ferries although at this stage any issues were between Brittany Ferries and the Minister. Background and relevant chronology 3. The general background leading to the award of a contract in favour of DFDS has been reported in the public domain. Nevertheless, it is appropriate to summarise the material events for the purposes of this application. I wish to stress that this is by way of summary only relevant to the application for leave. The full sequence of events is more complex and at this stage the material before the Court only represents information in the possession of Brittany Ferries. It is inevitable that in the context of the granting of a contract as significant as this one that there will be material in the possession of the Minister to which Brittany Ferries were not privy. In making this observation, I am not expressing any criticism of the Minister. 4. The process by which a ferry contract came to be awarded began with a joint procurement process between Jersey and Guernsey. I refer to this as the Channel Island Procurement Process. The Channel Island Procurement Process ran between May and October 2024. Detailed invitation to tender were sent out which led to tenders being submitted and invitations to negotiate. 5. The detail of the invitation to tender process was set out in the affidavit of Christophe

Mathieu sworn on 18 December 2024, filed in support of the application for leave to bring judicial review proceedings. I have read that affidavit and a number of the exhibits to which it refers. 6. On 13 August 2024, Brittany Ferries received an amendment to the procurement process. Paragraph 32 of the affidavit of M. Mathieu describes the event in this way: "32 On 13 August 2024 BAI received notice of amendment to the Procurement [284-288] ("the Notice of Amendment"). The Notice of Amendment indicated that the three initial tenders had not been deemed suitable for award at that initial stage. The Notice of Amendment also provided that the States were amending the Procurement to dispense with the requirement that Bidders must pass the Selection Questionnaire and meet Minimum Score Thresholds and Mandatory Requirements to be shortlisted for negotiation (all as defined). Final tenders would still be evaluated against the minimum requirements and award criteria set out in the ITT." 7. Returning to events in chronological order, Brittany Ferries was invited to negotiate by a letter dated 15 August 2024. One of the issues M. Mathieu emphasised was that Brittany Ferries made it clear during the meetings that its bid structure was that Brittany Ferries was the bidder, Condor Ferries was the proposed operator and Brittany Ferries would provide a full parent company guarantee. 8. Brittany Ferries submitted its final tender on 1 October 2024. 9. At this stage, DFDS and Irish Ferries were still involved but at some point after, unknown to Brittany Ferries, only DFDS and Brittany Ferries remained in the procurement at the point of final evaluation. 10. Next in the sequence of events relevant to the present application is the resignation of Mr Corrigan from having any involvement in the procurement process. 11. M. Mathieu's concerns were set out at paragraph 36 of his affidavit as follows: "36 I pause here to explain that from the outset of the Procurement the Senior Reporting Officer ("SRO") for Jersey was Mr Richard Corrigan, Chief Officer of the Department for the Economy for Jersey, forming part of the senior management team [321-324]. In his role as SRO, Mr Corrigan was responsible for conducting the Procurement from Jersey's perspective. For example, he led the Jersey team during the negotiation meetings held in September 2024 (described in paragraph 33 above). However, during the period after bid submission but before the outcome had been communicated to BAI, it came to my attention (through my membership of the Condor Facebook Users Group) that Mr Corrigan had participated in a poll conducted within that Group in which respondents were asked: "Who do I want to be awarded the Ferry Contract?" Mr Corrigan had responded and had selected DFDS. This was concerning to me as Mr Corrigan was deeply involved in the Procurement and along with his subordinates, was to be responsible for making recommendations for the award decision to ministers in Jersey. Indeed, such was Mr Corrigan's critical importance in Jersey's ferry tender process, that the Respondent described the loss of Mr Corrigan as "[having] my team decapitated" in witness evidence provided subsequently to the States' Economic and International Affairs Scrutiny Panel on 19 November 2024 [333]. I do not know when Mr Corrigan voted in the poll nor what stage the Procurement had reached when he did so." 12. Mr Corrigan, by an email dated 22 October 2024, recused himself from any further involvement in the procurement process. Notwithstanding that Mr Corrigan ceased to have any involvement in the awarding of any contract after 22 October, M. Mathieu was concerned about Mr Corrigan's views more

generally as set out at paragraph 37 and 38 of M. Mathieu's affidavit. 13. The final evaluation took place. While Brittany Ferries have not seen the records of that evaluation process, M. Mathieu receiving a letter from Mr Steve Wakelin of Strategy and Policy Officer of Guernsey on 8 November 2024 which explained that the evaluation process took place as follows. 14. M. Mathieu's affidavit summarised the information he had received as follows: "39.1 Scoring and evaluation was undertaken by an evaluation panel comprised of five officers from each island; 39.2 Officers scored their allocated tender sections independently then attended a structured moderation facilitated by procurement officers and supported by external consultants in order to present scores, rationales and discuss areas of difference; 39.3 Scoring and evaluation was concluded and closed on 17 October 2024 with no provision in the ITT for further evaluation or rescoring after that point; 39.4 At the point of closure of the evaluation one bidder had obtained an overall score of "fail" under one of the areas of evaluation. Given subsequent reports (see paragraph 41 below) it is evident that bidder was DFDS." 15. On 30 October 2024, Brittany Ferries was identified as the winning tenderer by Guernsey. The press release issued by the Government of Guernsey on 19 November 2024 stated that " Brittany Ferries' bid was very strong and passed all requirements under the tender including financial ". 16. M. Mathieu as set out in his affidavit at paragraph 42 believed by reference to media reports that the reason for DFDS being marked with a fail was. - "42 While I do not know the reasons for DFDS's exclusion from the process, I note that exclusion against the legal criterion is justified where, amongst other things, the bidder has provided for a "significantly worse contractual position and risk transfer for the States than that currently specified within the Draft Concession Agreement". In that situation a score against legal response requirements of 1 is justified which would lead to a score of "Fail" against that criterion and disqualification (paragraph 36.1 ITT). The transcript of the Economic and International Affairs Scrutiny panel meeting held on 19 November 2024 [325-361] on page 13 records Deputy Morel as stating, "both sides marked them down and eliminated them on the legal side". From context I understand "both sides" to refer to Guernsey and Jersey and "them" to refer to DFDS." 17. On 30 October 2024, M. Mathieu was emailed asking him to attend a meeting with the Chief Minister of Jersey and the Minister (Deputy Morel). The agenda of that meeting set out a number of questions that the Government of Jersey wished to put to Brittany Ferries. The detail of this is set out in M. Mathieu's affidavit at paragraphs 48 to 50. 18. On 1 November 2024, M. Mathieu received an email from Mrs Tracy Maurant, private secretary to the Chief Minister, which asked the following question: "Will Brittany Ferries (parent company) be the counterparty signing the agreement rather than entering into an 'Agreement through its subsidiary, Condor Ferries' as per your email of this morning? YES or NO? "Will Brittany Ferries (parent company) provide an explicit financial guarantee of all liabilities of the Operating Company? YES or NO?" 19. M. Mathieu's replies were as follows: "Will Brittany Ferries (parent company) be the counterparty signing the agreement rather than entering into an 'Agreement through its subsidiary, Condor Ferries' as per your email of this morning? YES or NO? No - BAI (Topco) will not be signing the Concession Agreement as it is not the Operator. But Yes - BAI (Topco) will be signing the parent company guarantee as provided for in the draft concession

agreement so it is on the hook to the Islands for all of the liabilities and obligations of the Operator as if it were the Operator. From a contractual perspective, there is no difference to the Islands as it has fully recourse to BF for any issues arising under the Concession Agreement and we fully expect that if any issues arise with the provision of the service that these will be taken up by the Islands with Brittany Ferries. Will Brittany Ferries (parent company) provide an explicit financial guarantee of all liabilities of the Operating Company? YES or NO? Yes - in signing the parent company guarantee, BAI (Topco) will be guaranteeing all the liabilities (including financial liabilities) of the Operator to the Channel Islands. It is meaningless to ask BAI to give a financial guarantee to the Islands of the Operator's liabilities to third parties such as the Operator's lenders as those liabilities are not owed to the Islands so any such guarantee would have no liabilities to attach to. But, in guaranteeing the entire performance of the Concession Agreement to the Islands, BAI (Topco) is explicitly acknowledging that it will need to resolve any issues at Operator level that impede the provision of the service, and this would include any issues triggered by the financing or the lenders. We have proposed the comfort letter to give further support to this overarching position." 20. On 7 November, M. Mathieu received a letter from Mr Andrew Scate ("Mr Scate") who was now the Senior Responsible Officer for the joint procurement process in place of Mr Corrigan. This followed a call the previous day. The letter stated: "I write to confirm our conversation yesterday in which I advised that the Minister was minded to formally terminate the joint procurement process. The decision to formally terminate was reached following the States of Guernsey decision to appoint a preferred bidder prior to material issues of clarification (on the part of Jersey) being resolved. Whilst the Minister has concluded that there is no tender that is capable of meeting our requirements to accept, he is committed to the conduct of an expedited procedure for a "Jersey- only" solution, and wishes bidders to actively participate in this. As stated in Paragraph 3.2 and Paragraph 10.5 of the Invitation to Tender, the Government of Jersey is entitled to abandon or cancel the procurement process at any stage, and to procure the services by alternative means. We will shortly commence the new process for a "Jersey-only" solution for the Ferry Services Operator. We will publish the indicative timetable and associated procurement documents (including service requirements) as soon as reasonably possible. We will contact you in due course to confirm where further information can be obtained about the new procurement process." 21. M. Mathieu sought information about the process that had been undertaken. Mr Scate responded on 8 November with the following: "[W]e will not enter discussions regarding the joint procurement process that has been formally terminated pursuant to paragraphs 3.2 and 10.5 of the ITT as stated in our letter of 7 November 2024, ensuing that the new procedure for a "Jersey-only" solution is not compromised or contaminated. As advised, the Minister has concluded that there is no tender (in current form) to accept that can meet our requirements. The Minister remains committed to the conduct of a new procedure for a "Jersey-only" solution." 22. On 11 November, M. Mathieu wrote to the Chief Minister. That letter raised the following concerns summarised at paragraph 59 of M. Mathieu's affidavit: "59.1 raised my concerns about the lack of openness and transparency as shown by the response of Jersey to my letter of 7 November 2024 compared to the

transparent approach taken by Guernsey; 59.2 raised concerns that the behaviour of former Jersey SRO Richard Corrigan and Deputy Kirsten Morel indicated bias against BAI; 59.3 explained that I could not understand how or why financial integrity of the BAI/Condor solution was being questioned given that BAI would provide a full parent company guarantee under the concession agreement; 59.4 explained that Condor would not be able to accept the proposed 7 month contract extension; 59.5 explained that BAI/Condor did not intend to participate in the process described as a being for a "Jersey-only" solution given our lack of confidence in the integrity and impartiality of Deputy Morel; ..." 23. On 11 November 2024, the Chief Minister wrote to M. Mathieu and stated the reasons for the refusal to answer the questions contained in M. Mathieu's letter of 7 November was that " We remain in a process with DFDS and we must be fair and equitable to all parties ". 24. On 13 November 2024, the Minister made a statement to the States of Jersey. 25. Brittany Ferries rely on that statement in support of its case which I address in more detail later, complaining about a lack of procedural fairness and alleging apparent bias or a pre-determination of the awarding of the contract in favour of DFDS. 26. On 13 November 2024, Brittany Ferries were invited to reconsider its indication that it would not participate in a Jersey only procurement process. 27. This was described in M. Mathieu's affidavit as an IPNP. He explained in paragraph 64 that the process would work in the following way: "64 The IPNP stated that tender responses showing tracked changes from the responses already submitted, would be required to be submitted by Thursday 20 November 2024, the evaluation and award decision would be made on Friday 21 November 2024 and the result would be communicated the following week." 28. A further meeting took place between Brittany Ferries, the Chief Minister and the Minister on 15 November 2024. M. Mathieu recalled in relation to that meeting: "I also recall that Deputy Morel informed us that BAI was second best in the Procurement and that BAI had failed the financial criterion however this was not explained to us in detail nor were documents shown to us that explained it. I could not understand this as I believed we had passed the financial criterion. Deputy Morel also stated that he did not believe in the BAI business plan." 29. On 18 November 2024, BAI sent a letter confirming its intention to participate in the new tender process while reserving all its rights. 30. On 19 November 2024, M. Jean-Marc Roué sent a letter to the Chief Minister explaining that Brittany Ferries would participate but putting on record M. Roué's concerns about the process to that point. 31. A further meeting took place on 22 November 2024 where Mr Scate explained that KPMG would evaluate the bid

submissions.

The Government of Jersey also wanted a Jersey only bid. M. Mathieu had described this as an impossible exercise to prepare a Jersey only schedule because that ignored that Brittany Ferries needed to serve Guernsey with essentially the same ships and to reflect the timetables for Guernsey (see paragraph 71 of his affidavit). 32. On 22 November 2024, Jersey issued a request for proposal. That request for proposal was described by M. Mathieu as being essentially as identical to the invitation to tender issued for the Channel Island Procurement Process. The material

change to which he referred was described at paragraph 75 as follows: "75 The legal criterion was identical between the RFP and earlier documents and the scoring table used to mark the legal criterion (found at pages 66-67 of the RFP) was also identical. However the wording relating to the consequences of a score of 0 or 1 (found at paragraph 35.1 of page 67) was changed." 33. He then continued at paragraph 76 and 77 as follows: "76 Under the rules of the ITT a score of 0 or 1 against the legal criterion would lead to mandatory disqualification. However, the rules of the RFP stated: "If a Bidder receives a score of 0 or 1 it will be classified as a technical fail [of] the evaluation of the Legal Response. Bidders may include mechanism to ensure the financial sustainability of the agreement." 77 I have set out above my understanding that the cause of DFDS's exclusion was that it had failed the legal criterion. The effect of the change in the competition rules would be that DFDS could put in a bid with the exact same stipulations that it had done previously but not be excluded." 34. Brittany Ferries submitted its final tender on 27 November 2024. In the final tender, Brittany Ferries proposed itself as the bidder and operator with Condor Ferries discharging the obligations of operator by way of subcontract. 35. On 3 December, Mr Scate telephoned M. Mathieu to tell him that Brittany Ferries had not been successful and that DFDS was to be awarded the concession agreement. Brittany Ferries complained that no reasons were given for that decision. By letter dated 4 December 2024, this position was confirmed in writing. 36. Brittany Ferries then retained external legal advisers who, on 11 December 2024, sought to understand the reasons for the contract decision and the reasons for the decision of the Minister not to proceed with an award of contract under the Channel Island Procurement Process. 37. On 16 December 2024, Mr Scate replied to Advocate Passmore of Ogier which provided the scores and reasons set out in an Excel spreadsheet. This was summarised as follows: "Evaluation and scoring process for the 2 final bids - BAI and DFDS

25. A comprehensive scoring matrix has been used to objectively assess and give value to the key criteria across each of the bids. These elements have been evaluated and overseen by KPMG along with Gol Technical advisers.
26. An executive summary of each of the bids is attached as Appendix A, and B respectively.
27. The full scoring matrix forms Appendix C of this document. Summary consensus scores for both bidders are contained in the table below.
28. DFDS scored 74% out of 100, and BAI were marked at 55% out of 100." 38. Mr Scate provided a brief synopsis of the difference between the bids. This was the same synopsis that was provide to the Minister as follows: "Brief synopsis of the difference between the bids 29. The DFDS bid provides for services to be delivered direct from the UK/Jersey/France; whereas the BAI bid serves Jersey by way of also stopping in Guernsey for many of its services.
30. The DFDS bid is considered fully compliant with the fleet investment plan/modernisation requirements, whereas the BAI bid includes vessels which fall outside of the useful economic life requirement during the life of, and at the end of the contract term

31. DFDS replace vessels earlier than the BAI bid, with BAI retaining older vessels longer during the term of the agreement
32. The BAI bid scored more highly in terms of customer experience and customer care plan
33. DFDS scored more highly in environmental issues and stakeholder engagement
34. In terms of the commercial assessment, BAI failed in relation to passenger and vehicle pricing cap, core revenue and pricing strategy, and the investment plan. The pricing fails were predominantly linked to the freight pricing proposals, where BAI continued to propose a tiered (volume and days of week) pricing structure. In comparison, DFDS passed all of these elements.
35. In terms of the financial assessment, BAI failed on funding and financing, financial stress testing and performance bond." 39. In relation to the reasons for the abandonment of the Channel Island Procurement Process, the reply referred to letters dated 7 November 2024 from Mr Scate, 13 November 2024 from the Chief Minister and a letter dated 21 November 2024 from the Chief Minister to M. Roué. 40. The reply also noted that paragraphs 3.2 and 10.5 of the invitation to tender gave the Government or Minister the right to modify, alter or withdraw completely from the procurement process at any time. 41. Finally, the note concluded as follows: "In summary, BAI/Condor came second by a very considerable margin in a fairly conducted bidding process. All key decisions in both RFP processes have had the oversight of or were made by the democratically accountable Council of Ministers (in particular, the decision to abandon the joint RFP and the decision to confer preferred bidder status on DFDS). The Jersey-only RFP made extensive use of external evaluators (KPMG) to ensure that the scoring was fair and independent." 42. The next document it is appropriate to refer to is a reply from Advocate O'Connell to Advocate Passmore dated 18 December 2024, which contained the following statements: "In the meantime, I am instructed to confirm that the Minister, while reserving all of his rights generally, will disclose all materials which are relevant to the process in which your client participated when bidding for the contract in the recent second tender process. By voluntarily agreeing to disclose such materials the Minister is acting demonstrably fairly and reasonably and in a candid and transparent manner, The materials thus disclosed will reveal that the process was conducted properly and fairly. There was a clear winner based on the scoring system. The result was not remotely close. When your client has carefully evaluated the relevant materials it will see that there are no proper bases to sustain any legal challenge to the decision that was taken." 43. In relation to the request for documents about the Channel Island Procurement Process, Advocate O'Connell's position was as follows:- "With respect, this request constitutes nothing less than a fishing expedition and is at sharp odds with the treatment of any other unsuccessful bidder in the history of procurement across the Government of Jersey. Specifically, any requests in relation to evaluation reports for the First Competition (which was withdrawn/abandoned) have no relevance to these threatened proceedings. The Minister was under no obligation to make an award (pursuant to the terms of the Invitation to Tender previously circulated), and no award was made. In addition, and importantly, your

client agreed to engage in the Second Competition process and cannot now complain about any alleged (but denied) deficiencies in the first one." 44. The evening before the hearing, Mr Scate for the Minister, filed an affidavit in opposition to the application for leave. This affidavit contained the following paragraphs. 45. In relation to the amendment of the Channel Island Procurement Process which Mr Scate had defined as the First Procurement Process. He stated the following at paragraphs 3.2 and 3.3: "3.2 From around early October 2024, Mr Wakelin had indicated that they would be going ahead with their preferred bidder, Brittany Ferries. 3.3 I met with the GoJ Council of Ministers three times during the week of 28 October 2024 to provide an update and obtain some political direction on our position and our approach. We discussed all options, including going ahead and agreeing with SoG's decision, however, they confirmed that were also concerned with the commercial and financial position of Condor Ferries which was inextricably linked to the Brittany Ferries bid. The position between SoG and GoJ was different in that regard, as shown in the investment plan scoring which had an 8 out of 10 from the SoG, which was significantly different to the 4 out of 10 that GoJ had provided." 46. Paragraph 3.5 of his affidavit states as follows: "3.5 GoJ made attempts to try to resolve the position with both bidders and went back to both companies for clarification. Both companies were invited to an online individual meeting with the Chief Minister, the Economic Development Minister and the senior team of government to try and resolve the issues with their bids. We sought to clarify these issues with them online and they responded in writing. We also met with the Brittany Ferries chief executive and executive team during the following week to talk about our concerns and to seek clarification on their position." 47. This appears to be a reference to the matters set out at paragraphs 47 to 52 of M. Mathieu's affidavit set out above. 48. Paragraph 3.7 and 3.8 stated as follows: "3.7 On the same day, the Council of Ministers met and discussed the position to be taken by the GoJ. Views were canvassed during the meeting from Ministers and Assistant Ministers present, and there was agreement in favour of GoJ abandoning the procurement process and commencing a procurement of a Jersey only service. 3.8 The Council of Ministers did not agree to name Brittany Ferries as the preferred bidder, in line with Guernsey, due to the fundamental points referred to above. As Guernsey had already made a unilateral declaration, and there were outstanding issues with both bidders, the procurement process was abandoned and GoJ decided to enter the procurement process for Jersey only services." 49. Mr Scate, at paragraph 3.12, confirmed that the decision to commence the Jersey only procurement process was communicated on 7 November. At the same time, Brittany Ferries had been asked to extend the current operating agreement by several months but this was refused. 50. In Section 4 of his affidavit, Mr Scate set out the new procurement process. At paragraph 4.4, Mr Scate stated the following: "We had said to both companies that we would expect them to be very efficient in the use of their documentation. They had both participated in the first procurement process and we did not expect them to completely start afresh. Instead, we would accept documents with changes for those documents that were still relevant from the first round." 51. Section 7 of Mr Scate's report referred to the evaluation and scoring matrix summary. His affidavit exhibited this summary and summarised the different criteria looked at. 52. He also

explained that the procurement documentation showed clearly how which elements were scored and the respective marks awarded to the various elements. 53. Paragraphs 7.5 and 7.6 set out who the evaluators were. 54. In relation to the legal response to the documents, this was addressed at paragraph 7.9 as follows: "7.9 The legal response to the documents was also assessed. The key test was whether the parties were proposing fundamental changes to the contract and Operating Agreement. This in itself was evaluated and scored. This might mean that a party which submitted no changes would get 5 out of 5 (i.e. 5%) but a party that made lots of changes would get 0%. That assessment was undertaken by myself, supported by Matt Thomas from Ports of Jersey and by Phil Ashley, who was our Head of Investment appraisal. The Law Officers department considered our conclusions. Both companies were equally marked on this element. They were both suggesting changes to the Operating Agreement which then warranted further discussion. So both companies scored a 2% score rather than a 5% score for that because both companies were suggesting changes to the contract. I wouldn't expect any company to score a full 5% on this element, and most companies would suggest changes to any contract offered." 55. Under the Jersey Procurement Process, the moderation process involved moderators external to the Government in the form of KPMG, as well as moderators from the Government of Jersey or the Ports of Jersey. 56. The conclusion of Mr Scate started at paragraphs 7.11 to 7.13 as follows: "7.11 The evaluation process demonstrated that both companies (Brittany Ferries and DFDS) were competent to run ferry services. They met most of the criteria in that regard. The big difference between the two companies was the fleet modernisation sub-plan. The bid from DFDS proposed 3 new vessels and it also proposed the fact that we would not have, at the end of the contract, ageing vessels. This was a key point of failure for Brittany Ferries because their bid did retain older vessels at the end of the contract, and the disagreed with our position on vessel life. 7.12 It is important to highlight that we have been currently left in a situation with the current contract of having old ferries operating in our waters for too long. This is significant because old ferries result in delays, maintenance issues, outages etc. As an island we do not want to have old ferries running in our waters without a degree of useful economic life to them. We are very clear to anybody operating in our waters about what we want in this respect. Brittany Ferries failed on their modernization plans because they, as part of their fleet, still had ageing vessels operating at the end of the contract. This has resulted in quite a binary position between the parties. DFDS understood that and were proposing vessels which would always meet the useful economic life clause. Brittany Ferries were not. 7.13 During the clarification day that we had with Brittany Ferries on 22 November 2024, they did ask about that and we were quite clear with them that we wanted to see vessels of only a certain age. We did not want to see old vessels operating in our waters. Another element of the evaluation and scoring matrix related to the vessel investment plan, which certainly DFDS did provide but both companies proposed investment in new vessels which is good. However, we get those new vessels earlier with DFDS as opposed to Brittany Ferries. Both companies provided investment, however vessels are provided earlier by DFDS and later by Brittany Ferries." 57. The affidavit then set out the position of the Government of Jersey and the Minister in relation to

financial certainty: "7.14 Another key element of the evaluation and scoring matrix related to financial certainty. In relation to Brittany, we were still left with uncertainty over the financial health of the contract and operating company. That fed into the scoring and can be seen reflected in the resultant end scores. 7.15 Despite requests for clarification to Brittany Ferries, GOJ was never able to understand clearly Brittany Ferries' financial position and Brittany Ferries'/ Condor Ferries' financial stability. 7.16 GOJ gave Brittany Ferries every opportunity to clarify the financial picture, but was not provided with sufficient responses nor detail. In particular regarding Brittany Ferries relationship with Condor Ferries, I considered that DFDS's financial position was far more favourable than that of Brittany Ferries." 58. Section 8 of his affidavit then described the moderation process which was led by KPMG and resulted in the scores as set out at paragraph 37 above. 59. Mr Scate then provided a report to the Minister. This report was also attached to his affidavit and contained both the scoring process and the synopsis set out above. The report recommended that the Minister appoint DFDS as the preferred bidder. 60. While a decision was ultimately that of the Minister, the report was considered by both the Ferry Procurement Political Oversight Group and the Council of Ministers who both approved the Minister's decision. 61. In relation to the process followed, Mr Scate deposed as follows: "I certainly feel comfortable that we undertook the right processes and there was enough rigour in assessing the information and concluding in an unencumbered and dispassionate way, It was without any undue political influence and certainly no influence from the previous SRO. There was enough of an air gap between this and the previous process. And I think we did our utmost to allay concerns, certainly to Brittany Ferries, that we wanted to see their bid and we were interested in doing business with them. Actually, I think if politicians really had their way, they would probably emotionally want to give a contract to Brittany Ferries rather than to DFDS because they are a local regional company. That was quite clear to me from the political narrative that they were worried about regional relationships. They just weren't able to get there because of the bid contents. I think it was as simple as that." 62. The affidavit also stressed the importance of lifeline services as defined in the procurement process to the island. This led to the following statement as paragraph 9.6: "9.6 We need to absolutely understand that the boats that we have operating in our waters are resilient and will do the job that they are being asked to do. We do not want to have vessels which are ageing and are subject to maintenance and breakdowns, because invariably, this threatens the Lifeline nature of the service." 63. At paragraph 9.9, Mr Scate rejected any allegations of bias and stated the following: "I wouldn't say we were biased. I certainly think we were looking for a company that does not have clear and present financial issues, which would mean that these services cease operating which would put Lifeline Services at risk. We don't want that. We want a service that just operates properly and that we don't have to worry about. And that, fundamentally is what we have been trying to achieve." 64. Mr Scate further commented on the evaluation process in the section of his affidavit headed ' DFDS as winning bidder' . At paragraph 11.2, he emphasised that the Minister was not involved in the evaluation and scoring matrix and that his only involvement was to receive a recommendation from Mr Scate. 65. Paragraph 11.3 also stated the following: "11.3 Although

I wasn't involved in detail in phase one, I think it's important to say that the DFDS were also marked higher in that first procurement, albeit we terminated that procurement. If they hadn't received that technical legal fail, they would have ranked even higher in that process." The application for judicial review 66. The application by Brittany Ferries seeks review of the Minister's conduct of the award of a long-term operating concession generally. 67.

Specifically, judicial review is sought of the decision to terminate the Channel Island Procurement Process and the decision not to award the said contract to Brittany Ferries and further, a review of the decision on or about 3 December not to award a contract for delivery of ferry services between Jersey, United Kingdom and France to Brittany Ferries and instead to award it to DFDS. 68. The grounds relied upon set out in the required application were: (i) A breach of duty of duty of procedural fairness; (ii) Apparent bias; and (iii) A failure to provide reasons. 69. The criticisms in respect of procedural fairness were as follows: "a. The refusal to award the Contract to the Applicant, notwithstanding that the Applicant's tender response was evaluated by the Respondent, pursuant to the Respondent's own mandated evaluated process, as satisfying all of the Respondent's requirements.

- b. Purporting to treat the Applicant's tender response as having failed to satisfy the Respondent's requirements in circumstances where the Respondent's evaluators agreed consensus scores demonstrating that the Applicant's tender response had satisfied the Respondent's requirements.
- c. Purporting to treat the Applicant as not having confirmed that BAI would be party to the Contract and/or had failed to guarantee performance of the Contract, in circumstances where BAI had expressly provided such confirmation.
- d. Not disclosing to the Applicant that the Respondent was purporting to apply a mandatory requirement that BAI must sign the Contract as operator, and that BAI not doing so would lead to the Respondent: (i) refusing to award the Contract to the Applicant, and (ii) terminate the award process; or not providing the Applicant with a fair or proper opportunity to respond to the imposition of such a mandatory requirement.
- e. The failure to provide any lawful and/or sufficient statement of reasons to the Applicant in respect of the decision to refuse to award the Contract to the Applicant and/or terminate the award process.
- f. Continuing to negotiate and/or pursue the award of the Contract to DFDS, in circumstances where its tender response had been evaluated as non-compliant and was required to be excluded from further consideration.
- g. Re-writing the competition rules applicable to the "new and fast" process ("the NAF Process") to remove the requirements which meant that DFDS's tender response was non-compliant and excluded from further consideration.

- h. Making public statements in advance of the conduct of the NAF Process which clearly indicated to those charged with conducting the process the outcome which the Respondent wished, and expected, the process to produce, namely the appointment of DFDS as the preferred bidder.
- i. The design and timetable of the NAF Process, which did not provide any fair opportunity for the formulation of any new or improved bid by the Applicant." 70. The apparent bias related to the position of Mr Corrigan referred to at paragraph 11 above and the public statement made by the Minister on 13 November 2024 referred to at paragraph 24 above. The relevant legal test 71. There was no dispute between the parties on the applicable legal test in deciding whether or not to grant leave. This was summarised by the Bailiff in *WE (Jersey) Limited v Minister for Environment*

[2022] JRC 044 at paragraphs 19 to 21 as follows: "19. Both WE and the Minister referred to different cases when illustrating the test but in effect there is agreement as to the way that the Court should approach this matter. In *X v Minister for Home Affairs*

[2018] JRC 222 the Royal Court set out the test approved by Commissioner Beloff and Warren v Lieutenant Governor [2017]

- (1) JLR 291 in the following terms: "3. The test for such leave in this jurisdiction, as applied in *Welsh v. Deputy Judicial Greffier* (7), is that set out by the Privy Council in *Sharma v. Browne-Antoine* (6) (

[2007] 1 WLR 780 , at para. 14(4)): "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628 and *Fordham*, *Judicial Review Handbook* 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

- 4. For an application for judicial review to succeed, the Royal Court would have to be satisfied that His Excellency's decision was unlawful, irrational or flawed by procedural impropriety (*Planning & Environment Cttee. v. Lesquende Ltd.* (4)) and for present purposes I must be satisfied that one or more of those grounds is arguably established on the material before me."

- 20. In *Sharma v Brown-Antoine* referred to in the citation above, the Judicial Committee of the Privy Council said: "It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which is hoped the interlocutory processes of the Court may strengthen"

- 21. In *Holmes v Law Society*

[2018] JRC 010 the Court said that the test for granting leave to proceed with a claim for judicial review is focussed on arguability and it has been described as: "A threshold stage designed to eliminate claims that are hopeless, frivolous or trivial and to ensure that the claims only proceed if there is arguable case that merits a full hearing with all parties and all relevant evidence." 72. The question I had to formulate at this stage was therefore the same question that the Bailiff formulated in the WE Jersey decision, namely whether or not Brittany Ferries has an arguable case in respect of each of the decisions of the Minister that Brittany Ferries wished to challenge, summarised at paragraph 67 above, and whether each of those decisions were either unlawful, irrational or flawed by procedural impropriety and, if they were, whether a full hearing was merited. 73. It is also right to observe in relation to this application that it is one that carries a high degree of urgency because the current contract operated by Condor Ferries comes to an end at the end of March as noted above, and the current intention of the Minister is to sign a contract with DFDS to take over those services once the current contract with Condor Ferries comes to an end. There is therefore a degree of urgency to this application being resolved as quickly as can fairly be achieved to all involved. 74. It is also right to emphasise that notwithstanding the importance of the application to Brittany Ferries, as well as the importance of the awarding of a ferry contract to Jersey generally, that at this stage the Court is not determining whether or not the assertions made by Brittany Ferries are right or not. Rather, the question for the Court is whether Brittany Ferries have overcome the threshold for leave to be granted.

Submissions

75. Advocate Passmore's position was that there had been a failure to give reasons in relation to termination of the Channel Island Procurement Process and there was also apparent bias in favour of DFDS and against Brittany Ferries. This was clear from the change of rules that happened in relation to the Jersey procurement process. The failure to give reasons when coupled with the apparent bias, meant that the decision not to award the contract to Brittany Ferries as part of the Channel Island Procurement Process alongside Guernsey, arguably had to be quashed. The effect of quashing the decision not to award the contract to Brittany Ferries meant that the entire Jersey procurement process was based on an erroneous decision and therefore also had to be quashed. 76. Why the reasons were important was that Brittany Ferries were never told what the concerns of the Government of Jersey and the Minister were in relation to its financial standing. This meant that Brittany Ferries neither had a chance to respond to the concerns of the Jersey Government before a decision was taken to terminate the Channel Island Procurement Process, and also did not have a chance to set out its response to those concerns in the Jersey procurement process. Advocate Passmore described this as a glaring omission. Nor did the affidavit of Mr Scate, explain what the financial issues were. 77. Advocate Passmore also emphasised that Brittany Ferries, according to the independent evaluations and the information received from Guernsey, had met all the criteria of the Channel Island Procurement Process while DFDS had not. The

implication behind this submission was that the only rational decision open to Jersey at this stage was to agree with Guernsey and enter into a contract with Brittany Ferries to provide a Channel Island service. It was therefore not fair to make a different decision without giving

reasons.

78. The concerns about the termination of the Channel Island Procurement Process were therefore: (i) A lack of reasons; (ii) The Government of Jersey and the Minister did not say what Brittany Ferries needed to address in relation to any ongoing concerns; and (iii) Its approach was based on a pre-determination. 79. This was more than enough to meet the required threshold for leave to be given. 80. Advocate Passmore did not accept that any defects in the Channel Island Procurement Process could be cured by the Jersey procurement process. His position was that the defects in the decision reached by the Minister in relation to the Channel Island Procurement Process meant that everything fell apart thereafter. 81. Advocate O'Connell's position was that whatever had gone before, the Minister was entitled to start again once Guernsey had reached a decision on their own and there was nothing irrational about that decision. The sole issue for the Court was therefore whether the process followed in relation to the awarding of a contract to DFDS for routes between Jersey, Guernsey and the United Kingdom alone was rational or not. Given the involvement of third party providers, he concluded that it was rational. However, he accepted that not all the material had yet been provided. 82. Advocate O'Connell contended that the case of Brittany Ferries was apparently weak which was very likely to fail, albeit accepting that if the case was arguable as set out in *WE Jersey Limited*, then leave would have to be given. His position however was that the relevant test was not met. 83. His position was that the process was fair at each stage, and this was a case where Brittany Ferries did not like the fact that they had not been chosen. 84. He also emphasised that the Jersey procurement process had external advisers involved in the form of KPMG. No criticism could be made of that process, the detail of which was set out in the affidavit of Mr Scate. 85. Advocate O'Connell also emphasised that the Minister did give a reason for terminating the Channel Island Procurement Process which was that Guernsey had decided to appoint a preferred bidder prior to material issues of clarification being sought. This placed Jersey in a difficult position which was either to go with Guernsey or formulate its own process. The original invitation to tender, at Clause 3.2.e and 10.5, gave Jersey the power to either modify the process or withdraw from the process completely. 86. Once the Minister decided to start the Jersey procurement process, it was also not right to enter into detailed discussion with either bidder as to why the earlier process had failed. 87. He also referred to the meetings that took place on 31 October and 15 November involving the Chief Minister. His position therefore was that Brittany Ferries knew that the Jersey procurement process was the opportunity given to Brittany Ferries to respond to those concerns. 88. While not covered in the affidavit evidence of Mr Scate, there was a wider concern about the financial standing of Condor Ferries which Brittany Ferries had known about for years. Brittany Ferries were clearly aware of these concerns. 89. In particular, the Minister and the

Government of Jersey were concerned that the contract was going to be operated by Condor Ferries even if entered into by Brittany Ferries. 90. In relation to Brittany Ferries' replies to the two questions posed by the Minister on 1 November 2024 and the answer set out at paragraph 19, what Jersey wanted was for Brittany Ferries to uphold the financial position of Condor Ferries so that Jersey could be certain that if Condor Ferries became insolvent, that the services Jersey needed would continue to be performed and there would not be a significant burden on the taxpayer. 91. The evaluation of the financial standing was carried out by Treasury. Their process was moderated as set out in the affidavit of Mr Scate. The Minister's position therefore was that the process was fair. 92. The Minister's position was also that any financial concerns were discussed and clarified on 22 November, referred to at paragraph 7.13 of Mr Scate's affidavit. 93. In relation to the alteration of the terms of procurement for the Jersey procurement process (see paragraph 32 above), the proposed change applied to both parties. However, the failure was because the legal advice received was that the initial responses of DFDS were not acceptable which was why they failed. Jersey wished to revisit that approach. The reasonableness was best tested by reference to the result received on this score, where both parties scored identically, neither party filed, and the result did not affect the outcome materially. 94. This led to the submission that DFDS on any view was a clear winner through a fair process. The involvement of KPMG took away any concerns about apparent bias. Advocate O'Connell emphasised that the involvement of Mr Corrigan was an inadvertent mistake. That mistake did not invalidate the entire process. 95. Advocate O'Connell also suggested that Brittany Ferries could have challenged the decision to terminate the Channel Island Procurement process earlier, and that it was now too late to do so because Brittainy Ferries had elected to take part in the Jersey procurement process., 96. Advocate Passmore in reply emphasised that the process followed for the Jersey procurement process could not make something lawful if the decision upon which it was based was unlawful, both due to a lack of reasons and apparent bias. This was clearly arguable and therefore the relevant test was met. 97. The answer given by Monsieur Mathieu on 1 November, as set out at paragraph 52 of his affidavit, was as clear as it could be. Brittany Ferries never understood why this reply was not sufficient. 98. He also confirmed that his instructions were that there were no discussions on 22 November about the financial standing of Brittany Ferries or indeed Condor Ferries. This could only be resolved at a substantive hearing. 99. The decision by Jersey to terminate the Channel Island Procurement Process was one that could be made but it had to be made fairly. It was not made fairly because of a lack of reasons and because it was tainted by bias. 100. To the extent that Advocate O'Connell had suggested that Brittany Ferries could have challenged the decisions earlier, any application for judicial review would have met the objection that it was premature until the Jersey procurement process was resolved. In any event, Brittany Ferries participated on the basis of a full reservation of rights. Discussion and decision 101. Both parties were in agreement on the relevant legal test which I have set out above. 102. I therefore start by reference to the decision by Jersey to terminate the Channel Island Procurement Process and whether reasons were given for that decision. 103. The conclusion I reached was that the first sentence of Mr Scate's letter of 7 November 2024 did give such

reasons.

These reasons were that Jersey had chosen to terminate the Channel Island Procurement Process because Guernsey had elected to appoint Condor Ferries alone, notwithstanding that Jersey and Guernsey had previously agreed to reach a joint decision. 104. At that stage, Jersey faced the choice of either agreeing to the appointment of Condor because DFDS had technically failed the procurement process or launching its own process. It is right to add that it was not in a position to appoint DFDS because DFDS had failed the process and therefore any appointment of DFDS without a further process would inevitably have led to a judicial review challenge. 105. It was also relevant that the decision was to move to a new process and not just taking a decision on the basis of what had already been filed. 106. However, simply because Brittany Ferries had met the criteria, did not mean that the Minister had to appoint Brittany Ferries. While Advocate Passmore did not say expressly this was the position, it was the logic of his submissions. 107. However, in my judgment, simply because someone meets the criteria to be awarded a contract following a procurement process or, taking a simpler example, a recruitment process, the party looking to engage a supplier of services or an employee does not have to do so. 108. I was therefore satisfied that the challenge to the decision of the Minister to proceed to a Jersey procurement process did not meet the required threshold for leave to be given to challenge the decision made on 6 November to terminate the Channel Island Procurement Process. 109. I also concluded that any full hearing reviewing the decision to move to a Jersey procurement process was not merited. The Minister faced a binary choice of either accepting what Guernsey had decided or moving to a Jersey only process. The decision of Guernsey placed him in that very difficult position and he was required to choose between these options and either appoint Condor Ferries or select a ferry operator for Jersey. He chose the latter and I cannot see that a full hearing would lead to any court setting aside that decision. In effect the decision was not to go with Condor at that stage because the Minister had reservations about Condor. It should not be forgotten that the Minister was under significant pressure to make a decision. This decision was also not about who would receive a contract from Jersey but only what process was Jersey going to follow to make that decision. 110. In making the decision to move to a Jersey procurement process, whether a full hearing was merited can also be tested by what the Minister did not do. He did not award the contract to DFDS. He also did not make a decision to award a contract based on what had been filed already. 111. His decision also revised the process to involve external assessors which was a new evaluation from what had gone before. Finally he encouraged Brittany Ferries to take part in that process. 112. The matters in the two preceding paragraphs support my conclusion that a full hearing was not required on the merits of the Minister's decision not to follow the decision reached by Guernsey to award a contract to Condor Ferries. 113. I also concluded that the grounds relied upon of apparent bias did not affect this decision and so did not meet the threshold for leave to be given. Rather they were relevant as I explain later to the Jersey procurement process. I rely on the same reasons set out at paragraphs 109 to 111 for refusing leave based on procedural fairness to challenge the decision to move to a Jersey procurement process for my conclusion that leave should not be given based on apparent bias/ a predetermination in favour of DFDS. 114. Where, however, I accepted submissions from Brittany

Ferries was that they were not given reasons about why the Minister had concluded there was no tender that was capable of meeting the requirements to accept. 115. This was clear from Mr Scate's response of 8 November where he stated that the Minister would not enter discussions regarding the joint procurement process that had been formally terminated. Secondly, the Chief Minister on 11 November stated that it would not answer the questions about the conclusions reached by the tender. This was because Jersey was involved in an ongoing process with DFDS. The Chief Minister's letter of 21 st November to M. Roue did not advance matters further. 116. The flaw in this reasoning is firstly that Brittany Ferries had been invited to take part in the Jersey procurement process. For that process to be arguably fair, it was entitled to know what the concerns of the Minister were. By reference to the submissions of Mr O'Connell those appeared in particular to be a reference to the financial standing of Brittany Ferries. Yet neither the correspondence nor the affidavit of Mr Scate or the material he exhibited sets out those concerns. 117. The nearest matters came to that was the discussion that took place on 31 October leading to the exchange of emails on 1 and 2 November. 118. In relation to the first of those exchanges, Brittany Ferries unequivocally offered to guarantee Condor Ferries' performance of a Channel Islands ferry contract. This was one of the conditions required by the draft concessions agreement, which required: "[delivery to the Island Authorities of a parent company guarantee in a form satisfactory to the Island Authorities entered into between the Operator and its parent company pursuant to which the parent company shall guarantee the obligations of the Operator under this Agreement;]" (Clause 2.1.1(e)) 119. In relation to why the answer provided by Brittany Ferries to the second question posed, set out at paragraph 19 of this judgment, was not acceptable, it is arguable that this goes beyond the requirements of the draft concession agreement. The position taken by M. Mathieu is logically arguable. Brittany Ferries did not want to subsume Condor Ferries into its own operations which was what Jersey's Guarantee requirements was effectively asking for. Brittany Ferries never received a substantive response to its argument. 120. This is important because Brittany Ferries, based on the material before me, did not know what case it had to be meet in respect of its financial standing and why there were concerns about the guarantee offered (which was asked for in the draft concession agreement for the Channel Island Procurement Process). I did not regard it as a decision maker being in error to give feedback to a bidder on concerns about their bid, when the process is being modified or developed as long as there is equal treatment for all bidders. In other words, both Brittany Ferries and DFDS were both entitled to know about any concerns the Minister had about the bids they had made for a Channel Island Procurement Process. What they were not entitled to know was the Minister's concerns about the other bidder, but that was not being asked for by Brittany Ferries. The decision to proceed with a Jersey procurement process leading to the receipt of further submissions from any bidder, does not affect the obligation to make that obligation fair. This means it should have been made clear to any bidder whether there were any specific concerns that had not been previously addressed and which the Minister wanted to be addressed on in respect of the Jersey procurement process. Indeed the obligation becomes all the more important when the Jersey procurement process was an evolution of what had already been submitted. This did not happen and so the threshold for giving leave that the Jersey procurement process was procedurally unfair was met. 121. Although Advocate O'Connell contended that the

Jersey procurement process was ultimately a fair one, the financial position of Brittany Ferries was clearly important and one of the central factors. In reaching my conclusion, I accepted that Mr Scate had set out the final scores received and Advocate O'Connell emphasised the clear difference. However, it was not clear how those results might have been impacted if Brittany Ferries had been informed what the concerns were about its response to a request for a financial guarantee of all liabilities of Condor and any other financial concerns. It was also not clear how any such responses might have affected the other assessments reached in particular Brittany Ferries' plans to replace or update its fleet during the lifetime of the proposed contract. 122. Advocate O'Connell quite fairly accepted that there was overlap between some of the criteria which was addressed in the moderation process. The fact of that overlap, however, means that the threshold for giving leave was met, that the impact of a lack of reasons and what the concerns of the Minister were and those carrying out the process for him, might have had a significant impact. In my judgment, only a trial could assess the impact of that lack of reasons on the final process. At any trial, the Court will have more detail on the evaluations carried out relevant to the financial standing of Brittany Ferries or impacted its standing. 123. More detailed evidence will also address to what extent the position of Condor Ferries as distinct from Brittany Ferries was a factor taken into account in assessing the financial standing of Brittany Ferries. I say this because the final proposal put forward by Brittany Ferries was that it would enter into the contract but would sub-contract performance to Condor Ferries. It was therefore directly on the hook for performance. At this stage, it is not clear whether the Minister's conclusion was also affected by concerns about the financial standing of Condor Ferries notwithstanding that Brittany ferries was proposing in the Jersey procurement process to enter any contract with Jersey. 124. In relation to the allegations of apparent bias, I concluded that any arguments of apparent bias for the Jersey procurement process could not be based on the evidence of Mr Corrigan because it was quite clear from the evidence of Mr Scate that he was no longer part of the process. That process was also a different process from one followed earlier. 125. What therefore remained arguable were the matters. The first was the statement made by the Minister on 13 November to the States and whether that was evidence of a predisposition towards DFDS. Secondly, I concluded that Brittany Ferries were able to contend that the change in process to alter the requirements which had led to a mandatory fail on the part of DFDS for the Channel Islands Procurement process was based on a predetermination. 126. It is right to say however that Brittany Ferries only just got over the threshold for giving leave on this ground. Had it been the sole ground I would have refused leave but when taken in conjunction with the failure to give reasons, I was persuaded that it was right to give leave on this ground in addition to the ground of procedural unfairness. In reaching this conclusion, I took into account the statement made by Mr Scate (who replaced Mr Corrigan as the Senior Reporting Officer to the Minister) in his affidavit at paragraph 2.9 "It is my view that Brittany Ferries should have been excluded for financial health reasons at a much earlier stage, but both GoJ and SoG did not do this as they would have had to exclude Brittany Ferries during summer of 2024 and there were concerns about what impact this would have had on passenger services in the height of the peak season." 127. It is also right to record that there are arguments against the assertion of apparent bias which are that the Government of Jersey had the power to amend rules and there was nothing irrational about doing so if the Government of Jersey realised

that it had not got it right in the first place. However, this question can only be tested at trial as the issue depends on why the rules were altered. 128. The Court at trial can also take into account the submissions of Advocate O'Connell that the final conclusion reached on this issue was the same for both parties. The percentage score this issue involved was also not determinative of the conclusion reached. 129. In relation to the third ground relied upon, namely the adequacy of reasons, in light of my decision that only the decision of the Minister on 3 December could be challenged, I was satisfied that adequate reasons were given for that. The grounds of challenge were therefore limited to breaches of duty of procedural fairness and apparent bias. 130. The sub-headings of the grounds relied upon for procedural fairness set out at paragraph 69 above were limited to grounds (e) to

- (i) but with the words 'and / or terminate the award process' in ground (e) being removed. 131. In relation to the grounds relied upon in relation to apparent bias, ground 2 concerning the position of Mr Corrigan was removed for reasons set out in this

judgment.

132. For these reasons, Brittany Ferries were given leave to challenge the decision of the Minister reached on 3 December 2024, by reference to allegations of procedural unfairness and apparent bias limited to the matters set out in this judgment. 133. Finally, I appreciate that this decision may have significant ramifications for the Government of Jersey and its desire to enter into a contract with DFDS. However, that is not a relevant consideration in relation to whether or not to grant leave if the relevant test is met and a trial is required. Rather, it is relevant to the Court and the parties making every effort to have matters resolved as soon as possible so that all parties and, more generally, the island know where they stand. Postscript and Directions 134. At a hearing that took place on Monday 23rd December, by which times the parties had received an earlier draft of the judgment for comments, my attention was drawn to arguments about whether the meeting on 15th December 2024 was a without prejudice meeting and so should not have been referred to in M Mathieu's affidavit. Secondly there had been arguments in correspondence about whether article 34 of the States of Jersey Law prevented Brittany Ferries from relying on the Minister's statement in support of its assertion of apparent bias. 135. In relation to the first issue this was not raised during the oral arguments before me and so it was too late to raise the matter once I had made my decision and given a draft of my reasons for comments. I should add that I am doubtful in any event whether the meeting could be described as without prejudice when the Jersey procurement process had not concluded. In relation to the second issue on this occasion, the Minister has elected not to pursue the point further about the scope of Article 34 while reserving the right to contend in another case should the point arise for

determination.

136. Finally I should refer to the fact that in issuing directions for the final application to be determined, I only required the Minister to file evidence in response, to the issues where I had granted leave and not in response to all the issues raised. This suggestion was raised by Brittany Ferries to address the need for further evidence should leave to appeal be given to challenge this decision and should that appeal be successful. I regarded this suggestion as contrary to principle because where the threshold for leave had not been given the matter was concluded absent any successful appeal so no further evidence was required on issues where leave had been refused. In addition such a task made the process of responding much more complicated and burdensome on the Minister. WE (Jersey) Limited v Minister for Environment

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Prepared on 22 October 2026 · Esheria