

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 9
(FRIDAY 4 JUNE 2021)

International Arbitration Centre
3rd floor Ritter House
Wickhams Cay II
Road Town, Tortola

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

DIRECTIONS HEARING

Counsel to the Commission Mr Bilal Rawat appeared.

Mrs Fiona Forbes-Vanterpool Principal Crown Counsel of AG's Chambers (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Court Reporter:

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Those present:

Mrs Fiona Forbes-Vanterpool, Principal Crown Counsel

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Mr Steven Chandler, Secretary to the Commission

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police Force

Mr Dame Peters, Audio-Visual Technician

P R O C E E D I N G S

COMMISSIONER HICKINBOTTOM: Good morning, everyone. I'm pleased to say that this hearing is again being live-streamed. I'm sorry that there were some problems with live-streaming on Wednesday. They were to do with the technical side of the operation, including the bandwidth of the internet. We're hoping that those have been resolved and that the live-streaming won't have any interruptions today.

In terms of representatives, Mrs Forbes-Vanterpool, you're here on behalf of the Attorney General?

MRS FORBES-VANTERPOOL: Yes, Mr Commissioner.

COMMISSIONER HICKINBOTTOM: Good morning.

And Mr Rowe, you're here for Silk Legal, and we have--you're remote--and we have Mr Rawat, counsel to the Commission of Inquiry.

First, Mrs Forbes-Vanterpool, can I thank you for your written submissions. They were really very, very helpful. And I think I agreed with them completely, but can I just set out what I think the position is, and then can you correct me if I'm wrong.

But the background is that the Register of Interests Act of 2006 requires Members of the House of Assembly to make a declaration of their interests both on assuming office and annually thereafter, the form of the Declaration set out in the Act. Under the Act, the Register, however, is only open to,

firstly, Members of the House of Assembly on application by them; secondly, for the purposes of a criminal investigation; and, thirdly, on an order of the Court--that's Section 9 of the Act.

Following the establishment of the Commission of Inquiry, the House of Assembly passed the Register of Interests Amendment Act 2021, which added to the circumstances in which the Register might be open to include a written request of a Commissioner of Inquiry, and that Act gave the Registrar power to provide information upon--I will read out--it's a new Section 13(1) (a) of the 2006 Act inserted by Section 4 of the new Act: "The Registrar may provide information that, in his opinion, is strictly necessary to fulfill the requests and upon such conditions as to the preservation of confidentiality after the purpose for same has been exhausted as he shall deem appropriate." That's the end of that quotation.

So, on the 1st of June--that's last Wednesday--the COI Team obtained copies of the remaining documents that the Registrar had; they had already obtained some. And that same day, Wednesday, the COI Team wrote to the Registrar asking for her position as to conditions attaching to the disclosure under that provision I've just read out, and also wrote to the Attorney General asking for her to appear today to make submissions as to the use the documents now in our possession from the Registrar could be put.

Now, in your written submissions, Mrs Forbes-Vanterpool, you make two vital submissions to where we go today:

Firstly, you submit that the conditions the Registrar may impose in respect of the documents and information she discloses to a Commissioner of Inquiry only bite after the Commissioner's use for the documents has been exhausted--it's not put very elegantly, but that's what the submission was--and I agree with that.

And the second important submission you make is that it was in the contemplation of both the Cabinet, who put forward the Measure, and the House of Assembly, who passed it, the Amendment Act, that once the information and documents were in the hands of the Commission of Inquiry, then further disclosure to the public, either in a hearing or in a report, might occur because whether such disclosure was in the public interest was ultimately a matter for the Commissioner, and the Commissioner might decide that it was in the public interest to disclose it further, and I agree with that as a proposition, too.

And finally, just to complete the important strands of your submissions, in addition to the conditions in relation to preservation of confidentiality under the new Act, you asked for two conditions. One is the documents containing the Confidential Information be returned to the Registrar or destroyed with proof of such destruction submitted to the

Registrar; and, secondly, no copies of the documents containing the Confidential Information be made or retained by the Commissioner after its use has been exhausted.

As I said, Mrs Forbes-Vanterpool, the submissions are very clear, but I found them particularly helpful because I agreed with them, and so if I can--if I could set out what I propose to do and why, and then I can hear any further submissions from you and from Mr Rowe and from counsel to the Inquiry, but in considering whether the documents and information that had been produced by the Registrar and that we now have should be disclosed in public firstly in a hearing, it seems to me that I have to take into account the importance of transparency of the Commission of Inquiry Hearings; and, if the documents can't be made public or aren't made public, then the Hearing would, for practical purposes, have to be heard in private.

And also, I have to take into account the wishes of not only the Registrar insofar as they're relevant but also the individual Members of the House of Assembly and former Members of the House of Assembly who we may summons.

My understanding is the Registrar remains neutral, and in views, probably rightly, under the Act, her wishes--the conditions don't bite until after the Commission of Inquiry's use has come to an end. But, in any event, the Commission is neutral.

In respect of the Members of the House of Assembly and the former Members whom we have summonsed--let me just stick to the current Members of the House, first. They expressed themselves, as I understand it, to be champions of transparent government and champions of the transparency in the proceedings of the Commission of Inquiry, and they've all voted for the 2021 Amendment Act, which contemplates that these documents, this information that may be put into the public domain.

So, it seems to me I can assume that each of them has no objection to disclosure of the documents and information so far as they apply to them, are relevant to them, both in respect of hearings and, indeed, the ultimate report. And if that assumption is broadly correct, what I would propose to do is to make a direction that if any Member of the House of Assembly or, now bringing them in, any former Members of the House of Assembly who are summonsed in respect of Register of Interests has any objection to his or her information and documents that we have obtained from the Registrar, those are--that is, information and documents which relate to their interests, if they have any objection to them being put into public domain at a public hearing or, indeed, in an ultimate report, then he or she must apply to the Commission of Inquiry in the usual way, in accordance with the relevant Protocol, by 4:00 p.m. on Tuesday the 9th of June. Otherwise, absent any application, then the relevant hearings will be in public, and the documents and

information produced by the Registrar in respect of the specific Member, will be referred to in public in those Hearings.

Finally, before I ask for any further submissions you have, Mrs Forbes-Vanterpool, in relation to the conditions you seek, I would propose to make those conditions with this caveat. It's not a caveat to the conditions but merely a necessary limitation on their scope.

You referred to the conditions biting on Confidential Information at the end of the Commission of Inquiry. If documents or information are referred to in public in the course of said Hearing, then, of course, information and documents will no longer be confidential; they will be public. But subject to that caveat, any documents or information that are not referred to in public, then the conditions will bite. That's what I propose to do. Those are the directions I propose to make, subject to any further submissions that you or Mr Rowe or Mr Rawat have.

MRS FORBES-VANTERPOOL: Thank you, Commissioner.

COMMISSIONER HICKINBOTTOM: Yes.

MRS FORBES-VANTERPOOL: If I may, just to iterate the points I raised in submissions regarding public disclosure.

COMMISSIONER HICKINBOTTOM: Yes.

MRS FORBES-VANTERPOOL: We submit, as you've stated, that the question of whether there should be wider public disclosure after the Registrar has disclosed the material to the

Commission of Inquiry is for you, as Commissioner, to determine. You are well-placed to consider the question applying the two-stage process which is referred to in the letter of June 1st, and we submit that it is for you to weight up the uses to which the material needs to be used or to be put and, to the extent to which it is both necessary and proportionate for any of the material to be made public, to fulfill the purpose for which it was disclosed; and in so doing, we submit that you should bear in mind in this exercise that the starting point is as reflected in the Act, and that is that, absent the particular circumstances as set out in Section 9, the House of Assembly has to date decided that the Register should remain private and confidential in the Virgin Islands and that, save in limited circumstances, as referred to in Section 1(a) and 13(1)(e) of the Act as amended.

And again, it is for you, Commissioner, and not the Registrar to decide if the purposes of the Inquiry reasonably and proportionately require disclosure to the public. And in making such a determination, an important factor should be, we respectfully submit, the consideration of the perceived need for public disclosure against the clear intention of the Legislature, as expressed in the Act, that the Register remain private save in, as I said, those limited circumstances as you referred to in Section 9 and 13 both of the original and amended Act.

COMMISSIONER HICKINBOTTOM: Mrs Forbes-Vanterpool, because I agree with all of that--

MRS FORBES-VANTERPOOL: Okay.

COMMISSIONER HICKINBOTTOM: --but given that the current Members of the House of Assembly have voted, I think, unanimously--I think--for the Amendment Act, in contemplation that the Declaration of Interests they have made may become public--may become public--once the information is disclosed to a Commissioner; and secondly, given that they are strongly favor in transparency in Government, and so I assume they personally have no objection to these matters going into the public domain. The balancing of the public interest is very easy, isn't it, because the people whose confidentiality it is have no objection?

MRS FORBES-VANTERPOOL: That is a matter for you, Commissioner, to decide--

COMMISSIONER HICKINBOTTOM: But it's a matter for them, isn't it, because they must say under the proposed directions whether they have any objection? If they have any objections, then I can deal with the objections. But if they have no objection--if they have no objection, they're a simple weighing exercise, isn't it?

MRS FORBES-VANTERPOOL: Well, that's for you to consider, Commissioner. Those are matters that you have to consider.

COMMISSIONER HICKINBOTTOM: But, on the one side of the balance, you have the public interest in transparency of both Commission of Inquiry and of Government and the individual Members whose confidentiality it is agree that it's disclosed in public, and on the other side of the balance what do you have?

MRS FORBES-VANTERPOOL: Well, on the other side of the balance you have to consider what's perhaps not on the other side; but, against that backdrop, you have to consider the clear intention of the Legislature that the contents of the Register remain private, and so you have to consider, Commissioner, what is reasonable and proportionate in the circumstances as regards why the public disclosure in that context. So all of that, we respectfully submit, Commissioner, weighs into that exercise you have to undertake to determine whether and why the public dissemination is necessary.

COMMISSIONER HICKINBOTTOM: Yes, thank you.

MRES FORBES-VANTERPOOL: And, Mr Commissioner, in regard to the conditions, these conditions, as we've stated in the submissions, are for the Registrar as she deems appropriate. It is for her, in her discretion, take into account all of the useful information that was requested and the purposes after which is exhausted to determine if these conditions should be applied. We're not saying that they ought to be, but we're saying these are conditions that the Registrar may apply in her discretion, the discretion being hers, Mr Commissioner.

COMMISSIONER HICKINBOTTOM: Well, hold on a minute. Paragraph 25 of your submissions: "In the light of the importance of confidentiality, it is appropriate to impose the foregoing conditions in these circumstances."

MRS FORBES-VANTERPOOL: Right. That is our position, but that is still a matter for the Registrar. It is her discretion that has to be exercised in respect of what conditions ought to be imposed.

COMMISSIONER HICKINBOTTOM: I understand that, and that's correct under the Act.

MRS FORBES-VANTERPOOL: Correct.

COMMISSIONER HICKINBOTTOM: But you're acting for the Registrar?

MRS FORBES-VANTERPOOL: No, we're not acting for the Registrar. The Registrar is independent. We have provided advice to the Registrar in respect of the Register of Interests; but it is for the Registrar, in her discretion, to determine what conditions may be applied.

COMMISSIONER HICKINBOTTOM: I understand that, that's fine.

MRS FORBES-VANTERPOOL: Thank you, Mr Commissioner.

COMMISSIONER HICKINBOTTOM: Anything else?

MRS FORBES-VANTERPOOL: No. Those are my submissions. Thank you.

COMMISSIONER HICKINBOTTOM: Very helpful. Thank you.

Mr Rowe, do you have anything to add to any of the submissions made on behalf of the Attorney General?

MR ROWE: Good morning, sir.

May I state firstly a concern. This bundle has come to our attention this morning.

COMMISSIONER HICKINBOTTOM: Well, with respect, Mr Rowe, this came to my attention that the submissions were only made this morning, the written submissions.

MR ROWE: And--and--but you can appreciate that any comments I make not having had the opportunity to review these documents would likely to be uninformed. What I would wish to do is to--will certainly accept the decision you have made that any objection could be made by Tuesday next week and confer with my clients having perused and examined the submissions and your Orders and act accordingly.

COMMISSIONER HICKINBOTTOM: Okay, Mr Rowe. I understand that. Thank you very much.

Mr Rawat, have you got anything to add?

MR RAWAT: Very briefly, three points.

Firstly, it is to thank Mrs Forbes-Vanterpool for such clear written submissions, which have been helpful in particularly making this Hearing shorter.

The second is an observation that, even if one goes back to the 2006 Act, it must have always been in the contemplation of the Legislature that, at least in certain

defined circumstances, material held by the Registrar of Interests could be made public because a court order could direct that disclosure be made, for example.

The second or the last observation I would make is in relation to the two-stage process which Mrs Forbes-Vanterpool has referred to. That is a process that governed the redaction of documents. It doesn't govern your decision as to disclosure of the use of material. The process is Stage 1 that material comes to you and your team in confidence, and the second part of the process is that, provide the person or entity that provided the documents will be given an opportunity to raise any issues concerning the content of the document before it is made.

And as we discussed on the last occasion, and as you explained in your opening remarks at that Hearing, the COI Team hopes to work with providers in as flexible a manner to ensure that the balance is struck between making sure that material that should not be aired publicly isn't, but the scheduled Hearings can proceed without disruption.

That's all I have to say.

COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

Mrs Forbes-Vanterpool, I'm going to make the directions that I've already indicated. Although Mr Rowe says the two-stage process relates to redaction, in a sense I think you're right, Mrs Forbes-Vanterpool, that in essence it does apply here. But at the moment, nobody has applied to redact any

part of these documents; the Registrar hasn't, nor has any of the individual Members of the House of Assembly. Giving them an opportunity to object to this information, these documents, or any part of the information or documents being put into the public domain is either an application to redact or certainly akin to it. And until such an application is made, it seems to me that the balancing exercise, such as it is, that I have to perform is all one way, and that is nobody objects to these documents being made public, and they should be made public, which means that the Hearing can be in public and live-streamed.

And in relation to the conditions, in the light of what you have said that you're not acting for the Registrar, subject to anything Mr Rawat says, we will write to the Registrar and ascertain from her which--what conditions, if any, she wishes to impose.

MRS FORBES-VANTERPOOL: Thank you, Commissioner.

COMMISSIONER HICKINBOTTOM: Anything else,
Mrs Forbes-Vanterpool?

MRS FORBES-VANTERPOOL: No, that's it. Those are my submissions.

COMMISSIONER HICKINBOTTOM: Mr Rowe, anything else from you?

MR ROWE: Just one simple issue, Commissioner. I'm looking at what I believe is in print so far. We notice that we have not been included in the e-mails and correspondence.

COMMISSIONER HICKINBOTTOM: Which e-mails have you not been included in, Mr Rowe?

MR ROWE: The letters what I have here from the bundle, the letters on the 3rd of June, the responses on the 3rd of June. I haven't printed all, but certainly those which concern our clients, we were not included in those.

I would respectfully ask, sir, that we write to the Commissioner giving a further e-mail address.

COMMISSIONER HICKINBOTTOM: I mean, I will hear from Mr Rawat, if he's got anything to add, but my initial response is that the correspondence was correspondence to the Registrar of Interests, who is not a participant and not, in fact, represented by the Attorney.

MR ROWE: You would appreciate, Commissioner, that the issue of the Declaration touches on concerns of the seven clients we represent. Although we actively act with the Attorney General and her office, this meets us by surprise, although unexpectedly we thought these submissions from Mrs Fiona Forbes would have been excellent, as I expected in the circumstances, but we would have loved to have an opportunity before and as, I think, will be the conditions throughout the Commission of Inquiry, that we be apprised beforehand at what is coming up so we can properly prepare ourselves. That's simply what we requested.

(Unclear) Mrs Forbes-Vanterpool, but in this

circumstance, as in the future, we would like to be fully informed that is what is happening in the same way that our correspondence to you, Commissioner, and your body is copied to the Attorney General as well.

COMMISSIONER HICKINBOTTOM: Mr Rawat?

MR RAWAT: The correspondence that is in the bundle was, as you pointed out, sir, to the Registrar. The Attorney General was copied in because, as we understood it, the Attorney General or the Registrar was acting or had come to the Attorney General for advice as to the ambit of her role under the Act. Mrs Forbes-Vanterpool has clarified the basis on which the Attorney General was here today.

In terms of the bundle itself, it was sent--and Mrs Forbes-Vanterpool can correct me I'm wrong, but she reached--it was sent to her this morning as well.

MRS FORBES-VANTERPOOL: Yes.

MR RAWAT: She also provided her written submissions this morning and, I must say, turned them around very quickly because she was able to refer to the bundle itself to assist you. My submission is there is no obligation on the COI to copy to another participant correspondence that is going to a third party or yet another participant.

Perhaps the point that you may wish to canvass with Mr Rowe is his remark that Silk Legal now work in active collaboration with the Attorney General because, as we had

previously understood it, the reason for Silk Legal to seek separate representation was because the seven Members of the House of Assembly that they now represent publicly stated through Mr Rowe that they had no confidence in the Attorney General.

MR ROWE: That has been--

COMMISSIONER HICKINBOTTOM: Just one moment, Mr Rowe.

Firstly, in terms of this correspondence, what Mr Rawat says is correct. In terms of the submissions, I only saw them this morning. And with respect, Mr Rowe, I had enough time to take them on board and, indeed, agree with them.

In terms of the wider issue of representation, the application on behalf of the seven Members, I think it is, of the House of Assembly whom you represent--and you've confirmed you still represent--was made on the basis that, although the Attorney General was ready, willing, and able to represent those Members, those Members did not want her to represent them because they considered she had various conflicts of interest; and, therefore, they considered she could not represent them, even if she wanted to. That, I think, was what Mr Rawat meant by the shorthand "a loss of confidence".

Now I understand from an e-mail, I think, yesterday that Silk Legal are now acting in collaboration with the Attorney General, whatever that means. But I'm not absolutely sure why it's now necessary for the Members of the House to

instruct lawyers other than the Attorney General's Chambers and those who support her. You may simply say that it's their choice. And although there doesn't appear to be any good reason on the face of it, if they wished to instruct other more lawyers at public expense, they have the right to do so.

MR ROWE: You are correct in every instance, sir, and we--I gather these are not adversarial--not adversarial practice, and Mr Rawat's attempt to divide and misinterpret what has never been stated by us, our clear indication was that, in matters concerning the Legislators, these particular persons, they wished to have this representation. And as you properly said, sir, it is their choice.

In fact, to the extend so far as to say, we, by our contract with these Legislators, it is open for them or for us to seek the assistance of additional attorneys to assist in this process. And that, sir, is a fundamental principle of natural justice which we are sure applies in these proceedings.

So, Mr Rawat, we have confidence in the Attorney General. We have never denied that confidence. What we were expressing was the expressed wishes of these seven, given what is undoubtedly the short staff, but I see the excellent representation of Ms Fiona Forbes to their team.

COMMISSIONER HICKINBOTTOM: Well, Mr Rowe, it's recorded that the reasons why you are acting for the Members of the House of Assembly who are not elected Ministers is recorded

both in the Transcript and, indeed, in one of my rulings. The main plank of it was that you made submissions that the Attorney General was conflicted out. Whatever was said then, you have now said that the Members have full confidence in the Attorney, for which I am glad. But in those circumstances, the Members of the House will no doubt reconsider their position as to whether it's necessary and appropriate for them to have separate representation, but I need say no more about that.

In terms of keeping you informed as to the proceedings of the Commission of Inquiry, you will be kept fully informed, Mr Rowe.

MR ROWE: I appreciate that, sir.

And just to reiterate, the decision respectfully is the decision of the Members. They are not--they are independent of the Attorney General. They are independent of this Commission. It is their right to choose who they wish to represent them and their rights to also terminate that representation if they so wish.

COMMISSIONER HICKINBOTTOM: I understand that, Mr Rowe.

Anything else, Mr Rowe?

MR ROWE: Nothing. No more, Commissioner. Thank you very much.

COMMISSIONER HICKINBOTTOM: Thank you very much.

Mr Rawat, anything else?

MR RAWAT: Nothing further. Thank you.

COMMISSIONER HICKINBOTTOM: Thank you very much.

MRS FORBES-VANTERPOOL: Thank you, Commissioner.

(Whereupon, the Hearing was concluded.)