BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

RULING No 2

1. On 26 April 2021, as sole Commissioner of this Commission of Inquiry ("COI"), I issued a summons to Ms Patsy Lake to appear before me on 6 May 2021 for the purpose of being examined under oath or affirmation and requiring her to produce at this hearing the following documents:

> "(a) All documents concerning every contractual arrangement that you as an individual entered into with the BVI Government and/or any BVI public departments and/or bodies in the last 3 years to date.
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> (b) All documents concerning every contractual arrangement that any company and/or business, which you are or were connected, entered into with the BVI Government and/or any BVI public departments and/or bodies in the last 3 years to date."

2. By way of background, briefly, Ms Lake is the Deputy Chair of the BVI Airports Authority, a member of the Social Security Board and a Director of the Cyril B Romney Tortola Pier Park. She is also a business woman, with a variety of commercial interests, who it was understood had entered into a number of contracts with various arms of the BVI Government, not only in her own name, but also through various businesses and companies.

3. At the start of that hearing, Terrance B Neale of McW Todman & Co on behalf of Ms Lake made two applications, namely:

    (i) An application dated 4 May 2021 made under section 12 of the Commissions of Inquiry Act 1880 ("the COI Act"), paragraph 13 of the COI Rules and paragraph 3 of the COI Protocol for Representation under Section 12 for a direction that, as a person whose conduct is the subject of inquiry under this Act, or who is concerned in matters under inquiry in the COI, Ms Lake is entitled to participate in the whole of the inquiry; and that Mr Neale represents her in that capacity.

    (ii) An application dated 5 May 2021 to set aside the summons as being (i) in breach of section 15 of the COI Act as it requires Ms Lake to provide documents to the COI which may incriminate her and (ii) in breach of the rules of natural justice as it may result in adverse consequences for her without providing her

full particulars as to why she is being summoned and requested to produce documents and thus she has no proper opportunity to obtain legal advice and/or properly prepare a defence or response.

4. At the hearing, I refused both applications, and said that I would later provide my reasons for doing so. These are those reasons.

5. Section 12 provides:

> "Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated, or concerned in the matter under inquiry, shall be entitled to be represented by counsel at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

References to "section 12" in this ruling are to that section. Paragraph 3 of the Protocol requires an application to be made in writing for a direction by the Commissioner confirming representation as a participant under section 12; and provides that, in the absence of such a direction, representation for a participant will not be allowed. However, by paragraph 26 of the COI Rules, the Commissioner may permit a witness to have Counsel present when giving evidence to the COI.

6. Mr Neale submitted that Ms Lake was at least "concerned" with the matters under inquiry simply because she had been summoned as a witness; but, given the lack of specificity in the summons compounded by the risk that, in giving evidence and/or producing documents, she may self-incriminate. The summons, he submitted, appeared to be a "fishing exercise" for evidence to formulate a case against Ms Lake. Whilst that particularly bore on the second application to set aside the summons, he submitted that it also clearly put Ms Lake within the scope of section 12.

7. However, in my respectful view, eloquent as Mr Neale's submissions were, they are based upon a false premise: whilst statute has given me many of the powers of a High Court Judge (including the power to summons witnesses and call for the production of documents: section 10 of the COI Act), the process in which I am engaged is investigatory and inquisitorial not, as in the courts, adversarial. It is not part of the function of the COI to "make a case" against anyone; but rather to see whether there is information that corruption, abuse of office or other serious dishonesty in relation to public officials has taken place, and to gather information relevant to the standards of governance and operation of the agencies of law enforcement and justice for the

purposes of making any recommendations in those areas that I consider appropriate. Ms Lake has been called to give evidence, and produce documents, that I consider relevant to those terms of reference, no more and no less.

8. I do not accept that Ms Lake falls within section 12 simply because, in my view, she may have information and documents relevant to my terms of reference, and has thus been summoned. If it had been the statutory intention that the scope of section 12 should include every witness (who would then have a right to participate, by way of Counsel, in the whole of the Inquiry), it would have been simple enough for it to have said so in terms; and, had that been the intention, I have no doubt that it would have done. In the colloquial sense, every person who lives in the BVI (and many who do not) are "concerned" about the COI: but, for participation in the whole of an Inquiry, section 12 requires a person to be "implicated, or concerned in" the matters under inquiry. That clearly imposes a minimum threshold of a person's interest in the subject matter of the COI which, in my view, merely being a witness does not meet. Nor do I consider the position different because, hypothetically, a witness may object to answering a question or produce a document during the course of his or her evidence because of the risk of self-incrimination, particularly when the potential self-incrimination feared may or may not have anything to do with the COI's terms of reference.

9. Whilst of course each application will have to be considered on its own merits, in the usual course, neither will merely being a witness make it desirable that a person becomes a participant in the inquiry for the purposes of section 12. Certainly, I am unpersuaded that it is desirable that Ms Lake should be represented by Counsel throughout the whole COI: Mr Neale did not make any submissions to the contrary.

10. I deal further with self-incrimination, and with the principles of natural justice, below in the context of Mr Neale's second application; but, for the reasons I have given, as things currently stand, I do not accept that Ms Lake falls within the scope of section 12. If circumstances change, then of course it is open to her to make a further application under that section.

11. However, for the purposes of the hearing on 6 May 2021, as I explained to Mr Neale, that determination would not adversely affect Ms Lake at all, because I would make an order under paragraph 26 of the COI Rules that Mr Neale be present during her giving evidence. That would enable him to give Ms Lake any advice she required on any

particular question or document, and also allow him to make any submissions on his second application (that the summons should be set aside). That is, in the event, how matters proceeded.

12. I therefore turn to Mr Neale's second application, to set aside the summons on the basis that it breached section 15 of the COI Act and/or the rules of natural justice, or alternatively to vary the summons so that it breaches neither.

13. Section 15 of the COI Act requires witnesses who are summoned to attend and give evidence, or produce documents, to obey the summons or risk criminal proceedings for refusal without good cause. However, there is the following specific proviso:

> "Provided always, that no person giving evidence before the commission shall be compellable to incriminate himself, and every such person shall, in respect of any evidence given by him before the commission, be entitled to all the privileges to which the witness giving evidence before the High Court is entitled in respect of evidence given before such Court."

14. Mr Neale submitted that:

    (i) The summons breaches section 15 and the strand of natural justice that requires procedural fairness because the requirement to answer questions is unrestricted and the requirement to produce documents is very broad in scope. Mr Neale submitted that it appears to be a fishing exercise as part of a wider exercise to make a case against Ms Lake rather than a bona fide request for specific information/documents to assist the COI.

    (ii) The request for documents is flawed because, in respect of arrangements between companies etc with which Ms Lake might be connected and the BVI Government, she may not have access to such documents or others might have rights of confidentiality over them which would mean she could not produce them.

    (iii) In any event, the COI is able to obtain all of the requested documents from the BVI Government, and so the summons is unnecessary.

    (iv) The summons breaches both section 15 and the rules of natural justice because giving evidence and/or producing documents has "possible adverse consequences" for Ms Lake, and the scope of the summons is vague and general and she has not been given any reason for having been summoned.

As the summons does not set out why she has been called to attend and produce documents, Ms Lake is unable to say whether an answer or a document would incriminate her or even take advice as to whether it might do so.

15. Dealing with these in turn:

(i) The schedule to the COI Act comprises a form of summons which, whilst not mandatory for a section 10 summons under the Act, is an example form that may be used. It is a materially identical form to that which is mandatory in the High Court (see rule 33.2(1) and (2) of the Eastern Caribbean Supreme Court Civil Procedure Rules ("ECSC CPR") and Form 12 appended to those Rules). It is a summons to appear at a hearing to give evidence "respecting such inquiry" and to bring any specified documents. It does not require any further reasons for the summons, or particulars of the questions that may be put. Just as questions in the High Court are limited to those relevant to the claim before the court, the questions at a COI are of course limited by its terms of reference. Relevance is, in any event, a matter for me to determine, with those terms of reference in mind. I deal with the "fishing exercise" point above: it is the COI's function to obtain information that bears upon its terms of reference, its process being investigatory and inquisitorial. At the hearing, Mr Neale did not pursue any suggestion that I had issued the summons in anything but good faith. In any event, any such a suggestion has no foundation.

(ii) The fact that Ms Lake may not have access to all of the documents concerning contractual arrangements between companies etc with which she is connected and the BVI Government, or others may have confidentiality rights over such documents, does not make the summons invalid or otherwise unlawful. Ms Lake retains all her privileges over the documents sought. Whether, under the COI Act, the privilege associated with self-incrimination attaches to documents is a moot point, but not one that I need to consider and determine at this stage: in my view, it cannot affect the validity of the summons. Ms Lake of course does not have to produce documents that are not in her possession or control; and she can make clear where others may have confidentiality rights over documents that are within the scope of her summons and within her power or control, and I can ensure that such rights are properly respected.

(iii) As a general proposition, it is open to the COI to request and require documents from any appropriate source. But, in any event, it is not true to say that the COI is able to obtain all the documents requested of Ms Lake from the BVI Government. First, the COI is unable to request from the Government documents concerning arrangements between the Government and companies etc with which Ms Lake is connected because we cannot necessarily identify all of those companies etc. Second, Ms Lake will have internal documents which the Government may not have. Third, the documents produced by the Government in response to a request are not in all cases complete.

(iv) I have dealt with the bulk of the submissions in relation to (iv) above. However, it is important to appreciate the principle underlying the privilege against self-incrimination. It is an evidential matter. Although the position has been altered both in England & Wales and in the BVI by statute, at common law, no person is bound to answer any question in civil proceedings if the answer to that question would in the opinion of the court have a tendency to expose him or her to any criminal charge, penalty or forfeiture which the court regards as reasonably likely to be pursued. It cannot, therefore, undermine the validity or lawfulness of a summons even where a question might be asked in respect of which the privilege might be invoked. Indeed, questions are allowed to be asked even where the answer may, or will inevitably, be covered by the privilege: but the privilege means that the deponent can object to answering a question, if the court accepts that the privilege is properly raised. The COI Act reflects these common law principles so far as evidence is concerned. As I have already indicated, the position with regard to documents is not so clear – and it is not necessary for me to determine now whether the privilege can be raised under the COI Act in respect of documents – but, insofar as it can be raised, then similar principles will apply.

16. For those reasons, at the hearing, I concluded that the summons was not unlawful as being in breach of either section 15 of the COI Act or the rules of natural justice.

17. Mr Neale raised one further point. He submitted that I have power to issue summonses only under section 10 of the COI Act which gives me the power of a High Court Judge to issue them. It is the usual practice of the High Court to give 14 days' notice of a

hearing at which attendance is required by summons (ECSC CPR Rule 33.5(1)). In Ms Lake's case, there were only 8 days.

18. I do not consider there is any force in this submission. Whilst it may be the usual practice of the High Court to give 14 days' notice, it is clear that the court can permit shorter notice (rule 33.5(2)). Unlike court proceedings, the COI has a short, defined period in which its proceedings must be completed: to require 14 days' notice in respect of every summons issued would undermine that timetable. It would be contrary to the public interest to delay the COI in that way.

19. It is my firm view that it is not necessary for 14 days' notice on a summons to be given. What is required, of course, is sufficient time for a witness to prepare and take any advice he or she may wish to take – but that is a different question. In a hearing such as that of Ms Lake's summons, a short period will usually be sufficient to ensure that the witness has that time.

20. However, at the 6 May hearing, I gave Mr Neale the opportunity to make submissions that Ms Lake required further time to give him instructions and take his advice, or otherwise to prepare for the hearing. He confirmed that, in the event, she did not require any further time, and wished the hearing to proceed that day (with Mr Neale in attendance to give such advice as she wished to take during the course of the hearing), which it did; and, during the course of the hearing, Ms Lake agreed to provide documents in her possession or control relating to her contractual dealings with government bodies.

The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021