

## **BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY**

### **RULING No 3**

1. On 4 May 2021, I heard an application by the Attorney General (“the Attorney”) on behalf of three BVI Government Ministers (“the three Ministers”) and the departments, offices and other Government bodies for which they are each responsible, and other identified Government entities including herself as Attorney, for a declaration that they are concerned in matters under inquiry in this Commission of Inquiry (“COI”) and are entitled to appear by the Attorney or by Counsel instructed by her at the whole of the COI. The three Ministers were Hon Andrew Fahie (Premier and Minister of Finance), Hon Carvin Malone (Minister of Health and Social Security) and Hon Vincent Wheatley (Minister of Natural Resources, Labour and Immigration). They are all, of course, also Members of the House of Assembly (“Members of the House”).
2. The Attorney, supported by the Solicitor General, the Rt Hon Sir Geoffrey Cox QC and two partners of Withers, submitted that each such person was concerned with the current and future governance of the British Virgin Islands, and thus sufficiently concerned in the matters under now under inquiry that they fell within the scope of section 12 of the Commissions of Inquiry Act 1880 (“the COI Act”), and were thus entitled to be represented by Counsel at the COI; and that she, as Attorney, was uniquely well-placed to appear for them as they wished her to do. She relied upon rule 13(6) of the COI Rules which encourages persons with joint or similar interests to be represented by single Counsel. In later written submissions, the Attorney indicated that she had been instructed by each of the three Ministers to carry out a full objective review of those matters under his responsibility so that she could prepare written submissions on their behalf “in respect of matters pertaining to [the COI] terms of reference, including the administrative systems, practices and policies of government and improvements to the standards of governance in the Virgin Islands”. In that endeavour, she was to be assisted by members of her Chambers, and the Rt Hon Sir Geoffrey Cox QC and Withers.
3. I granted that application, and declared that the three Ministers and departments, offices and other Government bodies for which they are each responsible, and the other Government entities as identified in a schedule prepared by the Attorney and attached to the order, are concerned with the matters under inquiry and shall be entitled

to appear by the Attorney or by Counsel instructed by her at the whole of the COI (Order No 1 dated 4 May 2021). That is the order which, on their behalf, the Attorney sought.

4. Within hours, however, I received an application from Hon Vincent Wheatley, who had been summoned to give evidence to the COI on 6 May 2012, for a declaration that, as a Minister, he is concerned and/or implicated in the COI; and that he be represented in the COI by the BVI law firm Silk Legal (BVI) Inc (“Silk Law”).
5. The Attorney, on behalf of Hon Vincent Wheatley, applied for an adjournment of the summons hearing to 7 May 2021, because a sitting of the House of Assembly had been called for 6 May and the Minister understandably wished to attend. I granted that application.
6. On 6 May 2021, Silk Legal applied on behalf of all of the Members of the House, excluding the Attorney but including the three Ministers as Members of the House, that they be permitted to represent those Members in their official capacity in the COI, on the basis that they fell within the scope of section 12 of the COI Act as being implicated and/or concerned in the matters under inquiry. The application was copied to the Speaker and to the Attorney. On 7 May 2021, the Speaker confirmed the instructions that Silk Legal had been instructed by all Members of the House, excluding the Attorney, and they wished Silk Legal to represent them “in their official capacities” in the COI. I should make clear that, as Mr Rowe confirmed at the hearing on 7 May 2021, the application was not made by the House of Assembly as a body – it could not be because it excluded the Attorney – but rather by 14 of the 15 Members of the House as individuals in their official capacity as part of the legislature.
7. I set down both applications for hearing on 7 May 2021, when Richard G Rowe and Daniel Fligelstone Davies of Silk Legal appeared for the Applicants. The Attorney with the Solicitor General, and Counsel to the Inquiry, also appeared. After the hearing, on 9 May 2021, Silk Legal lodged further written submissions, which I have of course also taken into account.
8. The application dated 4 May 2021 (referred to in paragraph 4 above) was not pursued, and I formally dismissed it at the hearing.
9. The application dated 6 May 2021 raises two issues:

- (i) Do Members of the House of Assembly, as individuals but individuals who are part of the legislature, fall within the scope of section 12 of the COI Act; and, thus, are they entitled to participate in, and be represented by Counsel at, the whole of the inquiry?
  - (ii) If so, by whom should they be represented?
10. In relation to (i), 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.”
11. That right to be represented “at the whole of the inquiry” is subject to a Commission’s powers under section 2 of the COI Act to prescribe how the Inquiry shall be executed, which necessarily includes the power to manage the participation of any person, reflected in paragraph 13(6) of the COI Rules which expressly gives me power to determine the nature and extent to which a participant and/or Counsel representing that participant can take part in this COI.
12. Mr Rowe’s primary submission was that individual members of the legislature had an interest in the subject of the third paragraph of the COI terms of reference, governance, sufficient for the purposes of section 12.
13. Mr Rawat set out reasons why it may not be necessary or appropriate for individual Members of the House to participate in the COI within the terms of section 12. For example, he submitted that it was open to each of them to make submissions or lodge information with the COI without being participants.
14. However, whilst I see the force of Mr Rawat’s argument in relation to the lodging of submissions or information, I accept Mr Rowe’s submission that an individual Member of the House has a sufficient interest in governance to bring him or her within section 12. Whilst it is perhaps not as direct an interest as that of a Minister, as appeared to be common ground at the hearing it is essentially the same interest as that held by the Government Ministers and their departments etc who, I found on 4 May 2021, fall within section 12. I emphasise that their respective interests are essentially similar because I am considering them only in their official capacities. It is uncontroversial that, if a

Minister or a Member of the House steps outside the proper scope of his official functions, then his or her position with regard to representation will change.

15. Therefore, I will declare that individual Members of the House of Assembly are concerned with the matters under inquiry; and thus, with the important caveat as to my powers in section 2 of the COI Act, they are entitled to participate in the whole of the inquiry.
16. Moving onto (ii), as the Attorney has properly reminded me during the course of this COI, most recently at the hearing of 4 May 2021, by section 58 of the Virgin Islands Constitution Order 2007 she is the principal legal adviser to the whole of the BVI Government, including both the executive and the legislature; and, as such, it is part of her role to advise and, if necessary, represent both Ministers and individual Members of the House in their official capacities. At the hearing, despite her heavy workload and whilst indicating she maintained a neutral stance in respect of the application, she expressed herself ready, willing and able to represent each of the Members of the House in respect of the COI. As appeared to be common ground at the hearing, there was no conflict of interest in her acting for both Ministers and Members of the House, particularly as their respective interest in the COI was essentially the same. The Attorney accepted the proposition that, by instructing Silk Legal who would be paid for out of public funds, there would be an additional burden on the BVI public purse. That proposition is self-evident, and Mr Rowe did not seek to controvert it. However, he submitted that, in exercising my powers under section 2 of the COI Act with regard to representation, it would be unlawful for me to take into account the principle of proportionality including (as he submitted in his written submissions dated 9 May 2021) whether instructing his firm would result in “‘duplication of efforts’ and would not be financially prudent”. The Attorney has made clear that, where she is representing public officials, she will ensure that participation by them in the COI will be reasonable and proportionate. That is as I would expect.
17. The obvious, efficient and cost-effective course would, on the face of it, therefore have been for the Attorney to represent the Members of the House as well as the Ministers etc whom she already represents.
18. However, in their submissions of 9 May 2021, the Members of the House, through Mr Rowe and Mr Davies, submit that that is not an appropriate course because, in their view, the Attorney has a clear conflict of interest. This does not arise as a result of her

already acting for the three Ministers and other public officials within the executive administration – there still does not appear to any suggestion that there is any such conflict – but because:

“... [The Hon Mrs Dawn Smith was a permanent secretary to the Office of the Premier as recently as 2019 and was the general counsel to the Financial Services Commission, and... would be a compellable witness before the Commission of Inquiry”:

“... [T]he Attorney General has a vested interest in the outcome of the enquiry [sic] as she has two brothers who will be subject to the inquiry. Mr Neil Smith, the former financial secretary for the Ministry of Finance (whom will be central to explaining the BVI Airways situation) and Mr Clive Smith who is the managing director of the BVI Airports Authority.”

19. Further, the submissions say:

“... [T]he Attorney General’s Chambers is responsible for much of the issues relating to governance within the Territory, which are being investigated. It is not only likely that the Attorney General will be a participant and a witness in the proceedings, but we are aware that she has in fact been requested to give evidence before the Commission of Inquiry. In those instances, it would be open for the representatives of the present House of Assembly to cross examine her, as they are no doubt to be considered participants in the Commission of Inquiry.”

In fact, by my Order No 1 (see paragraphs 1 and 3 above), the Attorney is already a participant in the COI for the purposes of section 12 of the COI Act.

20. It is unclear to what the submissions refer when they say that the Attorney “has been requested to give evidence before the Commission of Inquiry” – like all Members of the House, she has been invited to make representations on the matters under inquiry; and, as I have indicated, she has also been instructed by the three Ministers to make written submissions (with, no doubt, supporting information and documents) and oral submissions to the COI – but, whatever they have in mind, it is clear that the Members of the House for whom Silk Legal act reserve the right to be antagonistic to whatever she might put forward and may wish to controvert her and “cross examine” her on it.

21. I assume that, out of professional courtesy, Silk Legal’s submissions dated 9 May 2021 were sent to the Attorney – but, although she may well wish or be required to respond in the context of some later application, the submissions do not invite or require her response in the application before me for the reasons set out below.

22. In considering representation, it is convenient to look, first, at the eleven Members of the House who currently have no representation in the COI; and, then, at the three Members (i.e. the three Ministers to whom I have referred) who are already represented as participants in the COI by the Attorney.
23. For whatever reason, it is clear from their submission dated 9 May 2021, the eleven Members do not have confidence in the Attorney representing them before the COI. Whether that view is justified or not – about which I do not express any view – it is a view I must respect. Section 12 entitles the eleven Members to representation by Counsel. They are not currently represented. It is clear that, holding the view of the Attorney that they do, they cannot be represented by her. They wish to be represented by Silk Legal. I shall make a direction that they be represented by Silk Legal (BVI) Inc.
24. The other three Members, i.e. the three Ministers, are in a somewhat different position. Despite the submissions they have made to me through Silk Legal as to the Attorney, they are currently persons who are represented by her as a result of Order No 1. In the application they made that resulted in that Order, they expressed confidence in the Attorney, and submitted through her that there was no reason why she should not represent them. The submissions they have made through Silk Legal are to the diametrically opposite effect.
25. The three Ministers cannot have it both ways. I accept that a Member of the House who is also a Minister has two constitutionally distinct public posts. In some circumstances, I also accept that it might be possible to distinguish those two roles. However, here, leaving aside the common ground that the interests of a Minister and those of a Member of the House in governance are essentially the same, it is not conceptually possible for the same person, no matter how many hats he may wear, both to have confidence in the Attorney with regard to matters of governance and not to have confidence in her in respect of the same matters.
26. In respect of the three Ministers whom the Attorney already represents in the COI, they shall therefore continue to be represented in this COI by the Attorney. If any of them wish to be represented by Silk Legal as regards any of their official capacities in any part of the COI, then he must make a properly argued application on notice to the Attorney. I will deal with any such application on its merits. The application currently before me is wholly and patently inadequate for that task.

27. In the circumstances, it is unnecessary for me to consider any of the other submissions made before me, including that of Silk Legal that, in exercising my section 2 powers, it is unlawful for me to take into account proportionality. It is to be hoped that all Counsel who represent public officials will only seek to do so in a reasonable and proportionate manner, as the Attorney has assured me will be the case so far as those whom she represents are concerned. I shall, however, leave that issue formally open to be considered in any future application in which it is material.

Gary Hickinbottom

The Rt Hon Sir Gary Hickinbottom

Commissioner

10 May 2021