

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 39

(FRIDAY 24 SEPTEMBER 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Mr Hussein Haeri of Withers LLP (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Mr Richard Rowe of Silk Legal appeared for those members of the House of Assembly who are not members of the Government.

Mr Stephen Daniels of Capital Law & Associates appeared for Mr Wendell Gaskin.

Counsel to the Commission Mr Bilal Rawat also appeared.

Mr Neil Smith gave evidence.

Mr Wendell Gaskin gave evidence.

Court Reporter:

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Those present:

Session 1

Mr Hussein Haeri, Withers LLP (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Bilal Rawat

Mr Neil Smith

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

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 2

Mr Hussein Haeri, Withers LLP (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Stephen Daniels, Capital Law & Associates (attending remotely)

Mr Bilal Rawat

Mr Wendell Gaskin

Mr Steven Chandler, Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

P R O C E E D I N G S

Session 1

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3 COMMISSIONER HICKINBOTTOM: Just before we start, can
4 I raise one very short point with Mr Haeri.

5 Mr Haeri, next Friday, we're due to hear from Robert
6 Smith and Honourable Vincent Wheatley. We've asked them to
7 confirm that they will attend that day and asked the IRU to do
8 the same, but we haven't had any confirmation yet. Can you
9 confirm that they will be attending then?

10 MR HAERI: Yes, good morning, Commissioner.

11 I can confirm that we are coordinating with them, and
12 will revert on that as soon as possible.

13 COMMISSIONER HICKINBOTTOM: Right. Right.

14 And when will that be?

15 MR HAERI: As soon as possible.

16 Once we've been able to connect with them and get
17 confirmation, we will return directly with that information.

18 COMMISSIONER HICKINBOTTOM: Okay. So that will be
19 later on today?

20 MR HAERI: I cannot confirm when we will be able to
21 connect with them and get confirmation, but I expect it will be
22 in the course of today, yes.

23 COMMISSIONER HICKINBOTTOM: Good. I'm sorry, it
24 wasn't meant to be a question, Mr Haeri, but we certainly know
25 what you say. You'll appreciate why we need confirmation that

1 they are actually coming that day.

2 MR HAERI: Yes, I understand.

3 COMMISSIONER HICKINBOTTOM: Thank you, Mr Haeri.

4 Mr Rawat.

5 MR RAWAT: Good morning, Commissioner. Our first
6 witness today is Mr Neil Smith.

7 Before I begin asking questions of Mr Smith, can I
8 just put on the record the representation that we have today.

9 COMMISSIONER HICKINBOTTOM: Thank you.

10 MR RAWAT: As everyone will be aware, Mr Hussein Haeri
11 is here attending remotely on behalf of the Attorney General and
12 elected Ministers. We also have Mr Richard Rowe on behalf of a
13 number of Members of the current House of Assembly.

14 BY MR RAWAT:

15 Q. Mr Smith, thank you for returning to give further
16 evidence to the Commissioner. You gave evidence on the 29th of
17 June of this year when you made an affirmation. There is no
18 need to make a further affirmation. You're still bound by that
19 earlier affirmation.

20 You will see to your left that there are a number of
21 bundles. We will be going possibly to some of the documents in
22 those bundles as we go through your evidence today.

23 Can I ask you this, please, and that is to just
24 remember to keep your voice up and to speak slowly. It's, as
25 you will appreciate, important that we accurately record your

1 answers on the Transcript as best can be done. I would suggest
2 that you pull the microphone a little closer to you because it's
3 not there to amplify.

4 A. All right.

5 Q. The other thing that both you and I will need to avoid
6 is speaking over each other. That sometimes is unavoidable, but
7 if it does occur, I will stop and I'll let you finish your
8 answer.

9 A. Fair enough.

10 Q. Now, you explained when you last gave evidence that
11 you were Financial Secretary between 2006 and 2017; is that
12 right?

13 A. I believe so, yes.

14 Q. But, during that time, there were two substantial
15 projects which have been subject of hearings and evidence before
16 this Commission?

17 A. Right.

18 Q. And those are what we have been calling the BVI
19 Airways Project and also the Port Development Project. And when
20 you were here on the 29th of June, I asked you questions about
21 both of those. I would like to return to those two topics with
22 you today, and I'm going to take them separately in turn, so we
23 will start with BVI Airways.

24 Now, to give some further context, on the 10th of
25 September of this year, at the direction of the Commissioner,

1 you were sent what we call a "Warning Letter".

2 A. Okay.

3 Q. Historically, it's known as Salmon Letter.

4 A. Yes.

5 Q. But in modern Inquiries the more modern term is
6 "Warning Letter".

7 The purpose of that is to set out, as it did,
8 potential criticisms that may be made of you in the context of
9 your involvement in the BVI Airways Project, and what I should
10 make clear is that involvement would be in your role as
11 Financial Secretary. Those potential criticisms arise from
12 evidence obtained by the Commission.

13 I should also explain--and that's been made clear to
14 you in writing--that they do not constitute either provisional
15 or concluded views of the Commissioner. The purpose of a
16 Warning Letter is to ensure that you are treated fairly and have
17 an opportunity to respond to those potential criticisms.

18 And you have, in response, provided a written
19 response, which is detailed and which the Commissioner has read,
20 but can you confirm that you are content that your written
21 response should form part of the evidence before the
22 Commissioner?

23 A. Yes, I am.

24 COMMISSIONER HICKINBOTTOM: And can I thank you for
25 the response, which was clear and full and helpful, thank you,

1 Mr Smith.

2 BY MR RAWAT:

3 Q. Given the detail that you have been able to provide,
4 Mr Smith, what I would like to focus today is on clarifying some
5 details and obtaining additional information from you. I don't
6 propose to read out the entirety of the written response; but,
7 of course, what we can also set it in context, is the evidence
8 you gave on the 29th of June.

9 A. Fair enough. I agree, thanks.

10 Q. Because what we did do on the 29th of June,
11 particularly in relation to the Auditor General's Report on
12 that, so we did go through some of the issues that were raised
13 in that Report with you.

14 But, in fairness to you, what we should say is that in
15 the Preamble to the Warning Letter--

16 A. Um-hmm.

17 Q. --you have registered that what you describe as your
18 profound disappointment in the quality of the Auditor General's
19 Report.

20 A. Yes, sir.

21 Q. And you put it in this context: Firstly, that you did
22 cite in a draft of the Report, and you did write to the Auditor
23 General identifying what you considered to be, and I quote,
24 "specific inadequacies in the draft."

25 A. Yeah.

1 Q. You go on to say--and this is my first question to
2 you--is that you say: "I also took the opportunity then in my
3 comments to identify the systemic concern of the security of
4 files in the BVI Civil Service, which aided in creating
5 significant gaps in the Report's analysis, and which among other
6 things will, if not remedied, result in a significant loss of
7 the Civil Service's credibility and ability to perform as a
8 professional institution".

9 Now, this was you writing back in 2019.

10 A. Yeah.

11 Q. Taking that into account, could you just clarify a
12 little bit more for the Commissioner what you mean by "systemic
13 concerns".

14 A. Okay. So, I think I should say that it's a big topic.
15 What I should start by saying is that, in my assessment, this is
16 not just a simple subject, but assessment over years. I believe
17 that within the Civil Service we have, at least in my
18 experience, some of the most capable people in the country and,
19 you know, in my travels and stuff, they're pretty good as
20 individuals; but, as an institution, for some reason we have
21 been unable to harness that capacity to reflect in an
22 institution the individual capabilities of the vast majority of
23 Civil Servants that we deal with.

24 And I think a lot of that--I mean, there's a lot to
25 it, but we have systemic issues like a filing system where

1 things disappear, you put something in the file, and you come
2 back a month later and it's not there, and I think that that
3 could be handled pretty simply by having an electronic file
4 management system, for example.

5 We have a running controversy between what exactly is
6 meant by, for example--and this is a big one for me, I
7 think--what is meant by Ministers having administrative
8 authority. Is it--does it actually usurp what is the common
9 understanding of what an Accounting Officer is responsible for?
10 Meaning, is a Minister expected or required or should be able to
11 be given administrative directions to a ministry? Or is it just
12 merely on a policy level?

13 And is it--and when that question is answered
14 definitively, what role does the Civil Service actually play in
15 supporting Ministers? Is the--can the objectivity be relied on?
16 Are Civil Servants protected when they're doing their jobs, even
17 when there are disagreements between them and the elected
18 representatives? Are they protected and assured that insofar as
19 they are always doing what they should be doing, and to protect
20 it from the intricacies, I guess you would say, of are they--or
21 some subject of assessment on the elected representatives' side.

22 So, those are things that I believe that when you look
23 at them--and it's a lot more complex than that, but that's just
24 where we stand.

25 Do they add Ministers--and this is a big one--are the

1 Ministers assured, or are the elected representatives assured
2 that they are being supported by a professional, apolitical
3 organisation?

4 And I think that unless we address those things
5 directly--right?--for example, a Civil Servant should be assured
6 of protection insofar as they're doing their job--right?--but
7 I'm sure that you can see instances where sometimes they might
8 not feel as protected as they should be. And I think that once
9 those systemic issues are sorted out and clarity on the roles
10 and what can be done and what can't be done are sorted out,
11 unless that is not done, the fuzziness that that creates, and
12 the confusion that that creates is going to continue to result
13 in a lack of confidence in the Civil Service by elected
14 representatives, and a question of what exactly are their role
15 to the Ministers by the Civil Service and by the Civil Service
16 as a whole.

17 COMMISSIONER HICKINBOTTOM: Quite a lot of those
18 points, which, as you say, some big issues, big points there,
19 but quite a lot of them, Mr Smith, are looking at the
20 independence or the apolitical nature of the public officials of
21 the Civil Service from each side, from the public officials'
22 side and from the elected Ministers' side, but it's looking, as
23 it were, at the same issue, i.e., the issue of independence--

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: --of Civil Servants?

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: Yes, thank you.

3 BY MR RAWAT:

4 Q. Could I ask three question that flow from your
5 response.

6 A. Sure.

7 Q. Firstly about files. You advocate a move to a wholly
8 electronic system. Your time as Financial Secretary, obviously,
9 pre-dated the hurricanes.

10 A. Yes.

11 Q. So, when you're speaking of the "difficulties", do you
12 have that sort of pre-hurricane period particularly in mind?
13 Because obviously the Commissioner has received evidence from a
14 number of Civil Servants about the impact that the hurricanes
15 had on, if you like, document preservation within the Civil
16 Service, so could I ask you to elaborate a little bit more on
17 that. Are you speaking specifically of a pre-hurricane period
18 or do your concerns expand into post-hurricane?

19 A. There was some concerns before the hurricane period,
20 and it could be--I mean, I'm not necessarily suggesting that
21 there are nefarious reasons behind why files disappear, I mean,
22 there could be a bunch of reasons, but it's a lack of
23 discipline, for sure. But yes, I am speaking to some extent
24 about a pre-hurricane period and is exacerbated by the
25 post-hurricane period as well. Because if those files were

1 electronic, we would have been up and running--well, once we get
2 power, we would be up and running.

3 And that is what is mentioned in the Auditor General's
4 Report, for example, is that I dumped a lot of my files to her
5 for her to get the--in order for her to do the Audit Report.
6 And then even though there were gaps in my things--because I
7 developed the habit prior to the hurricane, that especially on
8 projects that had a potential to be very controversial that I
9 would make sure that I had a mirror copy in cyberspace so that
10 if anything came up, I could access those files and put them
11 back to where they were supposed to be.

12 And what is mentioned in the Auditor General's Report
13 is that I sent her loads of files, megabytes of files that I had
14 kept on this particular Project, and a lot of projects I have
15 that as well.

16 Sorry, the issue that I had with that is I don't think
17 that that was something I should have been doing. That is
18 something I did on my own initiative because of the gaps that I
19 saw.

20 COMMISSIONER HICKINBOTTOM: That was a sort of
21 personal initiative?

22 THE WITNESS: Yes.

23 BY MR RAWAT:

24 Q. And was there any reason you couldn't roll out that
25 personal initiative? I mean, as Financial Secretary, you're a

1 senior Civil Servant in a significant Ministry, and obviously
2 you're adopting this practice. Was there any reason you
3 couldn't encourage others to do the same or encourage the
4 development of policy that would--may offer better file
5 retention?

6 A. Yeah. We attempted to do it. There was a running
7 initiative that called "DocCover" (phonetic), but for some
8 reason it never really caught on. Some of us would use it.

9 But, you know--there's a saying in the Caribbean, you
10 can lead a horse to the water but you can't make him drink. So,
11 it requires, I think, a shift in mindset to not always have
12 something in front of me.

13 For example, the bundle that you sent me, I haven't
14 seen anything in hard copy up to now. Just everything is
15 electronic for me, I did my signature electronically, I sent it
16 to you. That's the way I operate, but there's some people, it's
17 difficult. I mean, I guess it's a transition from the old to
18 the new. It's difficult, and generally what happens is that
19 when you--in change management, they teach you that, or you
20 realize that getting over that line is sometime difficult, and
21 the impression I got is that sometimes when they would run into
22 problems, they would just lapse directly back into the original
23 form which is a paper file.

24 COMMISSIONER HICKINBOTTOM: But, in your view, moving
25 all files in all Ministries, I suspect, to electronic files--

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: --will help in a number of
3 ways, I think.

4 THE WITNESS: It will.

5 COMMISSIONER HICKINBOTTOM: I mean--yes, in a number
6 of ways.

7 THE WITNESS: Yes.

8 COMMISSIONER HICKINBOTTOM: Okay, thank you.

9 BY MR RAWAT:

10 Q. Second issue, you raise the position of a Minister.

11 A. Yes.

12 Q. Under the Constitution, the Minister has
13 administrative responsibilities, and I think the question goes
14 to what exactly does that mean?

15 A. Yes, I do.

16 Q. And would this be a fair way of putting your
17 experience, and that is that you have found some Ministers who
18 say, "I am policy only", but you have others who will take it
19 upon themselves to give administrative direction?

20 A. Yes, yes.

21 Q. And therefore there is a--

22 A. Confusion--

23 Q. --a subjective approach depending on the individual
24 Minister?

25 A. Yes.

1 Q. Thank you.

2 The third one was the question that you raise is, you
3 know, what assurances of protection does the Public Officer
4 have?

5 To put that back to you, within the system--we've
6 obviously seen the General Orders of 1982.

7 A. Yes.

8 Q. And this is a question at the beginning of the
9 hearings when we were still sitting in private, we explored with
10 a number of Permanent Secretaries, but again, drawing on your
11 experience, what protections are there for a Public Officer who
12 perhaps has a disagreement with the Minister?

13 A. I think that the general impression is that there is
14 little protection. Whether that is true in practice, I think,
15 is another issue, but I know that, even with me, in my role as
16 Financial Secretary, even though I general--you know, with the
17 last Minister, for example, I had a fairly easy relationship,
18 but--and I've also, in one instance which I note, have been the
19 benefit--the beneficiary of the head of the Civil Service coming
20 to my aid.

21 But I think that generally speaking there is a feeling
22 that there is a lack of confidence generally, or that if you put
23 yourself out there in doing the right thing, that you kind
24 of--you kind of feel like you're on your own, and I don't think
25 that it needs to be that way because, in a lot of cases, even

1 though it might not appear that way, the Minister might be
2 trying his best--his or her best to do what he think is correct,
3 and the Civil Servant might be doing their best to do what he
4 thinks is correct. If there is a disagreement, I think
5 experience has shown that generally the Civil Servant is the one
6 who tends to get the bad rap, so to speak. I mean, ultimately,
7 I have not seen where a Civil Servant doing the right thing has
8 lost a job or any--well, they might lose a post, but there is a
9 reputation of issues and things that arise from that, and I
10 don't know if that gives individual Civil Servants the
11 confidence that they should have to make sure that they continue
12 to do what they should do have duty-bound and so on to
13 actually--to actually--

14 COMMISSIONER HICKINBOTTOM: It seems to me that that
15 point is not perhaps entirely unassociated with the second
16 point, which is the position of the Minister--

17 THE WITNESS: Right, yes. It's related.

18 COMMISSIONER HICKINBOTTOM: It's related, because if
19 that were clearer, as it were, less subjective, that would at
20 least give the Public Officers confidence as to--

21 THE WITNESS: Clear--it will be a clear role
22 delineation between, yeah.

23 COMMISSIONER HICKINBOTTOM: Yes, thank you.

24 BY MR RAWAT:

25 Q. And it might be suggested that it's an example where

1 perception may be more important than reality.

2 A. Yes.

3 Q. Because if there was a perception within the Civil
4 Service that there are risks associated with, to borrow your
5 phrase, "doing your duty"--

6 A. Yes.

7 Q. --that might act as a brake on individuals taking
8 steps?

9 A. Because some people are more easily intimidated than
10 others. Some Civil Servants, you can tell them the worst things
11 and they're just going to, okay. Others, if you even change the
12 inflection in your voice, they're intimidated immediately.

13 So, what that says is, even by those two examples, I
14 should say, you could see that you could affect the
15 effectiveness of the Civil Service itself.

16 Q. If we could just return to the Preamble of your
17 written response, and I just want to summarise some of the
18 points you make, in fairness to you.

19 A. Um-hmm.

20 Q. You make the point that the Auditor General's Report
21 was written after the event.

22 A. Yes.

23 Q. And with the benefit of hindsight.

24 A. Um-hmm.

25 Q. You also point to the fact that there has been an

1 arbitration process?

2 A. Yes.

3 Q. And that has collected many more documents.

4 A. (Witness nods.)

5 Q. You make the point, and it's right that you should put
6 this on the record--

7 A. Sure.

8 Q. --that you consider, and I think it's perhaps that the
9 content of the Report you say ultimately you see it as an attack
10 on your professional integrity as a Public Officer.

11 A. Um-hmm.

12 Q. And you say that my entire career in the BVI Civil
13 Service has been focused on and is evidenced by consistent
14 efforts and successes in implementing and improving systems of
15 governance, transparency, and integrity in the BVI Civil
16 Service, sometimes under stiff opposition from the Civil
17 Servants and elected officials alike.

18 Against that background, Mr Smith, I hope that you
19 consider, therefore, an opportunity to set out your position in
20 writing--

21 A. Yes.

22 Q. --and also to give oral evidence does allow you a
23 reasonable opportunity to give the Commissioner your
24 perspective.

25 A. Yes, yes.

1 Q. There was one detail I would just like to clarify in
2 relation to your evidence on the last occasion, but you
3 explained that--and we don't need to go through the whole
4 chronology again, but the BVI Airways Project involved the
5 negotiation of a Framework Agreement.

6 A. Um-hmm.

7 Q. Which I think was signed off in December 2015?

8 A. That sounds correct.

9 Q. But I think you said on the last occasion that that
10 was negotiated by a team from Government comprising of yourself
11 and two other, and I don't think that the Transcript accurately
12 recorded the name of the other two on your team.

13 A. Okay.

14 Q. Can you confirm that it was Russell Harrigan?

15 A. Yes.

16 Q. And Clive Smith?

17 A. Yes.

18 Q. Thank you. Let's turn, if I may, to the first
19 criticism.

20 A. Sure.

21 Q. Potential criticism, that you address, and you have,
22 if I may say so, very helpfully set out your response for the
23 Commissioner in a format that is perhaps could be described as
24 "user-friendly".

25 A. I did my best.

1 Q. The first criticism relates to the implementation of
2 the BVI Airways Project.

3 A. Um-hmm.

4 Q. And you accept in your written response that the
5 Project was not put out to tender.

6 A. Yes.

7 Q. But you contend that this does not amount to a
8 complete bypassing of the tender process, and you set out in
9 some detail your position.

10 A. Yes.

11 Q. Can you help us with this: At any point in the
12 process, was consideration given to putting the Project out to
13 tender?

14 A. Actually, no, not to the best of my knowledge. In
15 discussions in which I was involved, no, we didn't consider
16 that.

17 And some earlier reason why that they--to put on a
18 flight between Beef Island and Miami has some technical
19 challenges--right?--the technical challenges I could think on
20 maybe only three aircraft that could do that, whether it is
21 profitable, one of which was used, and another one which I think
22 is the ERJ 170. To purchase one of those would have been just
23 too expensive so the economics wouldn't have worked out. And
24 I'm aware of another one I think is Fokker 70 that I think KLM
25 used the flight once, could do it as well, but...

1 There is a funny combination between new aircraft that
2 could barely get it done, that none of the established airlines
3 that would be interested in our route flew. Other issue of the
4 aircraft that could do it were old and inefficient.

5 And we also knew that the major airline, American
6 Airline especially, wanted to be in the BVI but because it
7 didn't have the current aircraft and the fleet, and I guess for
8 business reasons won't be prepared to buy anything to do it. We
9 knew that it was not a very--commercially, it wasn't a very
10 attractive venture.

11 So, I believe that because of all of those things,
12 that entire assessment, trying to get people to do it, are not
13 interested, knowing the technical challenges that were
14 involved--well, I guess for a number of years, just sat around.
15 And then Mr Hyman, who we knew was aware of the challenges that
16 we had about this strategic vision, I guess, of the current
17 government to establish air access, and the active pursuit of
18 extending the runway in order to achieve that, was aware of all
19 of that, and I guess he used that knowledge and his influence
20 within the Central Government to make that proposal to us.

21 COMMISSIONER HICKINBOTTOM: I certainly see that from
22 what you say, which I certainly accept, that this was a
23 challenging route.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: And whatever you did,

1 you're not going to be inundated with offers to do it.

2 THE WITNESS: No.

3 COMMISSIONER HICKINBOTTOM: But I'm still not quite
4 sure why, and you may not be sure why, there was no tender.

5 THE WITNESS: Yes.

6 COMMISSIONER HICKINBOTTOM: Because you put a tender
7 out there--

8 THE WITNESS: Only way to get that.

9 COMMISSIONER HICKINBOTTOM: You may not get many
10 people responding. You may not get any people responding but at
11 least then you know--

12 THE WITNESS: It's fair.

13 COMMISSIONER HICKINBOTTOM: And there is--there is
14 nobody out there. There's not somebody out there, you're not
15 left wondering.

16 THE WITNESS: Yes. And Commissioner, I actually
17 agree, and in 20/20 hindsight, yes, we probably slipped up
18 there--but, you know, I mean, it's easy for us to Monday morning
19 quarterback it and everything, which I accept there is--I could
20 see it as a deficiency. But I guess we are so much in a rush to
21 get and get the air accessing established that we probably
22 dropped the ball on that. I will take that on the nose.

23 COMMISSIONER HICKINBOTTOM: That's very fair, thank
24 you.

25 BY MR RAWAT:

1 Q. So, technical challenges you have spoken of which is
2 focused around choice of aircraft. Were those challenges--or
3 the challenge, were those challenges that emerged as you
4 embarked on the Project, or were they challenges that you were
5 aware of even before that first approach from Mr Hyman?

6 A. Even before, we were aware of it. And even the
7 aircraft that could do it were under limits of being able to do
8 it. So, the issue is not the distance, necessarily. It was a
9 combination of the runway length, so you had--you could only
10 take off with a certain load, fuel and passengers, and in that
11 mixture you have to get it right to make sure that the route is
12 profitable, while still having enough fuel to actually make the
13 flight.

14 So, I mean, I'm saying this just to give you an idea
15 of the challenges. I think when we worked it out, they had
16 maybe like 30 minutes loiter time between here and Miami, was
17 the loiter time, if they had to hold pattern for more than 30
18 minutes you will probably run out of fuel. So, it was on very
19 limits of what the aircraft could do anyway operating from that
20 runway.

21 COMMISSIONER HICKINBOTTOM: And just to go back half a
22 step, this initiative, this Project, as I understand it from the
23 evidence you gave last time, was only intended, in any event to
24 be a temporary solution.

25 THE WITNESS: Yes.

1 COMMISSIONER HICKINBOTTOM: The solution being to
2 extend the runway and effectively make it--I was going to say an
3 international airport, but an airport that could take aircraft
4 from--

5 THE WITNESS: Miami at least, yes.

6 COMMISSIONER HICKINBOTTOM: And much further away.

7 THE WITNESS: Yes, yes.

8 COMMISSIONER HICKINBOTTOM: Yes.

9 BY MR RAWAT:

10 Q. And to sort of I hope fairly summarise the issues,
11 firstly, it was runway length.

12 A. Um-hmm.

13 Q. Secondly, that you had lost American Eagle in 2013.

14 A. Yes, yes.

15 Q. And thirdly, that the focus on government was on
16 restoring a direct link--

17 A. Right.

18 Q. --into the BVI?

19 A. Yes.

20 Q. Now, if we look at page 4 of your written response--

21 A. Okay, I guess I got it. That was it.

22 Q. You'll see, if you look just to your left--to your
23 right, I think, you should see there are--

24 A. This...

25 Q. I think it is that, and that's your written response

1 on BVI Airways. And if you turn to your table and look at
2 page 4. It's useful to keep that in front of you as we go
3 through.

4 A. Yes.

5 Q. Now, what you say is that--because one aspect of the
6 potential criticism was that there wasn't a real examination of
7 alternative solutions, and you say alternatives to improving
8 access to the BVI were considered.

9 And when you say that, are you referring specifically
10 to the ones that you quote, which are improving the ferry system
11 and subsidizing a local airline or were there others?

12 A. Those were the ones I recall. Those were only--those
13 were the two.

14 So, the issues were to, because it came up all the
15 time about, if we had a more efficient ferry service between the
16 US Virgin Islands and the British Virgin Islands, that people
17 really wouldn't have an issue. It sounded good at first, but
18 when we surveyed all travels to the BVI, we realised that no,
19 that doesn't work. We just don't want to have to switch--change
20 more to travel again. They could accelerate once they get to
21 Miami, yes, but then to stop and then to start again was a
22 no-no.

23 So, that was one that, even though it sounded good at
24 first, based on our surveys of travelers to the BVI, we realised
25 that we need to avoid that. And also for the European side, and

1 even maybe Asian side as well. Coming through Antigua, you have
2 to stop in Antigua, you have to stop in Sint Maarten and get on
3 another plane to come to the BVI, so that was also an issue.
4 When we tried to--or reduce the impact of that by having a local
5 airline subsidized that would be on the tarmac all ready to go
6 when BA or--I don't think we did it in Sint Maarten, but at
7 least with BA, we were strongly--again Virgin, when they'll get
8 there, the passengers would probably maybe be on the ground half
9 an hour and then they will go on again, but that's something
10 that travelers really wanted to avoid; right?

11 But those are the two alternatives, at least those
12 were the two major ones that I remember--I recall.

13 Q. And did the consideration of those alternatives begin
14 after American Eagle had stopped flying to the BVI in 2013?

15 A. I suspect it started then. I wasn't around really
16 involved. I wasn't involved necessarily, but I was in a major
17 finance for sure, but I wasn't so much involved at that point,
18 but I became interested because I think I was sitting on the
19 Board. I didn't really pay much attention to it except the air
20 access issue that we needed to solve. But I would have been
21 around, I suspect. I don't want to say definitively "yes" or
22 "no", but I expect that they were.

23 Q. And over what period were they considered?

24 A. You mean the alternatives?

25 Q. Yes.

1 A. Well, alternatives are always considered, if that's
2 what you mean, but I don't know the details of those
3 alternatives because I just wasn't deeply involved in it, but I
4 know it would have been there.

5 Q. But can you say whether they were still being
6 considered after the BVI project?

7 A. BVI Airways Project?

8 Q. BVI Airways Project.

9 A. Well, it was still actively being pursued, because
10 even when you're pursuing the BVI Airways Project, we still had
11 boats that were running, I think, leaving even at night between
12 the BVI and St Thomas, and the local airline was still being
13 subsidised. But I think the idea was that the link between St
14 Thomas and US Virgin Islands would not have been so much
15 necessary anymore, but certainly the Antigua connection would
16 have still existed.

17 Q. But did there come a point where a view was reached
18 that these alternatives, which I think too you focus on
19 subsidising the local airline and trying to improve the ferry
20 service with the U.S. Virgin Islands. Did there come a point
21 when a view was taken that those alternatives were less
22 attractive than the BVI Airways Project?

23 A. We pursued the BVI Airways option because--I don't
24 know if I'm making sense.

25 The BVI Airways option was more a attractive option

1 than St. Thomas to--well, USVI to BVI. And that they would have
2 basically eliminated the need for that route. Not immediately
3 because you would have to develop a relationship with the
4 airlines and that type of stuff and then eventually it would
5 have phased out.

6 The Antigua one, I believe, would have still existed
7 because we just wasn't concentrating on that side so much.

8 I don't know if you recall, if you study the tourism
9 data, you will notice that most of the people that come to the
10 BVI as tourists, they come from North America or through North
11 America; right? Usually the individuals that come--and I hope
12 I'm not misremembering any data incorrectly--but most the
13 individuals that come to the BVI on vacation through Europe, I
14 think tend to be from either the UK or around the UK--you know,
15 it wouldn't be France necessarily, but UK mostly and maybe
16 Germany and those types of guys, but not France because they
17 would be going to Sint Maarten and Guadalupe and those type of
18 things.

19 So the heavy traffic would be coming from the North
20 American side.

21 And I could say this probably to give this a better
22 context, there's one conversation which the Minister at the time
23 for the Airport relayed to me. We had a special meeting with
24 one of the directors of Jet Blue, and this individual was going
25 to St. Thomas on one of his airplanes as a tourist, but he

1 noticed that when he got--when he was--when he got off the plane
2 in St Thomas, that about 20 percent of his passengers was going
3 to the BVI, so he wondered what's up with this, and he actually
4 came to the BVI to figure out what it was.

5 Just to show you the magnitude, at least 30 percent of
6 the people or more. So, if you could eliminate the extra
7 connection because, as a traveling person, you recognise that
8 when you're making a selection, you're essentially wasting time.
9 It could be the difference between someone not coming to the BVI
10 or someone coming to the BVI, and we wanted to increase the
11 probability of that occurred.

12 COMMISSIONER HICKINBOTTOM: So, the plan was to use
13 the Miami hub mainly.

14 THE WITNESS: Yes.

15 COMMISSIONER HICKINBOTTOM: And Antigua would be a
16 local hub as well?

17 THE WITNESS: Yes.

18 BY MR RAWAT:

19 Q. Considering the alternative, was there any cost
20 benefit analysis undertaken comparing the BVI Airways Project
21 against, for example, including the ferry service?

22 A. No, not to the BVI but to the traveler, if that makes
23 sense.

24 So, when you did the figures, it would cost
25 essentially the same. The ticket price between Miami and the

1 BVI would essentially be the same as the ticket price between
2 Miami and St Thomas. But the issue is now we have to pay
3 another \$50, or whatever, to jump over. And if you're a person
4 like me, where you put a value on your time, it's a lot more
5 than what you pay for the taxi fare and the--

6 COMMISSIONER HICKINBOTTOM: So, was research
7 done--because it's not really--it's not really money in that
8 sense.

9 THE WITNESS: Yes, yes.

10 COMMISSIONER HICKINBOTTOM: It's convenience for the
11 passenger--

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: --which may result in them
14 not coming here at all.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: So, was there any research
17 done into the passenger preferences?

18 THE WITNESS: There was a study I recall done by the
19 BVI Airports Authority:

20 COMMISSIONER HICKINBOTTOM: Yes.

21 THE WITNESS: I don't remember the name of the Company
22 but it did look into that, and a lot of it was things like what
23 we call day trippers. You won't get day trippers. You wouldn't
24 come to the BVI for the weekend. You'd go to St Thomas for the
25 weekend, but you wouldn't come to the BVI because you lose the

1 first day just getting here. Then you lose a second day leaving
2 here, so things like that would be looked at.

3 COMMISSIONER HICKINBOTTOM: I understand, yes.

4 BY MR RAWAT:

5 Q. Is that what you mean, that study on behalf of the
6 Airports Authority, when you refer at your page 5 to subsequent
7 investigations or several investigations?

8 A. Yes, exactly.

9 Q. So, that's a project initiated by the Airports
10 Authority?

11 A. The airport was very interested in it because they
12 wanted to determine whether or not it made sense to extend the
13 runway, yes.

14 Q. You say "several investigations". Were there any
15 other investigations that you recall?

16 A. I'm aware of the first Board doing something as well,
17 but I don't remember what that looked like, but I saw the one
18 for the airport.

19 Q. And can you give us a sort of time frame when these
20 investigations were going on? We've got 2015 as when the
21 Framework Agreement comes into play.

22 A. It was before that. It would have been--they were
23 looking into the Master Plan, so I suspect that might have been
24 maybe 2013-2014. It was before 2015.

25 Q. Now, as I understand the rationale behind the Airways

1 Project--

2 A. Hm-umm.

3 Q. --it was intended to proceed in tandem with extending
4 the runway; is that right?

5 A. Yes, yes.

6 And it was, actually.

7 Q. And you described it as an "interim measure" in your
8 written response.

9 A. Um-hmm.

10 Q. How long was it intended to be in place as an interim
11 measure?

12 A. We planned it to be for five years because we'd
13 expected the runway to take, maybe, two years to construct and
14 get to that point, maybe in 18 months. We had to wait a little
15 bit longer than that--well, we didn't get to the construction
16 stage but we did get to the point to make the decision on who to
17 put to do the work.

18 So, the hope was that, you have the interim measure.
19 You develop the market, you know, where people get used to
20 coming there, to the BVI. And when there is a runway, you have
21 the bigger, more efficient aircraft with the established
22 airlines coming in. So, by that time, BVI Airways would be
23 going out--well, they might have decided to stay if they
24 refueled the different aircraft. But the point is, now we have
25 a more efficient mode of travel all of a sudden.

1 COMMISSIONER HICKINBOTTOM: You have less need for a
2 hub?

3 THE WITNESS: Yes.

4 COMMISSIONER HICKINBOTTOM: And possibly, if that--BVI
5 may be a hub, but anyway, you would have less reliance on Miami
6 and Antigua?

7 THE WITNESS: Yes, yes.

8 COMMISSIONER HICKINBOTTOM: Okay.

9 BY MR RAWAT:

10 Q. Again, an element of the potential criticism raised
11 here is a failure to learn from what might be described as the
12 collapse of British Caribbean Airlines in 1986.

13 Now, you give two reasons in your written response why
14 British Air--Caribbean Airways failed in 1986. Firstly, that
15 American Airways, I think under the guise of American Eagle,
16 began to fly into the BVI.

17 A. Yes.

18 Q. And secondly, you say that there was some controversy,
19 in any event, surrounding Caribbean Airlines.

20 Were you aware of the Caribbean Airlines venture
21 before becoming involved in the BVI project--Airways Project?

22 A. Yes. As a--as a young lad, I guess I would say, I was
23 quite intrigued by--Caribbean Airways is the name of it; right?
24 I remember the BAe-146. I remember, as a little child, going up
25 to the airport and seeing them doing practice runs. So I was

1 aware of it then. And I do recall there being something about
2 there being a list of activity concerned--connected with it.
3 But I was aware of it.

4 So, before we began this, I did a little more research
5 into it, and I realized that the times kind of coincided, and
6 then I queried a bit more, so it was a combination of both of
7 those things: American Eagle flying into the BVI because we had
8 Air BVI and those guys before, but now we had American Eagle.
9 And I think maybe slightly before that, there was a controversy.
10 I think they were running drugs or something on the planes,
11 something really, really nasty.

12 Q. Just so that we can be clear, was any regard given to
13 the fact that the British Caribbean Airways venture, which
14 involved flying between Miami and BVI, had failed?

15 A. Oh, yeah. But you have to look at the reasons why it
16 failed. Of course we knew that it failed, but the reasons why
17 it failed were not technical issues, if I'm making sense.

18 COMMISSIONER HICKINBOTTOM: The reasons they failed
19 were commercial--

20 THE WITNESS: Yeah.

21 COMMISSIONER HICKINBOTTOM: --with American Eagle.

22 THE WITNESS: Yes.

23 COMMISSIONER HICKINBOTTOM: And possibly--

24 THE WITNESS: The very--the commercial reason why they
25 failed was the same commercial reason that made BVI Airways

1 viable, if I'm making sense.

2 COMMISSIONER HICKINBOTTOM: I understand that.
3 Because there was no competition.

4 THE WITNESS: Right.

5 BY MR RAWAT:

6 Q. Now, you go on to say in your written response that
7 the principals of BVI Airways were experienced businessmen with
8 evidenced and successful track records, and that they also hired
9 individuals with experience in aviation.

10 A. Um-hmm.

11 Q. Now, you previously explained--and I could take you to
12 it if it will help--but you say that at the beginning of the
13 process you carried out due diligence on of the principals of
14 BVI Airways.

15 When you say "principals," are you referring, then, to
16 Bruce Bradley, Jerry Willoughby, and Scott Weisman?

17 A. Yes.

18 Q. Did you know any of those three before the inception
19 of the BVI Airways Project?

20 A. No.

21 Q. Did they come to you, if you like, or to the BVI
22 Government through Mr Hyman?

23 A. Yeah. I became aware of them through Mr Hyman, and I
24 saw them for the first time--I think Mr Hyman was actually
25 there. He brought them to introduce to the Premier at the time,

1 and I think some of the other Cabinet Members might have been
2 around, and that's where I got to meet them, yeah.

3 Q. Now, what you said you used to carry out the due
4 diligence--

5 A. Um-hmm.

6 Q. --was something called World-Check.

7 A. Yes.

8 Q. To assist a little further, what is World-Check?

9 A. World-Check is something that we use in financial
10 investigation where you check--you look at it for politically
11 exposed persons; you see if anybody, or the people you're
12 checking have issues that any other financial investigation
13 agency or other law-enforcement authorities have got against
14 them, so you might have people that are under investigation for
15 money-laundering or somewhere, stuff like that. So, that's what
16 we normally do. That's the first line of defence I would use,
17 as a Financial Secretary, to see if we have an issue.

18 Subsequent to that, I actually had the head of the FIA
19 run them. I just said, "Hey, just check this for me", and he
20 did a check and he didn't see anything come up.

21 And when a lot of controversy around BVI Airways
22 started to happen in the public, actually had PwC to do a more
23 in-depth assessment of it. I mean, we saw things that we knew
24 about, like the involvement in a failed enterprise before and
25 those types of things. So, there was no surprises, really.

1 Q. So--and you say World-Check is something that you did
2 in financial investigations. So is it something that you have
3 to subscribe to?

4 A. Yes. I think there was a subscription involved.

5 Q. And is it run by a company or--I mean, who operates
6 World-Check?

7 A. That's a good question.

8 I don't know. I would have to check on that to find
9 out who exactly is behind it, but we used it all the time.

10 Q. When you say used it all the time, had you used it in
11 your time as a Financial Secretary?

12 A. Yes, yes.

13 Q. How did you come to know World-Check?

14 A. I guess, you know, you work with people in financial
15 investigations and things like that, and they tell you that it's
16 there and you gain access to it.

17 It became known to me through the execution of my
18 duties as Financial Secretary.

19 Q. So, World-Check is your first line of defence. That
20 didn't produce--

21 A. Anything.

22 Q. --anything. It didn't produce anything at all, or
23 didn't it produce anything negative?

24 A. Negative, yeah.

25 Q. Was there some information on the principals in

1 World-Check?

2 A. If I recall, we did a search, and we didn't see
3 anything attached to the names.

4 Q. I see.

5 So, the names didn't carry any flags and didn't come
6 up at all?

7 A. No. Hm-umm.

8 Q. And then you also had the head of the FIA also
9 undertake--

10 A. Yes. I mean, I did that afterwards because I was
11 under the impression that maybe I had missed something, so I
12 said, "Hey, just check these names here for me".

13 Q. When you say you did that afterwards, was that after,
14 if you like, the problems--

15 A. After the problems, sure. One--I was kind of saying
16 maybe, Neil, maybe you didn't do this properly, so I just had
17 somebody who had the skill sets, the specific skill sets to
18 do--these investigators know how to do things a bit differently
19 from me. But he didn't come up with anything either, so...

20 Q. And if we try and give a date to that, that's
21 after--was that after the 7 million had been paid--

22 A. No, while it was being paid.

23 Q. Right.

24 So, once you've committed to the Framework Agreement--

25 A. Yes.

1 Q. --which is December 2015, as the process was ongoing--

2 A. Yeah. And I started to second-guess myself.

3 Q. So, you went to the FIA?

4 A. Not officially. I called them on the phone and said,
5 "Hey, do me a favor, check this out, call me back and say"--and
6 he didn't see anything to be concerned about.

7 Q. And that unofficial inquiry did not produce anything
8 negative?

9 A. Yes. That was unofficial. If something had showed
10 up, I would have said, now we need to do something official.
11 But that's courtesy between colleagues, just to put it...

12 Q. In terms of PwC, at what point did you get PwC
13 involved?

14 A. That's when things started to really get controversial
15 in the public. I don't know about the dates. But I guess the
16 dates would be unimportant, though.

17 Q. But the--we can use as a benchmark the escrow point,
18 which I think is July 2017, but did you--I will check--

19 A. It would have been--it would have been after we
20 established the escrow.

21 Q. Right. That you went to--

22 A. PwC, yes.

23 Q. And did you go to the FIA before you established the
24 escrow?

25 A. After. Because, like I said, I was beginning to

1 second-guess what I had done as an individual, so I just wanted
2 to have someone else show their eyes on it, and then when it
3 continued, it went to PwC.

4 Q. But taking you back to the beginning, aside from
5 World-Check, did you undertake any other due diligence?

6 A. Other than Mr Hyman, no.

7 Q. The question that flows from the financial criticism
8 is: Why did you think that a background in real estate, which
9 is what Mr Bradley had, and a background in investment banking,
10 which was Mr Scott Weisman's background--

11 A. Yeah.

12 Q. Why did you think that experience meant that these
13 individuals could run an airline?

14 A. Okay. Because, primarily, running an airline is a
15 commercial enterprise. And experts in the aviation industry
16 would tell you that actually a plane is the last thing you
17 actually get. You have to deal with profit and loss, you have
18 to deal with market share, you have to deal with regulatory
19 requirements. And the basics of it is a business, albeit not a
20 simple one, could be a complex one, but the basics of it is a
21 business.

22 So, what are you looking for when you're running an
23 airline? When you look at the CEOs of those airlines, most of
24 them don't know anything about airplanes but they're good
25 businessmen. They might have been in the Company a while, but

1 they're generally businessmen. So, again, okay, you have good
2 commercial acumen, in my view.

3 And on top of that, when you look at it, one of
4 them--what's the name? Jerry Willoughby is his name. He had a
5 lot of aviation experience. He'd actually retired from the US
6 Air Force as a Brigadier General, I think. He was a training
7 captain for Delta for a lot of years. And then they brought on
8 individuals who, when they presented their CV, they said that
9 these people were in the industry. So, I had no concerns about
10 them being able to run a successful business, firstly.

11 And then, secondly, based on the information I got,
12 they've had the exports attached to them that would make sure
13 that the commercial-specific knowledge--not the commercial, the
14 airline-specific knowledge was actually present. That is how I
15 assessed them.

16 Q. You have spoken of the inquiries you made with
17 World-Check to see you, if you like, if there was anything
18 recorded negative against the names of the principals.

19 A. Um-hmm.

20 Q. And you say--and I accept what you say about
21 Mr. Willoughby's background in aviation. Focusing on Mr Bradley
22 and Mr Weisman, who didn't have that background, where did the
23 information come to you that they had commercial acumen? Where
24 did the information come to you that these individuals had
25 commercial acumen?

1 A. Well, it's easy to find, I think on the internet, if I
2 recall. Also from--how should I put it?--representations from
3 Mr Hyman who at the time was one of our most trusted advisors in
4 Government at the time. But actually seeing things that
5 Mr Bradley had done, actually.

6 Q. So, if you like, the two--the two sources that you
7 relied on to form a positive view of the principals of BVI
8 Airways were open source research on the internet--

9 A. Right.

10 Q. --and Mr Hyman, who had a long-standing relationship
11 with the BVI Government--

12 A. Yes.

13 Q. --essentially vouching for him.

14 A. Yes, and checking with World-Check to see if there
15 were any issues attached to them.

16 Q. I see.

17 If you turn, please, to Mr Smith--and you see the
18 larger--yes, the larger lever-arch file there on the desk, yes,
19 if you could turn up, please, page 39. I'm taking you to a page
20 in an appendix to the Auditor General's Report and you see at
21 II, the directors of BVI Airways are identified, and we see
22 listed there, and we see Mr. Willoughby, Mr Weisman, Mr Bradley,
23 and Mr Hyman, and also Mr Geluk, who was the Government
24 representative.

25 A. Um-hmm.

1 Q. But there are two others there, Robert Cisella and
2 Pauline Jones.

3 A. Um-hmm.

4 Q. Did you make any inquiries in relation to those
5 directors?

6 A. No.

7 Q. Were you aware that they were going to be involved as
8 Directors before the Framework Agreement was signed?

9 A. In the beginning, no. I don't think in the beginning.
10 But then as we started to put the structure together--they
11 started to put the structure together, I should say--then I
12 became aware. I know I met Ms Jones; she was introduced to me.
13 The other, Robert Cisella, never met him. But I'm aware of
14 Ms Jones and what is supposed to be her background.

15 Q. And how were you made aware of that background?

16 A. Just their representation, nothing that I--I didn't
17 feel it necessary to actually go check because I was more
18 concerned about the main guys, which were Jerry, Scott, and
19 Bruce.

20 Q. You see, also at III, that the beneficial owner of BVI
21 Airways are recorded as Colchester Aviation, which was a vehicle
22 of Mr Bradley's, but also Ms Jones and Bradley Goggin, who had
23 20 percent of the share ownership.

24 In relation to Mr Goggin, prior to signing the
25 Framework Agreement, were you aware of him?

1 A. I don't think so, no.

2 Q. At any point after signing the Framework Agreement,
3 did you undertake any due diligence in relation to him?

4 A. Yeah. Bradley, I was actually quite intrigued by him.
5 He was a Royal Air Force pilot, had actually come off of the
6 Queen's flight, so I wasn't too--I didn't feel a need, seeing
7 that he was a minor player, so to speak.

8 Let me explain why I say that.

9 The reason why--and I think they explained this after
10 they started to put things together--is that they were doing
11 this to try to make sure that most of the shares were British,
12 so that they could--how to put it? So that it could be
13 registered as a British airline as opposed to a US airline. So
14 what they explained was that they were trying to, in their
15 contractual agreements with Bradley--Brad, they used to call
16 him, and Pauline, that the vast majority of the shares--it could
17 be 51 shares--were British, so the airline would be registered
18 as a UK airline.

19 So, this was some, I guess, corporate structuring
20 messing about.

21 Q. You said that--I think you were introduced to Ms Jones
22 after--certainly after they started putting the structure
23 together. I assume the "they" is Mr Bradley, Mr Weisman--

24 A. Yes, Mr Weisman--sorry for interrupting.

25 Q. Not at all.

1 But was that structure, that step of putting the
2 structure in place, did that start happening after you'd signed
3 the Framework Agreement?

4 A. Yes, because I recall Scott being very risk-averse and
5 not wanting to start to invest time and effort into something
6 that was not agreed.

7 Q. If you turn over to page 38--

8 A. 38, okay.

9 Q. You see there that's listed in the appendix key
10 management personal of BVI Airways, and you will see some names
11 that we have already gone through. But there are others, for
12 example, Scott DeLacy recorded as Vice President of Operations,
13 Terrence Mack recorded as Director of Maintenance, Glenn Fordyce
14 as Chief Inspector/Quality Assurance.

15 Were these the individuals who you say were the ones
16 the principals had recruited with the required training and
17 experience in aviation?

18 A. Yes.

19 I could also say that I didn't pay too much attention
20 to those simply because they would have had to pass muster with
21 SC. So I mean, I was just mostly concerned with making sure of
22 facilitating the success of the venture, insofar as I was
23 allowed to do so, because I was balancing two things: I didn't
24 want the Government of the Virgin Islands to be accused of not
25 facilitating the enterprise. And then, on the other side, I

1 wanted to make sure that we weren't, for the lack of a better
2 term, taken for a ride. So, those two things I had to be
3 managing all the time. I was very, very concerned about the
4 potential for litigation--I was very aware of it--from the
5 principal of the BVI Airways against the Government of the
6 Virgin Islands.

7 So, most of the time I was concentrating on managing
8 the technical aspects of the concern with, from the point of
9 view as to whether or not had they progressed or had their
10 representation on what they spent, does that make sense based on
11 the cash projections that we had made before? So, I depended on
12 SC and the U.S. Department of Transportation and FAA,
13 eventually, to actually vet these technical people because these
14 were the individuals that have to be doing their manuals and all
15 of those type of things, so I didn't pay attention to those.

16 Q. But in terms of your ability to describe these
17 individuals as having the required training and experience in
18 aviation, did that simply come from your being given sight of
19 their CVs?

20 A. Yes, from that. And also it was affirmed or confirmed
21 by, well, the obvious acceptance of them by SC support
22 international--SC.

23 Q. May I pick on one point you said in your earlier
24 answer, which is that you were very conscious of the risk of
25 litigation.

1 A. Yes.

2 Q. And that risk, I think you seem to indicate, coming
3 from the principals of BVI Airways.

4 A. Um-hmm.

5 Q. How early into the Project did you become conscious of
6 the risk of litigation?

7 A. After we signed the Framework Agreement, and we
8 weren't able get to the Letter of Credit.

9 Q. Which is what led to the, if you like, the escrow
10 arrangement?

11 A. Um-hmm.

12 Q. So, it was around then that you became alert to the
13 risk of litigation?

14 A. Yeah. After we--after we realized we couldn't get a
15 Letter of Credit, and I began to get the impression that we need
16 to be extra careful, so the antennas went up, because I realized
17 that a lot of what they had intended to do was hinged on the
18 Letter of Credit, having this financial instrument that you
19 could use to do things with, even though they didn't have the
20 cash in hand. So, that's where I began to get maybe some
21 insight into how I believe the stuff was structured.

22 And then I started to question Scott some more. And I
23 began to understand exactly how actually--you know, how it
24 intended to raise funds and all of those things, and a lot of it
25 was hinging on a Letter of Credit. That was an essential part

1 of the Framework Agreement.

2 Q. And an essential part of--as you then came to
3 understand it--the mechanics under which BVI Airways would
4 operate?

5 A. Yes.

6 Q. And by then, they had been paid 5 million by--

7 A. No. By that time they had only been paid the initial
8 sum, which was about 500,000. I don't know what the schedule
9 is. Do you know what it is? It should be--

10 Q. The Escrow Agreement, which is what you put as your
11 benchmark for when you started, the antenna went up.

12 A. Oh, yeah, yeah. I remember.

13 So, let me explain that. It took us some months to
14 actually get the escrow agreement agreed. So, after we realized
15 that we weren't going to be able to get the Letter of Credit on
16 terms that would be acceptable, then the discussions centered
17 around meeting the Escrow Agreement. So, as to the Escrow
18 Agreement, when those began, those discussions became necessary,
19 I guess is the way I should put it--when these discussions
20 became necessary is when I realized that we need to be--I need
21 to be managing for risk more than anything else, yes.

22 Q. And what was it about how--about the response of the
23 principals of BVI Airways that made you think "I've got to start
24 managing risk"?

25 A. Well, I don't mean to sound circumspect, but I grew up

1 in a culture that is heavily influenced by the British way of
2 doing things. I mean, people tend to speak in a more civil way
3 to each other, but I also am very aware of the very American way
4 of doing thing, they're very brash and confrontative, I guess I
5 should say.

6 So, even though it was clear to me that Scott seemed
7 to have a lot of confidence in me, I guess because of how he saw
8 me operate, it was also clear that, look, if I have to cut your
9 throat--we're going to do what we need to do to protect
10 ourselves and, you know, you need to--as far as we're concerned,
11 okay, all right, I need to be--my role now is to prevent a
12 situation from the Government of the Virgin Islands from being
13 exposed to suits or anything like that.

14 I mean, the relationship between myself and Scott, who
15 I spoke to mostly, was always cordial. If I ask a question, he
16 will tell me. But then, when you push it a little too far, you
17 will see--that capitalistic side, I guess you could say, would
18 come out.

19 Q. If you turn up page 9 in the bundle. Sorry.

20 A. Page 9, okay.

21 Q. Now, this is turning to another element of Potential
22 Criticism 1, which is to use Sixel Consulting Group to do a
23 Feasibility Study, and for it to be a joint Feasibility Study
24 rather than the BVI Government getting its own.

25 Now, who proposed Sixel as the group to do this study?

1 A. As I recall, it would have been those people from BVI
2 Airways.

3 Q. So, they came to you and said, "let's use Sixel"?

4 A. Not to me personally, but yes, they came to the
5 Government.

6 Q. The Government?

7 A. Yes.

8 Q. And were other names put forward by BVI Airways?

9 A. Not to the best of my knowledge.

10 By the time I began to start to pay attention to this
11 matter, it was at a point where I was not deciding who to choose
12 for the study but to check out the Sixel to see whether or not
13 they were capable of doing it. I wasn't involved in the initial
14 decision to choose Six, but when I came in, I was duty-bound to
15 check out Six to make sure that, okay, these people, are they
16 credible, and do they have experience, do they have the capacity
17 to do that? That's when I came into it.

18 Q. And in the process of checking them out, did you learn
19 whether the BVI Government had put any other names forward?

20 A. No, I don't--it didn't come up.

21 Q. Would a fair summary be that BVI Airways proposed
22 Sixel; the government accepted. And then, when you came on
23 board, Sixel were already in place, and the work that you did
24 was to you check them out, so to speak?

25 A. Yes, I needed to make sure they could do what they

1 said they were going to do. But like I said, it was
2 conceivable. I don't know if that's what actually happened, but
3 it is conceivable.

4 Q. So, just to clarify, what do you say is conceivable?

5 A. It is conceivable that BVI Airways were the one who
6 proposed Sixel, but I don't recall being involved in that
7 discussion, who we're going to use or anything like that, at
8 all. It was BVI Airways said we are going to use these people.
9 And at that point I had to determine whether or not I was
10 confident in my role as the Financial Secretary because at that
11 time I wasn't the lead person involved. I was brought into it
12 because of my role as Financial Secretary in those initial
13 stages.

14 Q. In those initial stages, who was the lead person
15 involved?

16 A. It would have been the Premier's Office, whoever was
17 in the Premier's Office.

18 Q. Would there have been a particular Public Officer in
19 the Premier's Office who--

20 A. It would be the Permanent Secretary. I suspect it was
21 Roderick Penn, but I don't know if he was there yet. It would
22 have been whoever was Permanent Secretary of the Premier's
23 Office and the Premier and maybe one or two Cabinet Members with
24 them.

25 Q. I see.

1 Now, if you turn to page 7 in your written response.

2 A. Okay.

3 Q. You explain there, Mr Smith, that as well as saving
4 costs, one reason for the joint instruction was to demonstrate a
5 commitment to the success of the venture by both parties.

6 A. Right. That's right.

7 Q. Why was it necessary for--to demonstrate such a
8 commitment?

9 A. So, when I became involved, one of the questions I got
10 was that the main reason why the principals of BVI Airways had
11 any confidence that Government was going to work through this,
12 or could work through this, was because of the presence of
13 Mr Hyman, who, like I said, we trusted in the Central Government
14 because of the roles he played. He was in Government longer
15 than me, and I came in and did what I considered to be highly
16 sensitive work with him already.

17 And so that was part of the reason why he had the
18 confidence of first--the Government in the first place.

19 And in the second instance, like I said, I don't need
20 to keep saying this, but I guess they did do business long
21 enough, you know that deal, somebody want to do something but
22 they don't actually do it. So, I got the impression, when I
23 became involved, was that this sharing of cost was a way of
24 Government demonstrating its commitment to these people that
25 were seriously considering the static loading; right?

1 I don't know if you realize it, Commissioner, but in
2 Government--well, in the Government that was on the official
3 part, there were numerous instances of ideas coming up and then
4 just going away. So, I guess this was one of their ways of
5 trying to get some sort of serious consideration of the
6 Government.

7 Q. Can you help the Commissioner with this: Was there
8 any reason why the Sixel were not asked in their study to
9 examine alternatives to the use of BVI Airways?

10 A. I'm not aware of those. Were there? Was there?

11 Q. I--

12 A. I don't know.

13 Q. I'm afraid I can't give evidence.

14 Were you aware, or was there a reason why Sixel were
15 not asked to consider alternatives to the BVI Airways Project?

16 A. No. I had no idea.

17 The way I understand it is that the scope was fairly
18 simple: How do you get an aircraft flying--an aircraft flying
19 between Beef Island and Miami, direct, in a manner that is
20 profitable? That's what I--loosely, that's what I understand
21 the scope is. So, I guess I focused on that.

22 I knew there were other aircraft besides the ERG that
23 could do that, which was, like I said, the ERG, Embraer 170.
24 That didn't come up here, and we raised that when we had
25 discussions afterwards in the negotiations, which referred to

1 why wasn't that plane considered. And then, when we looked at
2 it, actually acquiring that aircraft would have been more
3 expensive than ERG. So, I think their scope was just narrow.

4 COMMISSIONER HICKINBOTTOM: In relation to Sixel, as I
5 understand your evidence, Mr Smith, you weren't--you personally
6 weren't involved in the selection of Sixel?

7 THE WITNESS: No.

8 COMMISSIONER HICKINBOTTOM: You, as it were, were
9 given Sixel.

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: It turns out that Sixel
12 were chosen by the operators.

13 THE WITNESS: Um-hmm.

14 COMMISSIONER HICKINBOTTOM: And as you say on page 8
15 of your response, later, during the course of the arbitration,
16 you became aware that the operators had substantially amended
17 the Report prior to providing it to the Government--

18 THE WITNESS: Yes.

19 COMMISSIONER HICKINBOTTOM: --to ensure that it
20 predicted a more favorable outcome to the Project.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: You weren't involved in
23 the selection of Sixel. But one of the unfortunate results of
24 Sixel being chosen by the operators--

25 THE WITNESS: Um-hmm.

1 COMMISSIONER HICKINBOTTOM: --was that this happened?

2 THE WITNESS: Yes.

3 COMMISSIONER HICKINBOTTOM: And that's unfortunate.

4 THE WITNESS: Yes.

5 Commissioner, apparently, it seemed to be like it was
6 quite a fight between Sixel and BVI Airways. I remember--you're
7 aware that Sixel is an organisation that has an international
8 reputation. So, apparently, there was quite a bit of--

9 COMMISSIONER HICKINBOTTOM: There was quite a lot--as
10 I understand it, quite a lot of pressure from BVI Airways?

11 THE WITNESS: Yes. I wasn't aware of that until the
12 Arbitration.

13 COMMISSIONER HICKINBOTTOM: I understand that.

14 Mr Rawat, I see the time. Is now the time--

15 MR RAWAT: If I may just ask--may I just ask about two
16 or three more questions--

17 COMMISSIONER HICKINBOTTOM: Yes, of course.

18 MR RAWAT: --just to finish off?

19 COMMISSIONER HICKINBOTTOM: Yes.

20 BY MR RAWAT:

21 Q. Did you or others in the BVI Government have any
22 meetings with Sixel to discuss the Report after it had been
23 provided?

24 A. No.

25 Q. You if turn up page 7--

1 A. Not that I'm aware. I didn't. I'm not aware of
2 anybody else.

3 Q. You're not aware or--you didn't have any meetings and
4 you're not aware of any others within Government--

5 A. No.

6 Q. --having such meetings?

7 If you turn up 746 in that big bundle.

8 A. Okay.

9 Q. This is part of the Arbitral Award, and you provided
10 evidence to the Arbitration--in fact, you gave oral evidence.

11 A. Yes.

12 Q. If I could draw your attention to paragraph 31.14, it
13 says there that one of the consultants with whom Mr. Willoughby
14 interacted was the Sixel Consulting Group.

15 And then it continues that, during the Hearing, the
16 BVI Government spent considerable time and effort attempting to
17 show that Mr Willoughby's interaction with Sixel demonstrated
18 "deceit and corruption" on the part of Mr Willoughby, BVI
19 Airways, and Colchester Aviation.

20 Now, it then continues at 31.15: "The BVI
21 Government's attempt to portray Mr Willoughby's interaction with
22 Sixel Group as sinister failed. Mr Willoughby's interaction
23 with the Sixel Group was exactly as envisioned when the Sixel
24 Group was retained jointly by the BVI Government and BVI
25 Airways."

1 And then it continues: "It is true, as the Government
2 pointed out, that there was a draft Sixel Report/Executive
3 Summary which was submitted to Mr Willoughby and Mr Bradley
4 before the Final Report/Executive Summary was submitted to the
5 BVI Government. It is also true that Mr Willoughby commented
6 upon the draft, and that it was edited by the Sixel Group before
7 it was submitted to the BVI Government. That process, review and
8 comment by BVI Airways on the draft before submission of the
9 final to the BVI Government, is required by the consulting
10 agreement."

11 And then the Arbitrator quotes from that agreement.

12 And then, at 13.18 on the next page, the Arbitrator
13 points to one error that was corrected by Mr Willoughby.

14 Now, it seems to me, when one looks at that, the
15 conclusion of the Arbitration was--or one conclusion of the
16 Arbitration was that there was nothing sinister about changes
17 that were made to the Report before it reached the BVI
18 Government. Is that your understanding of the outcome the
19 Arbitration at this point?

20 A. That's my understanding, yes.

21 Q. But there is reference there to a consulting
22 agreement. Did the BVI Government ask for a clause in that
23 agreement to allow them to comment on the draft report before it
24 was finalised?

25 A. I don't know.

1 Q. Thank you.

2 MR RAWAT: Commissioner, we will be moving on to
3 another topic, so I will pause there.

4 COMMISSIONER HICKINBOTTOM: Yes, we will have a break.
5 The Stenographer needs a break after an hour, and we've been
6 going about an hour and a half, so we will give him his break.
7 About five minutes?

8 THE WITNESS: Sure.

9 COMMISSIONER HICKINBOTTOM: Good.

10 MR HAERI: Commissioner, I can come back you your
11 question, if you like.

12 COMMISSIONER HICKINBOTTOM: Yes, please.

13 MR HAERI: I can confirm that Minister Wheatley and
14 Mr Joseph Smith-Abbott will be available for the Hearing on
15 Friday next week.

16 COMMISSIONER HICKINBOTTOM: Mr Haeri, thank you very
17 much for getting that to us today. Thank you.

18 MR HAERI: You're welcome.

19 COMMISSIONER HICKINBOTTOM: Thank you.

20 (Recess.)

21 COMMISSIONER HICKINBOTTOM: Mr Rawat, we're ready to
22 resume. Thank you.

23 MR RAWAT: Thank you, Commissioner.

24 (Pause.)

25 COMMISSIONER HICKINBOTTOM: We can proceed.

1 MR RAWAT: Thank you.

2 BY MR RAWAT:

3 Q. Mr Smith, we're at page 8 of your written response.

4 A. Um-hmm.

5 Q. Now, there, in relation to financial oversight and the
6 part of the criticism that effectively says that there was no
7 effective financial oversight, you say that that's misleading
8 because it suggests that there was no accountability to the BVI
9 Government by BVI Airways for the funds which had been given by
10 the Government or that no effort was applied to verify the
11 acceptable use of the funds.

12 Now, you admit that Financial Statements were not
13 forthcoming, even though that was a requirement of the Framework
14 Agreement, and you go on to say, that when they did come, they
15 were, in your view, inadequate, and you had to make prolonged
16 representations for them to be produced to you; is that right?

17 A. Yes. The criticism says there were no or not
18 adequate. I think if it said there was no effective financial
19 oversight, that might have been slightly different, but that is
20 correct, you have to make prolonged representations, I had to
21 make prolonged representations, and eventually got something
22 that I didn't--wasn't good enough at all.

23 But what I've recognized is that on one side I'm
24 balancing, I'm trying to protect the Government from possible
25 litigation. I'm not getting Financial Statements but using what

1 I did have, which was work that was--that I could verify very
2 easily, I could verify the planes they could have, I could
3 verify that work was being done, all the regulatory things were
4 being done, staff were hired, staff were trained, I knew how
5 much staff there were, I knew how much training they got. Based
6 on that, I could match that with what we anticipated the cash
7 flows would be. So I had to use that I accept that yes, I
8 didn't get Financial Statements when we were supposed to, and
9 when we did get them, we didn't get anything that was worth
10 anything that I could rely on.

11 But for there to be--I can't accept that there was no
12 financial aspect of oversight. I would say that was not the
13 type of financial oversight that I would have liked.

14 And as I began to get probably a little more
15 unsettled, what I realized as well is that in order for them
16 to--for BVI Airways to be given approvals by the U.S. Department
17 of Transportation, they had to actually prove that a venture is
18 financially viable, so that's another cog that I knew--I know
19 there were probably a lot more open with the U.S. Department of
20 Transportation, and also I knew that they had to be fairly open
21 with ASSI as well.

22 So, all of those things put together in a balance. I
23 had to reasonable confidence and there was verified later with
24 the arbitration proceedings to a large extent, is that they were
25 doing things that they needed to do, and the expenditures that

1 they had were matching up with what we would have anticipated.

2 Now, when you get towards the end of the enterprise in
3 2017--I think it was, right?--then you begin to get into some
4 rough waters as to why they didn't go the extra mile to actually
5 put on this service. All the things that were needed to be done
6 were done--you know?--but it didn't actually fly, and that is
7 the concern. But to say whether or not--am I concerned that
8 they were just taking the funds and pissing it away, no.
9 Perhaps they could have been a bit more efficient with it?
10 Perhaps. But were they doing the things that they needed to do
11 in order to get the enterprise running commensurate with what we
12 had anticipated the cash flows would be, my answer to that, in
13 my assessment, is yes.

14 Q. So, would a fair summary of your position on this
15 element be that the wording--the concerns used is the phrase
16 that there was no or "no adequate financial oversight"?

17 A. Yes.

18 Q. And you're willing to concede that there was no
19 effective financial oversight. And then what you went on to say
20 was that, in terms of Financial Statements, you agree those were
21 not forthcoming, but you were at least able to get some comfort
22 from other information as to what BVI Airways was doing?

23 A. Yes. Well--

24 Q. That gave you some comfort that they were spending the
25 money that the Government had given them in the expected manner?

1 A. Yes, I was confident that they were.

2 And I don't know if I'd want to say with no effect.
3 It may be a bit soft. There was not the financial oversight
4 that we should have gotten.

5 COMMISSIONER HICKINBOTTOM: But as Mr Rawat said, you
6 were sufficiently content--

7 THE WITNESS: Yes.

8 COMMISSIONER HICKINBOTTOM: --that the money that they
9 had was being spent on what they should have been spending it
10 on.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: And more or less, in the
13 course that--

14 THE WITNESS: It should have been, yes.

15 COMMISSIONER HICKINBOTTOM: That it should have been.
16 Okay.

17 BY MR RAWAT:

18 Q. And there was nothing in the Framework Agreement that
19 could allow the BVI Government to compel the production of
20 Financial Statements?

21 A. Well, it was part and parcel of the Framework
22 Agreement.

23 Q. So, was it a surprise to you when these Financial
24 Statements were not forthcoming?

25 A. It was a surprise because maybe it's a fault that I

1 have, but I tend to be that seeing that we should do it,
2 benefits are written you should provide it.

3 COMMISSIONER HICKINBOTTOM: But also the BVI
4 Government was entitled to Financial Statements because it had a
5 Director on the Board.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: The Director must have
8 been entitled to the Financial Statements.

9 THE WITNESS: Sure. Right.

10 COMMISSIONER HICKINBOTTOM: So it had a route--

11 THE WITNESS: A route.

12 COMMISSIONER HICKINBOTTOM: --to the Financial
13 Statements.

14 BY MR RAWAT:

15 Q. If we turn to another element of this, which is the
16 failure to take up the operator's offer to come to the U.S., I
17 think it was to Fort Lauderdale, and review their financial
18 records.

19 A. Yes.

20 Q. I think if I've understood your position in your
21 written response correctly, it was that--it was your advice that
22 it should be done?

23 A. Yes. It was my strong advice.

24 Q. Who did you give that advice to?

25 A. The Premier and the Minister of Finance. Both people.

1 Q. Are they not one and the same?

2 A. Yes, they are.

3 Q. And a decision was taken that you should not travel to
4 Fort Lauderdale or no one from the BVI Government should go to
5 Fort Lauderdale to view those financial records; is that right?

6 A. Yes. The decision was that the BVI Government will
7 not go to Fort Lauderdale.

8 Q. And was that a decision of Cabinet or was it a
9 decision of an individual Minister?

10 A. I was speaking to my Minister. I don't know but I'm
11 fairly confident it was his decision alone, but I was just
12 speaking to him.

13 Q. So that was the Minister of Finance, the then-Minister
14 of Finance told you you were not going to Fort Lauderdale?

15 A. Yes.

16 Q. Were you given any reason for that decision?

17 A. No. No.

18 Q. Now, I think one reason that you put forward for this
19 sort of state of affairs was that BVI Airways represented that
20 they had a lack of confidence in the ability of the BVI
21 Government to keep records that were sent to Government
22 confidential.

23 A. Yes.

24 Q. Did you think that those representations were
25 credible?

1 A. Unfortunately, yes. I think they were.

2 Q. But was it in relation to all documents that were
3 provided or to the fact that Government has to lodge a contract
4 in the central Registry?

5 A. No. It's more than that. There have been several
6 breaches which I think even the Commission might have
7 experienced that of confidential documentation ended up in the
8 public domain. And that was also the case during this event,
9 during the course of this enterprise, that was one of the
10 concerns that we had, not just the Ministry but through the
11 Ministries of Government. I, myself, have suffered for it where
12 correspondence that I exchanged with the then-Governor ended up
13 on the news.

14 So, I mean, I think that the concern's credible, but I
15 don't think that that was something that they should have taken
16 upon themselves to deal with. You had an agreement to share the
17 Financial Statement. Yes, I understand the concern, but I think
18 they should have still gone through with what we agreed to in
19 the Framework Agreement.

20 COMMISSIONER HICKINBOTTOM: I understand that the
21 concerns about confidentiality as a general principle. I can't
22 quite understand why the Financial Statements of BVI Airways
23 were regarded by the operators as so confidential that they
24 couldn't let you have them. I mean, they may have been leaked.
25 You've accepted that. But--

1 THE WITNESS: Why does it matter?

2 COMMISSIONER HICKINBOTTOM: So what?

3 THE WITNESS: Exactly.

4 COMMISSIONER HICKINBOTTOM: So, is it right that, as
5 the general proposition that things in Government, in the BVIG,
6 that should be kept confidential, are not always kept
7 confidential?

8 THE WITNESS: Um-hmm.

9 COMMISSIONER HICKINBOTTOM: But did you consider the
10 excuse or the reason that the operators gave you for not sending
11 you the Financial Statements to be credible? That's a
12 different--that's really a different question.

13 I know that they offered to show them you in Fort
14 Lauderdale.

15 THE WITNESS: Um-hmm.

16 COMMISSIONER HICKINBOTTOM: And I assume by that offer
17 they expect--well, that they thought you would or may go and see
18 them, so in that sense they weren't trying to keep them secret
19 from you.

20 THE WITNESS: Yes.

21 So, yes, I mean, I don't--I didn't--I mean,
22 Mr Weisman, or Scott and myself had numerous conversations on
23 this. I mean, same with Scott. He's representing that this is
24 commercial, we don't want this to end up in the public.

25 So, when the option, I guess I should say, of actually

1 going to Fort Lauderdale to see it, I thought it was amazing
2 that we could just go in there and just go through the
3 documents, as long as we don't leave with anything. I thought
4 it was a good affirmation, even though I thought that Financial
5 Statements, in my view, should be public anyway, so I
6 didn't--well...

7 COMMISSIONER HICKINBOTTOM: So, you didn't, as it
8 were, overthink it. Your strong advice was let me go and look
9 at the Financial Statements.

10 THE WITNESS: Or anyone else for that matter.

11 COMMISSIONER HICKINBOTTOM: Or someone else. Someone
12 go over the Financial Statement, that advice was not taken up?

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: Yes, thank you.

15 BY MR RAWAT:

16 Q. Can I just take you, before we move on to the next,
17 just to page 10 of your written response, please, Mr Smith, and
18 I just wanted to sort of encapsulate what you say there.

19 You say that eventually the public was not able to
20 receive the benefit from the ventures anticipated, however this
21 was certainly not because the BVI Airways had not obtained the
22 requisite approvals established structured to do so, as indeed
23 by the end of July 2017 or the necessary approvals had been
24 received. And that's a point I think you developed earlier in
25 your evidence.

1 A. Yes.

2 Q. You say, this unfortunate event was not as the result
3 of the best efforts of the BVI Government and BVI Airways not
4 being brought to bear on the matter, nor that all was not in
5 place to commence flights.

6 So, certainly when it came to the point where, in
7 effect, Government had committed--had reached the limit of what
8 it had agreed to commitment and was not willing to commit more--

9 A. Yes.

10 Q. --from your understanding of the position, planes were
11 ready to fly?

12 A. Yes.

13 Q. Could I ask you just to turn to page 752 before we
14 move on. Again, returning to the Arbitration Award, at 32.2.

15 A. Um-hmm.

16 Q. The Arbitrator points to the evidence you gave in the
17 Arbitration, that the BVI Government was far more interested in
18 getting more people to the British Virgin Islands on non-stop
19 flights--

20 A. Um-hmm.

21 Q. --than in making revenue or even getting back its
22 7 million.

23 A. Correct.

24 Q. And on the next page, evidence is summarized. Or set
25 out, in fact. I won't read it out, but what you were asked was

1 that it wasn't a primary importance that the Government get its
2 7 million back; is that correct?

3 You said: It was not the way we would have liked it
4 to happen, obviously, we would have liked to see the airline fly
5 in. That would have been the return that we would ask for, and
6 where there were excess amounts, the 7 million would be paid
7 back.

8 So, from your position as Financial Secretary, your
9 understanding of the position of Government was that Government
10 wanted to see, at most, was people coming in to the BVI on a
11 non-stop flight from Miami.

12 A. Yes.

13 Q. And if some of the 7 million came back to Government--

14 A. It would have been a plus.

15 Q. That would have been the plus?

16 COMMISSIONER HICKINBOTTOM: And that makes sense. It
17 was an investment in that sense.

18 THE WITNESS: Yes.

19 COMMISSIONER HICKINBOTTOM: Because if you've got
20 people visiting BVI, then you'd get a return, although difficult
21 to measure, but you get a return.

22 THE WITNESS: Yes.

23 COMMISSIONER HICKINBOTTOM: This, though, is the
24 Minister's note. Looking at page 10 of your response,
25 Mr Rawat's referred you to part of that, and what you say there,

1 again summarizing the top part, is that the arbitration award
2 says that the unfortunate event of planes never flying was not,
3 these are your words, was not as the result of the best efforts
4 of the Government and BVI Airways not being brought to bear on
5 the matter, nor that all was not in place to commence flights.

6 So, just pausing there for a moment, because you've
7 given evidence, which I understand, but although you haven't got
8 Financial Statements, so far as you were aware on what you could
9 see, everything had been done by the operators that should have
10 been done, the money had been spent as more or less as it should
11 have been spent under the contract.

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: And you were ready to go.
14 You got everything in place ready to go.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: Continuing your answer:
17 Indeed, it was that the Project was ultimately underfunded, and
18 you go on to say that the Government having acted in good faith
19 weren't prepared to put any more capital in.

20 THE WITNESS: Correct.

21 COMMISSIONER HICKINBOTTOM: Under the agreement, the
22 Government were to put \$7.2 million in, and they had--

23 THE WITNESS: Yes.

24 COMMISSIONER HICKINBOTTOM: --by this stage.

25 The operators were not to put any money in.

1 So, when you were on the point of being ready to fly,
2 under the agreement, neither the Government nor the operators
3 were committed to put any more money in.

4 THE WITNESS: No.

5 COMMISSIONER HICKINBOTTOM: And neither did, and so it
6 just stopped, but that's a really a curious thing, isn't it?

7 THE WITNESS: It's curious because up until now, even
8 up to now, I can't understand why the service didn't commence.

9 COMMISSIONER HICKINBOTTOM: Because on your
10 evidence--and I absolutely understand it--on your evidence,
11 everything, so far as you're aware, was done that should have
12 been done.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: And so the Framework
15 Agreement had succeeded to that extent.

16 THE WITNESS: Yes.

17 COMMISSIONER HICKINBOTTOM: You're ready to fly, and
18 then a dead stop.

19 (Witness nods.)

20 COMMISSIONER HICKINBOTTOM: And the Framework
21 Agreement didn't expect--didn't anticipate the next step.

22 THE WITNESS: Well, I guess what it anticipated was
23 that, by the time \$7 million were expended--well, before the \$7
24 million was expended by Government that the aircraft would have
25 actually been flying.

1 COMMISSIONER HICKINBOTTOM: Correct. That's true.

2 THE WITNESS: That was anticipated.

3 COMMISSIONER HICKINBOTTOM: Because the last
4 2.2 million was paid after the date that aircraft should have
5 been flying.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: So, that's true.

8 So, when you say everything was being done as you
9 hoped it would do, that's a caveat to that?

10 THE WITNESS: Yes, a caveat.

11 COMMISSIONER HICKINBOTTOM: But--yes, so--but why it
12 didn't proceed is a bit of a mystery, isn't it?

13 THE WITNESS: I have my opinion on that.

14 COMMISSIONER HICKINBOTTOM: You say that the reason
15 was that there was no money, but--

16 THE WITNESS: You know, I think there was just a
17 falling out, basically. In my view, our Government--the
18 Government of the Virgin Islands did more than it should have
19 done, really, in a sense. But we wanted it to succeed, we paid
20 ahead of when you're supposed to invest in it.

21 And the other Party to the venture, if it believed in
22 the Project as they purported to believe--to say that they
23 believe in the Project, then they should have put willing to put
24 some skin in the game and just get the aircraft flying.

25 I mean, I remember several arguments with Mr Weisman

1 saying, Scott, I mean, you're speaking to me now. I know that
2 you could afford it; right? Just put yourself over there and do
3 at least a flight for a week. That will instill the confidence
4 in the Government, in the people in the Virgin Islands that you
5 could have a decent conversation again and he just refused to do
6 it.

7 So, at that point, I thought the impression I got is
8 that there was a complete loss in confidence by both Parties in
9 each other.

10 COMMISSIONER HICKINBOTTOM: Mutual loss of confidence,
11 for whatever reason?

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: Thank you.

14 BY MR RAWAT:

15 Q. If we move on, please, to the second potential
16 criticism which relates to a failure to provide to Cabinet, the
17 BDO Report that was prepared in January 2015, and which to put
18 it neutrally--

19 A. Um-hmm.

20 Q. --gave them a much more pessimistic assessment of the
21 risks associated with this Project, perhaps Sixel had done.

22 Now, if you turn up page 477 in that bundle, please.

23 A. Yes.

24 Q. I'm taking you, Mr Smith, to part of the Transcript of
25 your evidence in June. And if you look at line 9 in this

1 Transcript, I asked--and this was in relation to the BDO
2 Report--"do you know why that Report wasn't put before Cabinet?"

3 And your answer was: "No, but I doubt that it was
4 anything deliberate. We had made the changes, made changes
5 according to what BDO had presented before."

6 Would it not have been your responsibility to ensure
7 that the BDO Report was before Cabinet?

8 A. Well, I think I probably explained this in the written
9 submission with Ms Ward, I think, saying it again, I would be
10 very much surprised--well, let me talk about Cabinet procedure
11 first.

12 What we are compelled to do is when a Cabinet Paper is
13 presented before Cabinet, or when it goes to Cabinet, you send
14 the paper that has the background information and decisions and
15 financial and legal implications and stuff, and appended to that
16 are all the files that are concerned with that particular topic.

17 So, the BDO Report just by a mere virtue of the
18 procedure that we file, if it was on the file, it would have
19 been attached, or remain contained--and I think it may have been
20 two files that went, but I'm not sure, it would have been inside
21 of that grouping of files.

22 So, to say or even imply that there is a deliberate
23 attempt to mislead a Cabinet even by the mere procedure that we
24 have to follow to get Cabinet Decisions done, it doesn't follow,
25 if I'm making sense; right?

1 COMMISSIONER HICKINBOTTOM: Yes, to a certain extent,
2 Mr Smith. My understanding is that you say that the BDO Report
3 would literally have been sent to Cabinet because it would have
4 been in a file--

5 THE WITNESS: Right.

6 COMMISSIONER HICKINBOTTOM: --with the Cabinet Paper.

7 THE WITNESS: Yes.

8 COMMISSIONER HICKINBOTTOM: But we've heard evidence,
9 quite a lot of evidence, as to how Cabinet works.

10 THE WITNESS: Um-hmm.

11 COMMISSIONER HICKINBOTTOM: And the papers to Cabinets
12 are not always sent round with a huge--with a huge amount of
13 time between the papers and the meeting.

14 THE WITNESS: Um-hmm.

15 COMMISSIONER HICKINBOTTOM: And Cabinet Ministers
16 would be unlikely perhaps to read the whole file than the
17 Cabinet Paper and any documents referred to in the Cabinet
18 Paper. But subject to that I understand that's your evidence.

19 THE WITNESS: Yes.

20 And that's just one point, that's on procedure.

21 The second point, though, is, which I think is
22 probably the more important point is that the BDO document was
23 the--I guess the anchor on which the negotiations are made, so
24 the salient points in it, things like Interline Agreements,
25 making sure that the aircraft will actually do what we said it

1 could be. What else was there? The return on investment,
2 something else, making sure that the Government had someone on
3 the Board of Directors.

4 BY MR RAWAT:

5 Q. If you turn up page 23. That might help you.

6 A. 23?

7 Q. Look at 109 in the Auditor General. And the Auditor
8 General sets out four matters which--

9 A. 109 on--

10 Q. Page--

11 A. Clause 109, okay. Yes.

12 Q. Yes, at the very bottom under heading "Financial
13 Assessment".

14 If I explain, the Attorney General's Report
15 highlighted four points from the BDO Report.

16 A. Yes.

17 Q. And we--I put that to Mr Geluk who confirmed that he
18 was one of the team that had authored the BDO Report, and he
19 confirmed to the Commissioner that these were the key points
20 that the Report had raised.

21 A. Yes.

22 Q. And were, he agreed, substantial concerns.

23 So, I think your point is that the concerns that were
24 raised by BDO were fed into the Framework Agreement.

25 A. Yes.

1 Most definitely. And I mean, I made my--I made my
2 written submission. I'm not in the habit of embarrassing
3 people, but this--what the Auditor General represents there is,
4 frankly, not true. It's not true.

5 Q. Well, just clarify that because--

6 A. She represents that none of the above recommendations
7 made by BDO was adopted. That's simply not true.

8 Q. So, which of them do you say was adopted?

9 A. So, the return on investment, we went through each of
10 them.

11 The 20 percent Rate of Return agreed. And the reason
12 why it was 20 percent Rate of Return anticipated in the original
13 MOU was because the Government was investing over \$10 million.
14 We cut that down to 7. And when you do the mathematics of it,
15 you get some range of between 4 and 8 percent--right?--if I
16 recall. I think I have it in my submissions somewhere. At
17 least the Auditor General was notified of what that was in my
18 response to her.

19 Q. Can I just pause you there.

20 A. Sure.

21 Q. If we take it in point, BDO raised a point that under
22 the Memorandum of Understanding there was--what was contemplated
23 was that there would be a 20 percent interest rate, but that's
24 what, if you like, BVI Airways or its principals would get, and
25 they recommended an interest rate of between five and

1 10 percent.

2 A. Um-hmm.

3 Q. What interest rate did the Government of the BVI agree
4 to in the Framework Agreement?

5 A. I didn't put--we didn't put the interest rate. What
6 we did was do the mathematics between Government's investment
7 and what was supposed to be the cost of the venture. And like I
8 said, when I calculated it, it was below 8 percent. It ranged
9 between maybe four or 7 percent, depending on how we looked at
10 it.

11 And I represented that in my submissions to the
12 Auditor General, which she completely ignored.

13 Q. If you look at the next point that is made--

14 A. Um-hmm.

15 Q. --which is that there was a need for Interline
16 Agreements.

17 A. Yes.

18 Q. And you say that was put in place in the Framework
19 Agreement; is that right?

20 A. Yes. To the best of my recollection, I have to go
21 through the Framework Agreement again, but that was an essential
22 matter. And to the best of my recollection the reason why it
23 didn't occur immediately is because we recognised that it was a
24 chicken and egg situation. I'll have to check the Framework
25 Agreement, but I know it was something we discussed with

1 Cabinet, and I would--and I am--double-check to see if it's
2 actually in the Framework Agreement. But it was something that
3 we discussed and Cabinet was fully aware of, but I expect that
4 it was in the Framework Agreement.

5 I don't want to tell--say something that's not--

6 Q. That's fair enough.

7 What was also raised by BDO was that Government would
8 be taking on a significant liability risk by signing a revenue
9 guarantee contract with parties that apparently lacked relevant
10 operational experience.

11 A. Um-hmm.

12 Q. Now, do you say that that was dealt with in the
13 Framework Agreement?

14 A. I think that wouldn't be dealt with in the Framework
15 Agreement, that would be dealt with in the part we were dealing
16 with. So, like I said, I was confident in the commercial
17 document of the principals, and based on the--well, let's
18 consider the three principals--right?--which I consider
19 principals being the Jerry Willoughby, the Air Force guy. You
20 have Scott, and you have Brad, so you had the operational
21 experience from Jerry Willoughby, and you had a commercial
22 document. So, I don't know how--if you consider those, that was
23 a matter that we dealt with directly.

24 Q. And then there was a query over age of aircraft.

25 A. Um-hmm.

1 Q. But you say that was dealt with in the Framework
2 Agreement?

3 A. Well, not in the Framework Agreement directly, but
4 that was a discussion that we had in the negotiations for sure.

5 Q. I see.

6 A. When I speak about a Framework Agreement, I'm speaking
7 about the 20 percent interest rate which the \$7 million dealt
8 with. The Interline Agreements, all of those things were dealt
9 with.

10 I don't want to say something that is not so, but all
11 of those specific issues, they were dealt with directly, but I
12 could go through the Framework Agreement again to see exactly.
13 But if I wrote that, that means I obviously checked it; but I'm
14 willing to...

15 Q. If we--on a very, very quick check of the Framework
16 Agreement, the key elements of the Framework Agreement are
17 included in the arbitration award.

18 A. Um-hmm.

19 Q. I will return to it. It's at page 680 in the bundle.
20 That's where it starts. And where the Arbitrator sets out the
21 substantive part.

22 If you turn through to page 685, you will just see at
23 the top there, and tell me if I'm misunderstanding this, but it
24 says: "During the term, the operating profits, if any, of the
25 Project, shall first be retained by BVI Airways to establish

1 commercially reasonable reserves; second, shall be retained by
2 BVI Airways to reduce any operating deficit for the Project,
3 plus a 20 percent per annum return, not reimbursed by the
4 guarantee and any remainder will then be paid, on a quarterly
5 basis to the Government in an amount not to exceed, singly or in
6 the aggregate, the guaranteed amount".

7 But that reference to 20 percent, is that not a
8 reference to the point that BDO might have picked up on?

9 A. No. My understanding that reference has to do with
10 our Government's investment in the enterprise such that BVI
11 Airways gets a 20 percent return.

12 So, yes, they could go ahead and get the 20 percent
13 return, but it wouldn't be at the cost of the Government of the
14 Virgin Islands.

15 I don't know if I'm making sense there.

16 So, remember the aim here is to subsidise an airline
17 such that they get--so that the BVI Government gets a service.
18 However, the initial MOU, because of the costs that the
19 Government had to invest, Government itself, through its
20 investment in BVI Airways, would be guaranteeing a 20 percent
21 return to BVI Airways. That is what we are protecting the
22 Government against, not the profits that BVI Airways makes
23 themselves. That was our interpretation of it, and that is what
24 we prevented Government from guaranteeing by cutting the subsidy
25 down from 10-point something million down to \$7 million. That

1 was the reason why it came down.

2 Q. I see.

3 I think the--you don't need to look it up, but in the
4 Auditor General's Report she has summarized the Government's
5 obligations under the MOU as (1) to provide Financial Report in
6 the form of a revenue guarantee, Letter of Credit or other
7 financial accommodation which would cover all Operating Costs
8 including amortization of capital investment over the Contract
9 period, plus 20 percent per annum return.

10 And your point is that what made its way into the
11 Framework Agreement, on your understanding, was that the BVI
12 Government was no longer guaranteeing a 20 percent return, but
13 was effectively agreeing to a position where--

14 A. 7 million.

15 Q. Yeah, you could have 7 million.

16 A. Yes.

17 Q. And as we've shown, you know, if you make a 20 percent
18 return, well-done, but we're not giving you a 20 percent--

19 A. No.

20 Q. I see.

21 COMMISSIONER HICKINBOTTOM: But--so, you took the
22 20 percent as being what? I'm not quite--I'm not quite sure
23 what you mean.

24 THE WITNESS: Okay, so--

25 COMMISSIONER HICKINBOTTOM: This is the--the Framework

1 Agreement is clear. Before the BVI Government get any money
2 back or any money at all, the operators get a number of things,
3 including a 20 percent return.

4 THE WITNESS: Um-hmm.

5 COMMISSIONER HICKINBOTTOM: There was no seat
6 guarantee under the Framework Agreement, so they weren't going
7 to ever be guaranteed a return in that sense, so where does this
8 guaranteed return in the sense that you say come from?

9 THE WITNESS: Okay, so initially the--the initial MOU
10 required Government to invest some 10-point something, it was
11 over \$10 million; right? And based on the forecasting, they
12 were getting 20 percent return, but that 20 percent return was
13 based on Government's injection of \$10 million. We cut that
14 \$10 million down to 7, which if you placed it in the same model,
15 you'll get a significantly less Rate of Return for BVI Airways.
16 So, in other words, we protected ourselves against guaranteeing
17 them for 20 percent return.

18 COMMISSIONER HICKINBOTTOM: There was no guaranteed
19 return. Once the seat guarantee went--the seat guarantee,
20 obviously, would guarantee a return.

21 THE WITNESS: Right.

22 COMMISSIONER HICKINBOTTOM: But once the seat
23 guarantee went, BVI Airways weren't guaranteed anything.

24 THE WITNESS: Anything, no. Well, that's even more--
25 (Overlapping speakers.)

1 COMMISSIONER HICKINBOTTOM: They could have made a
2 loss.

3 THE WITNESS: Yes.

4 COMMISSIONER HICKINBOTTOM: But the framework was
5 framed differently. The Framework Agreement was before BVI
6 Airways getting any money back, as I say, getting any money at
7 all.

8 THE WITNESS: You mean BVI Government?

9 COMMISSIONER HICKINBOTTOM: BVI Government.

10 BVI Airways, the operators, got back certain amounts
11 of money, but including a 20 percent return.

12 THE WITNESS: Yes, but it wasn't guaranteed.

13 COMMISSIONER HICKINBOTTOM: It wasn't guaranteed.

14 THE WITNESS: Yes.

15 BY MR RAWAT:

16 Q. But it's still the case that, in terms of financial
17 risk, it was the BVI Government that took the risk, wasn't it?
18 I mean, you were--the Government was the Party that was putting
19 in the money?

20 A. Yeah--you know, we were the ones that wanted the
21 service, we were the ones whose economy depended--well, still
22 depends, on having a better air access--better air access, so it
23 was something you could say, okay, that's a subsidy, I guess,
24 we're willing to put in.

25 I mean, in the rest of the Caribbean, I know for a

1 fact that many governments give established airlines subsidies
2 every year, so it was essentially the same for us in this case,
3 just say it was front-loaded, if you're up front with it and you
4 can carry with on the rest of it. We've done our part. Giving
5 you a push, you're saying BVI is carrying a flag, that is what
6 we're going to do, go on and get what you need to get done or we
7 try to facilitate and \$7 million is the limit of what we are
8 going to give you.

9 COMMISSIONER HICKINBOTTOM: But the way it was
10 structured, the commercial risk fell upon the shoulders of the
11 Government?

12 THE WITNESS: Initially, yes. The initial commercial
13 risk, yes.

14 COMMISSIONER HICKINBOTTOM: Yes.

15 BY MR RAWAT:

16 Q. And the other side, so to speak, were not under the
17 Framework Agreement required to make any financial commitment,
18 were they?

19 A. Yeah. That is--that is--I recall having that
20 discussion that we were putting funds in it first, but for some
21 reason and I can't explain I really wish we could, it didn't
22 make its way into the Framework Agreement.

23 COMMISSIONER HICKINBOTTOM: This is page 14 of your
24 response, I think.

25 THE WITNESS: Yeah. I really can't speak--yeah.

1 COMMISSIONER HICKINBOTTOM: What you say there, again,
2 summarising is, you can't recall the reasons for why the
3 \$6 million injection by the operators was omitted.

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: You say towards the bottom
6 that you were doubtful of any deliberate action by the operators
7 not to raise funds to assist in the venture.

8 THE WITNESS: Um-hmm.

9 COMMISSIONER HICKINBOTTOM: I mean, that's true, in
10 the sense that I think the evidence is that they are thought to
11 have been good for the money.

12 THE WITNESS: Well, based on what we were able to
13 discern, it would be.

14 COMMISSIONER HICKINBOTTOM: Exactly. So, it wasn't a
15 deliberate action not to raise funds. It was a deliberate
16 action not to--

17 THE WITNESS: Not to put it in.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 BY MR RAWAT:

20 Q. And if we go to 749 in the bundle, if you look at
21 31.30--

22 A. Um-hmm.

23 Q. --which is again back to the Award, but there was a
24 reference there to a meeting 26th of August--that should be
25 2015.

1 A. Yes.

2 Q. And I take it that's between representatives of the
3 Government, including yourself--

4 A. And the negotiating team, yes.

5 Q. --the negotiating team, and let's call them "BVI
6 Airways" for short.

7 A. Yes.

8 Q. But there was an indication given to the negotiating
9 team that they would have an investment of some \$6 million up
10 front. What the Arbitrator notes is the source of that money
11 was not specified, and in any event, in the final Framework
12 Agreement, Colchester Aviation and BV Airways made--should be
13 "BVI Airways"--made no financial commitment whatsoever. So,
14 this takes us up to, as the Commissioner has done, to page 14 of
15 your third criticism, and I hope I'm being fair to you, but it
16 may be something that we can take shortly because you have dealt
17 with it in some detail, Mr Smith.

18 But we go from a situation where, in August of 2015,
19 the negotiating team is given that indication. You then got the
20 decision going to Cabinet, and Cabinet essentially gives the
21 go-ahead, and then the Framework Agreement is finalised and
22 signed in December of 2015.

23 You couldn't, when you--when you gave evidence on the
24 last occasion, you couldn't say--and you've said it again in
25 your written response--you couldn't explain why there was no

1 reference in the Framework Agreement to the 6 million. Was
2 there a point in the process where, if you like, as the lead of
3 the negotiating team, you realized that this wasn't going to
4 materialize in the Framework Agreement?

5 A. No, I don't recall that. I don't recall that. I
6 really wish I could because that, to me, was a
7 significant--Commissioner, that \$6 million would have been, in
8 my view, one of the things I pushed, giving Government of the
9 Virgin Islands the comfort to go ahead.

10 COMMISSIONER HICKINBOTTOM: Yes, I--sorry, carry on.

11 THE WITNESS: No, really, that is something that, even
12 up to now, we're trying to figure out what happened.

13 But what I can say is that, even in the beginning, I
14 knew that there was a very honest effort on their part to bring
15 other investors in. I'm not so sure whether they come to the
16 point as to say, "okay, we probably wouldn't put it in
17 ourselves, we'd get other people to put it in", but I really
18 can't say why it didn't show up in the Framework Agreement. It
19 really is puzzling. We just can't--because it's in the Minutes,
20 it is what we agreed, but I don't know why it didn't. It was
21 really one of those--and I think it was a significant point that
22 I really wish I could get to the bottom of.

23 COMMISSIONER HICKINBOTTOM: But the Arbitration Award
24 carries on, having mentioned the meeting in August 2015, where
25 the \$6 million up front from the operators is referred to. But

1 it says--it goes on to say that Clause 16 of the framework
2 constitutes the full agreement of the Parties, and there is no
3 6 million in the framework.

4 THE WITNESS: Yeah.

5 COMMISSIONER HICKINBOTTOM: And it goes on to say that
6 the BVI Government knew and agreed, in Clause 6 of the Framework
7 Agreement, that "unaffiliated and unassociated investors" would
8 be sought and needed when investors could not be persuaded to
9 put money in, and the Government money ran out. The
10 "commercially reasonable efforts" clause of the Framework
11 Agreement did not require operators to pay whatever it took to
12 get the service launched and operating.

13 So--and again, this is just going back to the reason
14 why it came to a sudden halt on the brink of being ready to go.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: But in contractual terms,
17 the BVI Government knew what they had agreed to put in. They
18 weren't prepared to put any more in. They knew that the
19 operators had no contractual obligation to put any money in.
20 They could not guarantee any other investors coming along and
21 putting money in. And, in fact, none did.

22 So, they were proceeding on a course where the wall
23 that they hit was always coming at them.

24 THE WITNESS: Yeah.

25 COMMISSIONER HICKINBOTTOM: It was always coming at

1 them.

2 THE WITNESS: And you know, Commissioner, if I was to
3 hazard a guess, which I'm not, what I would say is that when the
4 controversy around BVI Airways began to really take root and,
5 you know, the negativity and the dissent and all of those
6 separate things, you had on one side a group of people trying to
7 make something happen, but then the public image of it was that,
8 hey, this thing is no good.

9 And my view would be that, even if I were BVI Airways,
10 I would have started to have some caution. I mean, we're doing
11 this thing with the Government of the Virgin Islands, and even
12 though the sitting Government isn't making a fuss, there is so
13 much stuff going around about this, should I really invest in
14 it? That's their side.

15 I mean, they should have thought about it as a venture
16 and been willing to put it in. That's my issue. But other
17 investors, looking at it from the outside, would be looking at
18 it as an investor, and investors are naturally risk-averse,
19 looking at it and saying, I don't know. So, the investment
20 environment that might have been present at the beginning of the
21 venture wasn't the same in the middle of it.

22 COMMISSIONER HICKINBOTTOM: But all of the commercial
23 risk was on the shoulders of the Government. So, during this
24 phase when the brick wall was there--

25 THE WITNESS: Right.

1 COMMISSIONER HICKINBOTTOM: --and the Project was
2 racing towards it, the BVI Government put in \$7.2 million. The
3 operators did not put any money in.

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: And without suggesting
6 they did anything wrong, because the Arbitrator has come to a
7 view on that, but without any suggestion, they were paid for
8 what they did.

9 THE WITNESS: Um-hmm.

10 COMMISSIONER HICKINBOTTOM: And the result was that
11 the BVI Government paid this money and did not get--there was no
12 public benefit. The public benefit would have been an airline
13 running an air route running from Beef Island to Miami.

14 THE WITNESS: Yes.

15 COMMISSIONER HICKINBOTTOM: That was the benefit.

16 THE WITNESS: That was the benefit.

17 COMMISSIONER HICKINBOTTOM: And it didn't get any
18 public benefit at all, in the event.

19 THE WITNESS: Eventually, no. They got minimal
20 benefit. When I say "minimal benefit" is because that BVI
21 Airways actually had done a flight between here with some BVI
22 athletes.

23 COMMISSIONER HICKINBOTTOM: That was a charter.

24 THE WITNESS: It was a charter.

25 COMMISSIONER HICKINBOTTOM: What they did not get is,

1 they did not get--

2 THE WITNESS: The service that we asked for, we did
3 not get.

4 COMMISSIONER HICKINBOTTOM: Correct. Thank you very
5 much.

6 BY MR RAWAT:

7 Q. Now, in terms of the negotiating, just to clarify,
8 that's yourself, Clyde-Smith, and Russell Harrigan?

9 A. Yes.

10 Q. So, you negotiate the Framework Agreement. Who ends
11 up signing it on behalf of the BVI?

12 A. The Premier.

13 Q. If I take you back to page 14 of your written
14 response, please--and this is in the context of, you know,
15 Cabinet not being informed about this 6 million investment that
16 was flagged up in August 2015 and which then doesn't appear in
17 the Framework Agreement. You say that you can only infer that
18 there was a directive on which you were to act, and "had that
19 been the case, any omission of such a requirement would not have
20 been the result of any unilateral decision by myself to do,
21 especially since I did not have the Authority, nor did I sign
22 the agreement".

23 In terms of--just clarify what you mean by
24 "directive". Who would have given you a directive?

25 A. Okay, so we were acting on the instructions of

1 Cabinet.

2 The Framework Agreement would have had to meet the
3 provisions that were stated in the decision--well, the decision
4 that was made by Cabinet.

5 What I'm reluctant to speculate on is whether, in
6 fact, that \$6 million injection by BVI Airways was one of the
7 directives and instructions that came from Cabinet. I don't
8 recall, and I can't--I don't have custody of the paper.

9 Now, if it wasn't there, then the criticism that
10 arises from the \$6 million not being there, I think, goes away
11 immediately. If it was there and it was not done, then
12 something must have happened. And what I'm suggesting, it would
13 not have been a deliberate effort by me, but, instead, that in
14 the signing of the Framework Agreement it would have been done
15 in full--it would not have been--it would not have been done in
16 a manner that would have been deceptive to Cabinet. It would
17 have been done in a way that--

18 COMMISSIONER HICKINBOTTOM: You're saying that the
19 decision--the decision of Cabinet to approve the Framework
20 Agreement--

21 THE WITNESS: Right.

22 COMMISSIONER HICKINBOTTOM: --must have been made in
23 the knowledge that the \$6 million was not in the Agreement.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: Got it. Thank you.

1 BY MR RAWAT:

2 Q. Obviously, you get to a point where the Framework
3 Agreement was ready to be signed. Was Cabinet made aware of the
4 content of that Framework Agreement, including the fact that the
5 BVI Airways principals were not required to invest any money?

6 A. What--what I can--I don't recall writing a Cabinet
7 Paper. But, like I said, I'm willing to--I'm reasonably assured
8 that the Cabinet Members were aware. But I can't recall writing
9 a Cabinet Paper and saying this is the Framework Agreement
10 approved. I can't remember doing that, but I wouldn't be
11 surprised if that did happen. And if it didn't happen, I would
12 be not just surprised but stunned if, indeed, the Cabinet
13 Members weren't aware of the contents of that Framework
14 Agreement in detail.

15 Q. But, of course, the Premier is the person signing it.
16 The Premier/Minister of Finance--

17 A. Yes.

18 Q. --would have been aware of the money coming from the
19 Government side and no investment coming in from the BVI Airways
20 side.

21 You mention--and this is at page 15 of your written
22 response--that, as Financial Secretary, you don't have direct
23 access to Cabinet.

24 A. Correct.

25 Q. So, does that mean that you would not be allowed to be

1 present or at Cabinet meetings?

2 A. I would be allowed to be present on invitation. When
3 I say "direct access", meaning I could not just walk in but have
4 to be invited into Cabinet. So, any communication between
5 Public Officer and Cabinet, besides the Cabinet Secretary and
6 the Clerks, whoever they have with them, would be through a
7 Minister. So, in effect, we advise the Minister, and the
8 Minister would say whatever they have to say to Cabinet.

9 So, the point I'm trying to make with this possible
10 criticism is that you could hold me to an account if indeed I
11 had direct access to Cabinet and the burden of proof was on me,
12 if I actually had that direct conversation. But the burden of
13 proof is on me to inform my Minister.

14 Q. The Minister is the Minister of Finance?

15 A. Yes, Minister of Finance in my case.

16 Q. Yes.

17 A. But one of the other points I'm trying to make is
18 that--and I'm not saying that this is something that we should
19 necessarily hang our hat on, but I'm fairly confident as well,
20 is that nothing that those Ministers did was secret. Whenever
21 one Minister did something, all the other Ministers knew. So
22 whether Cabinet, as a body, was aware, I cannot tell unless I
23 were able to look at Minutes. But I'm fairly certain that
24 Ministers in their separate capacities were aware.

25 I'm not sure if I'm making sense.

1 COMMISSIONER HICKINBOTTOM: No, no. What you're
2 saying is that the Members of the Cabinet would have known this
3 \$6 million was not in the Framework Agreement.

4 BY MR RAWAT:

5 Q. Could we move on to the fourth criticism, please,
6 which is at your page 16, and this relates to the inclusion of a
7 provision in the Framework Agreement that BVI Airways was to use
8 "commercially reasonable efforts" to launch a service by the
9 30th of--31st of October 2016. This was included against the
10 advice of the Attorney General.

11 And your evidence in June was that you had discussions
12 about this, and I think you also addressed it in the--in your
13 written response. You had discussions about this term, not only
14 with the Attorney General but with Mr Hyman and other legal
15 practitioners, and ultimately the term found its way into the
16 Framework Agreement.

17 Now, what the criticism points out is that this ties
18 into a conflict of interest because you have Mr Hyman in a
19 position where not only was he advising Government but he was
20 also, shall we say, advising the non-Government parties.

21 A. Yes. All the parties, yeah.

22 Q. Now, first of all, the Attorney General is the Legal
23 Adviser to Government.

24 A. Um-hmm, accepted.

25 Q. You quite rightly and properly acknowledge that in

1 your response, that that's the position of the Attorney General.
2 But how did it come about that the advice of the Attorney
3 General on this aspect of the agreement was not followed?

4 A. Well, on balance, we decided--I mean, based on my
5 conversations, and--on balance, we thought it would not have
6 been a material difference.

7 And one of the things that--let me put it this way:
8 We have to accept the Attorney General's not infallible, and
9 that when you get into legal arguments, yes, if you follow the
10 advice of the Attorney General, as a Civil Servant, then you are
11 protected in your actions because you're following legal advice
12 from the Chief--legal advice. That's accepted.

13 But we also knew that Mr Hyman, as a legal
14 practitioner in the United States, having worked with the
15 Government of the Virgin Islands over the years, his views would
16 have had some credibility in addition to that.

17 And I think my concern with it, the possible criticism
18 was suggesting that I was listening to Mr Hyman, which was not
19 the case. He was one of the opinions that was considered.

20 And on balance, when we listened to the various
21 opinions of various lawyers from all over the place, from within
22 BVI, from outside, commercialized, non-commercialized. It was
23 felt that, based on what we were trying to achieve, that the
24 legal difference between the two was one that was not
25 significant enough to stop the venture from occurring because

1 the BVI Airways, on one side, were adamant that it was
2 necessary, and we, on the other side, the AG was saying not.
3 And when we try to balance all of those and we had a discussion,
4 and we said okay, we just decided to proceed.

5 Now, the legal, I'm not going to even try to go into
6 the legal points of it because, like I said, I'm not qualified
7 to do all of that. But, on balance, we decided that it was fine
8 to use reasonable--

9 COMMISSIONER HICKINBOTTOM: The difference, wasn't
10 it--the difference between the operators making commercially
11 reasonable efforts to fly and guaranteeing flights, that was
12 the--that was the difference?

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: And the difference here
15 was fatal to the Project.

16 THE WITNESS: Um-hmm.

17 COMMISSIONER HICKINBOTTOM: Because the Arbitrators
18 found that they made commercially reasonable efforts, but there
19 was no guarantee, so there were no flights.

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: I know that was with the
22 benefit of hindsight.

23 THE WITNESS: Yes.

24 COMMISSIONER HICKINBOTTOM: It is with the benefit of
25 hindsight. But as I understand it, the Attorney General was

1 pointing out the difference between those two.

2 THE WITNESS: It was, yes.

3 COMMISSIONER HICKINBOTTOM: But ultimately, it seems
4 to me that the risk that was taken was a matter--as long as it's
5 on an informed basis, was a matter for the Minister or Cabinet.

6 THE WITNESS: Yeah.

7 BY MR RAWAT:

8 Q. And in your answers just now, Mr Smith, you referred
9 to the "we". Just clarify that a little for us. At this point,
10 I mean, who ultimately decided that you could cope with having
11 the term "commercially reasonable efforts" in the Framework
12 Agreement?

13 A. Ultimately, it will be the Minister, but it would be
14 based on my advice. You explain what the issues are, to the
15 best of your ability. And that's where sometimes you have to
16 sympathize with Ministers. You kind of have to balance a lot of
17 things together. They know what they are trying to achieve,
18 they know what are the risks, and you say, okay, all right,
19 yeah, that is okay, yes. Let's proceed with this particular
20 course.

21 So, that's when I say "we" because I can't--which is
22 not a flaw, and I mean the Auditor General's Report was rife
23 with them, is that I can't make a unilateral decision, just
24 don't do it, unilateral decisions on policy matters. If I could
25 only advise, you could blame me for giving the wrong advice.

1 COMMISSIONER HICKINBOTTOM: I'm sorry. But did you
2 advise that commercially reasonable efforts was, in all of the
3 circumstances, acceptable?

4 THE WITNESS: Advice that the AG had a concern with
5 the difference between commercially reasonable and reasonable?

6 COMMISSIONER HICKINBOTTOM: No, no. It's the
7 difference between commercially reasonable efforts and risk.

8 THE WITNESS: What are you referring to now?

9 COMMISSIONER HICKINBOTTOM: I mean, I'm just looking
10 at the Arbitration Award.

11 THE WITNESS: Okay, right. Right.

12 If I recall, "commercially reasonable" was
13 only--wasn't it just in one place in the Framework Agreement?
14 That's what my recollection is.

15 BVI Airways shall use these commercially reasonable
16 efforts to launch and operate nonstop commercial air service.
17 So, that is the two words that we have issues with.

18 BY MR RAWAT:

19 Q. It appears at Clause 1 and Clause 2, so--which is 682.

20 A. Um-hmm.

21 Q. And, in fact, in Clause 3 as well, so Clause 1 at the
22 end of the paragraph--

23 A. Reasonable, right.

24 Q. Reasonable efforts to provide a minimum of three
25 flights a week. Commercially reasonable efforts to take such

1 action in relation to certification.

2 A. That's what you mean, Commissioner, when you say "in
3 all cases"?

4 COMMISSIONER HICKINBOTTOM: Yes.

5 THE WITNESS: Okay. So, all righty. I accept that.

6 BY MR RAWAT:

7 Q. Just to clarify the Commissioner's point, I mean, you
8 were accepting--it was ultimately the decision of the Minister.

9 A. Um-hmm.

10 Q. But you--your advice, having consulted Mr Hyman and
11 other legal practitioners, the Attorney General, was that it was
12 something that the BVI Government should accept?

13 A. That we could swallow, in light of what we were trying
14 to achieve.

15 Q. What was the position you were in, though? You said
16 BVI Airways' position was that that term had to be in the
17 Framework Agreement?

18 A. Um-hmm.

19 Q. Was it a sort of make-or-break term? Were you given
20 the impression by BVI Airways that if that term did not come
21 into the Framework Agreement, then things wouldn't progress?

22 A. That was one of the things, yeah. I mean, we had them
23 over another thing, but--

24 Q. That was a red line?

25 A. It was a red line. It was a red line, yeah. But,

1 Commissioner, I think that when you say that I got the advice of
2 Mr Hyman, I mean, for me sometimes words mean a lot, so I took
3 the advice of other legal practitioners besides the AG, of which
4 Mr Hyman was one, because I saw the difference of the message in
5 there.

6 Q. Yes. Would a fair summary be that you consulted the
7 Attorney General?

8 A. Um-hmm.

9 Q. You also consulted other legal practitioners?

10 A. Other legal practitioners.

11 Q. One of whom was Mr Hyman?

12 A. Yes.

13 Q. Now, at the time that you're doing this, and so we're
14 leading up to the Framework Agreement--

15 A. Um-hmm.

16 Q. --who did you consider Mr Hyman was representing?

17 A. BVI Government.

18 Q. And when was the first time that you got an indication
19 that that wasn't actually the case?

20 A. I believe it was towards the end, when we were in a
21 big shakeup with BVI Airways.

22 Q. And towards the end, are you saying when you're
23 getting the sort of issues around the fact that Government has
24 committed its 7 million and would not be committing any more
25 money?

1 A. Right.

2 And there were, for lack of better terms, some
3 fighting between Government and BVI Airways. And then that is
4 when I got a first indication that that might have been the
5 case, and then it was confirmed after I got into the evidence of
6 these Arbitration Hearings.

7 But I had not a clue, nor anyone on our side, for that
8 matter, that someone who BVI Government had relied on for
9 decades had been in--deeply involved in some of the most
10 sensitive matters that we had, or would do something like that.
11 It was only after we started to dig into things that we
12 recognized what was indeed the case.

13 Q. Was he involved in the negotiations around the
14 Framework Agreement?

15 A. Yes, he was.

16 Q. And we can see an example of that, if you turn up 714.
17 At 18.10, this is in the context of, I think, BVI Airways is
18 concerned about the Framework Agreement becoming public.

19 A. Um-hmm.

20 Q. Which goes to the point that we were discussing
21 earlier about security. And we see here Mr Hyman writing to the
22 principals about the changes in the final agreement. At that
23 time, was it the view of the negotiation team that Mr Hyman was
24 involved on the part of Government?

25 A. Where? Which clause?

1 Q. Look at 18.10, page 714.

2 A. Um-hmm.

3 Q. Do you see the sentence that says: "During the end
4 stage of negotiating the Framework Agreement, on November 22nd,
5 2015, Mr Hyman wrote to"--and the three principals are named,
6 and then there is quoted text from what Mr Hyman wrote. And it
7 begins: "Upon reviewing the proposed changes in the final
8 agreement".

9 So, at that time, your impression was that he was
10 effectively on your side of the negotiating table; is that
11 right?

12 A. Yeah, always. Yes. Yes, that's proper advice he was
13 giving there, as far as I can read there.

14 Q. Now, you point out in your written response, because
15 what was drawn to your attention was the evidence of Mr Geluk
16 to--or JELUK (phonetic)?

17 A. JELUK (phonetic). I mess up. I still have issues
18 with his name.

19 Q. He points out that his evidence to the Commissioner
20 was that when he went to a meeting of the BVI Directors, he was
21 introduced to Mr Hyman as a director.

22 Was there a time when you learned that Mr Hyman was a
23 director of BVI Airways?

24 A. You know, I don't recall it being there. I don't
25 recall it being advised on that day, but Mr Geluk and myself

1 were there at the same time. But I don't recall it because it
2 seems to me that if I had heard it or there was a recollection
3 of it, it would have started to raise some red flags, maybe not
4 enough to demand a whole renegotiation or stopping of the
5 Project. But when I started to raise my eyebrows--I really
6 don't recall it, but I have to depend on Mr Geluk, and I have no
7 reason to believe that what his recollection is is anything but
8 the case.

9 Q. You make the point that Mr Geluk was also a director
10 of the BVI Airways Board.

11 A. Um-hmm.

12 Q. And clearly, he had no conflict of interest.

13 A. Yes.

14 Q. But isn't he in a different position from Mr Hyman
15 because Mr Geluk was appointed on behalf of government and
16 nominated by Government to be Director of the BVI Airways,
17 whereas it appears to have been a surprise to you that Mr Hyman
18 was on that Board?

19 A. Yeah. That is--I mean, I think you probably have a
20 point there. But why would I--I mean, even in light of what I
21 said, should I be concerned that someone in a high position of
22 trust, on retainer, so to speak, of the Government, if they were
23 in full disclosure that they were, in fact, a part of this, I
24 think the issue is whether or not we would have to assess
25 whether or not that was something that we were willing to live

1 with or not. But like I said, I don't recall it being the case.

2 If it was the case, as what I'm suggesting there, I'm
3 not so sure that it was something that would have been a no-go.
4 It might have been, and it might not have been, due to the
5 initial relationship. That is what I'm trying to say. And
6 that, even if that is the case, is that sufficient to see--or
7 sufficient to make the leap from that situation to what the
8 criticism is? Is that fact, in and of itself with Mr Hyman,
9 enough to make the leap from that fact to the criticism that is
10 made, which is fairly--it speaks of corruption and all of these
11 things. I don't know if that's a sufficient leap. It might be
12 something that we look at and say should not have happened. I
13 don't have an issue with that.

14 COMMISSIONER HICKINBOTTOM: But your response to it is
15 that you didn't know.

16 THE WITNESS: Yes, I didn't know. I just didn't know.

17 COMMISSIONER HICKINBOTTOM: But with--given that, in
18 terms of all of the negotiations, and we know now with the
19 benefit of hindsight--

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: --that things did not end
22 happily. But during the negotiations, BVI Government on one
23 side, BVI Airways on the other, and Mr Hyman was a director of
24 BVI Airways.

25 THE WITNESS: Um-hmm.

1 COMMISSIONER HICKINBOTTOM: That's the--

2 THE WITNESS: And even in negotiations, he was--the
3 impression all of us got is that he was on our side.

4 COMMISSIONER HICKINBOTTOM: Exactly.

5 BY MR RAWAT:

6 Q. Could you turn up page 767, which is taking you back
7 to the Arbitration Award. 37.6, the Arbitrator sets out--and
8 the Arbitrator, I think, in this Award describes the Project as
9 the AVRO Project, from the type of plane that you intended to
10 use. And says at 37.6: "Actually, at the outset of Mr Hyman's
11 involvement in what became the AVRO project, Dr Smith and the
12 BVI Government could only have thought that Mr Hyman was with
13 the airline, not the Government, or, at most, a go-between".

14 And the Arbitrator then, at 37.7, refers to a
15 January 9, 2014, message to Dr Smith, in which Mr. Hyman wrote
16 that he was attaching "some financial profit and loss
17 projections for the new airline that we proposed to you".

18 A. Um-hmm.

19 Q. Then the Arbitrator quotes an attachment that came
20 with that message in which Mr Hyman refers to "our airline
21 proposal for the BVI", and it then continues at 37.8 where the
22 Arbitrator notes: "Dr Smith's effort notwithstanding--and that
23 is referring to Dr Orlando Smith's evidence to the
24 Arbitrator--"it is not possible to read Mr Hyman's letter and
25 conclude that it is from the lawyer representing the BVI

1 Government as to the 'new airline'. To the contrary, Mr Hyman
2 is discussing how much BVI Government would '1) owe us or
3 receive from us as profit-sharing'".

4 The Arbitrator then gives another example and quotes
5 from Dr Smith's evidence to the Arbitration, where, if we go
6 over to 769, Dr Smith describes Mr Hyman as the go-between.

7 And at 37.10, the Arbitrator notes: "Dr Smith's
8 testimony that Mr Hyman was the 'go-between' is consistent with
9 Mr Hyman's description of his role in the AVRO Project, and
10 actually led Mr Hyman to suggest that the Government and airline
11 split his 'success fee'".

12 If you look at 37.11, the Arbitrator notes that during
13 the course of the Project, Mr Hyman quite visibly appears
14 representing BVI Airways, not the BVI Government, at least twice
15 during the course of the AVRO project--once, directly adverse to
16 a BVI Government entity.

17 And the example that's given at 37.12 on 770, is that
18 BVI Airways had a dispute with the BVI Airports Authority, which
19 is solely owned by the BVI Government and operated by government
20 employees, as Clive Smith confirmed in his written witness
21 statement in the Arbitration. And in that dispute between BVI
22 Airways and the Airports Authority, Mr Hyman represented BVI
23 Airways. That is a summary without the detail there.

24 But what you have is evidence that the Arbitrator sets
25 out that shows that, at best, Mr Hyman is the go-between; he's

1 not representing either side. Or, at worst, that there is
2 evidence that could only lead to the conclusion that he was, in
3 fact, representing BVI Airways. Was any of that
4 information--was there any of that information something that
5 you were aware of?

6 A. I was aware of some of it.

7 Q. When did you become aware of it?

8 A. I mean, I would say aware--I want to believe that I
9 might have been aware of this letter but I don't think so. I'm
10 not so sure.

11 Q. That was the 2014 letter?

12 A. Yeah, but I'm not so sure.

13 And I'm aware there was a dispute between the BVI
14 Airports Authority and BVI Airways. But I wasn't aware of the
15 level of involvement of Mr Hyman in that. I know he was
16 involved in some manner, but I was not aware of the detail.
17 Based on what the Arbitrator is saying, based on the nature of
18 his representations, obviously, he was representing BVI Airways.
19 I had no reason to believe that his involvement in that
20 particular matter would have been anything except a go-between
21 between BVI Airways and the Government of the Virgin Islands,
22 for the reason that he knew the importance of airlift to the
23 BVI. And as far as I'm aware, he loved the BVI as well. In my
24 view, he would have seen it as a civic duty to get the dispute
25 resolved. But to represent BVI Airways is something I'm not

1 aware of at all, or I was not aware of it until Arbitration.

2 Q. But I mean, Clive Smith was there on the negotiating
3 team because he was representing the Airports Authority, wasn't
4 he?

5 A. Um-hmm.

6 Q. And he didn't draw to your attention in that dispute
7 between the Airports Authority and BVI Airways Mr Hyman was
8 appearing on behalf of BVI Airways?

9 A. We don't discuss things like that, unless--I mean,
10 what would be a forum that he would have discussed that with me?

11 Q. Sorry. I didn't quite catch what you said.

12 A. What would have been the forum in which he would have
13 discussed that understanding with me?

14 Q. Meetings of the negotiating team, perhaps.

15 A. No. The negotiation team hadn't met, if I recall,
16 before this, didn't it? We didn't have--the negotiating team
17 that you're speaking about operated in D.C. to get the basic
18 tenor of what the Framework Agreement would look like. We
19 didn't constitute ourselves after that, if I'm making sense.

20 Q. Did the negotiating work up until the Framework
21 Agreement was signed in December 2015?

22 A. Right. And then that was it. But this is not a
23 capacity he's in here. This is in his capacity as an employee
24 of the BVI Airports Authority solving a dispute with--solving a
25 legacy dispute, so to speak. This is what I'm saying.

1 So, I don't--I'm aware of the dispute, but I wasn't
2 too integrally involved in solving the dispute. Yes, I was
3 involved in terms of trying to broker some things, but I was not
4 aware of who was representing and who was not representing.

5 Q. Did you actually get involved in this dispute between
6 the Airports Authority and BVI Airways?

7 A. As a Board Member, yes, I had some conversations with,
8 I think, the Chairman at the time. And, essentially, we came to
9 an agreement where we said okay, we'll accept--because I'm a
10 Board Member and was a shareholder of the BVI Airports
11 Authority. So, we said, okay, yeah, you've got a dispute on
12 this, and then eventually we said okay, there's a dispute on
13 this, on these fees. We'll allow that to go, and we make sure
14 we charge this amount, if I'm making sense. They came to some
15 sort of agreement to say, "okay, this is what we'll charge", and
16 we let it go.

17 Q. Your point is that, in your role as Financial
18 Secretary, which puts you on a number of Statutory Boards, no
19 doubt, but what didn't come up or didn't surface for you was
20 that Mr Hyman might be--

21 A. Representing BVI Airways.

22 Q. Yes.

23 A. That would have been a problem, yeah.

24 Q. Can you just--I think it's one clarification we just
25 need to sort out on your page 13.

1 A. 13?

2 Q. Page 17, please, of your written response.

3 A. Right.

4 Q. You see at No 2, it's whether you intend this wording.

5 You write that the exact nature of the relationship that
6 Mr Hyman had with BVI Airways was--and then, most importantly,
7 "one which I was not aware of".

8 A. Um-hmm.

9 Q. 2 was "severe and material breach of trust and
10 confidence in Mr Hyman by myself".

11 A. Um-hmm.

12 Q. Did you mean to say that, or did you mean to say that
13 it was a severe and material breach of trust and confidence in
14 you by Mr Hyman?

15 A. A severe--confidence in the trust that I had in him,
16 yes.

17 Q. So, was--you placed trust and confidence in him?

18 A. Yes, yes.

19 Q. And the fact that he had this relationship amounts, in
20 your view, to a breach of that relationship of trust and
21 confidence that you imposed on him?

22 A. The--the intimacy of the relationship between Mr Hyman
23 and BVI Airways, had I known that, that being a really, really
24 serious matter, that would have--it would have sent things
25 topsy-turvy from the beginning.

1 And I think I've said that in other areas that we've
2 discussed today.

3 MR RAWAT: Commissioner, I'm moving on to another
4 topic.

5 COMMISSIONER HICKINBOTTOM: Yes.

6 MR RAWAT: I'd perhaps suggest a half-hour lunch
7 break.

8 COMMISSIONER HICKINBOTTOM: You've got two of these?

9 MR RAWAT: Yes, two of these, and then Ports
10 Authority. But I think Ports Authority might, hopefully, be a
11 little shorter.

12 COMMISSIONER HICKINBOTTOM: Yes. We've got Mr Gaskin
13 coming, at the moment, at 2:00. Should we put him off?

14 MR RAWAT: I think if put him off 'til 3:00.

15 COMMISSIONER HICKINBOTTOM: Yes. Put him off until
16 3:00.

17 Mr Smith, we are going to break for lunch until half
18 past 1:00, if that's okay, and then we'll recommence. We have
19 two more matters on BVI Airways and BVI Ports Authority.

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: Good. Half past 1:00.
22 Thank you very much.

23 MR RAWAT: Thank you.

24 (Recess.)

25 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

1 We're ready to proceed.

2 MR RAWAT: Thank you.

3 BY MR RAWAT:

4 Q. We're at page 19, Mr Smith, in your written response.

5 But before I turn to that, can I just ask a couple of
6 follow-up questions on what we've already said.

7 A. Sure.

8 Q. Now, we discussed the circumstances in which there was
9 a, let's call it, "proposal" in August 2015 that the principals
10 of BVI Airways would be putting \$6 million into the venture, so
11 you'd actually have a venture capitalised at 11 million.

12 A. Right.

13 Q. And obviously--and we've canvassed with you why that
14 didn't end up in the Framework Agreement. But once that didn't
15 make its way into the Framework Agreement, were you proceeding
16 on the basis that they would not be investing themselves?

17 A. No, it was always the--it was always the assumption
18 that--I shudder to use that word--there was always the
19 assumption that they would make--they would make comparable
20 investments up to that amount.

21 Q. I see.

22 A. Yeah.

23 Q. So, irrespective of other investments that they
24 might--investors that they might have brought in to the
25 Project--

1 A. Um-hmm.

2 Q. --from your perspective, you expected the principals
3 of BVI Airways to be investing an amount similar to that that
4 the Government was willing to front-load?

5 A. Yes, yes.

6 And as a matter of fact, when you recognise that they
7 weren't making investments, things began to fall apart.

8 So, yes, we front-loaded the Framework Agreement, and
9 we've given you funds before the framework schedule, so you
10 should have gotten it, and we were always under the impression
11 that you will, you know, put in your share. But once we began
12 to interrogate them, I guess you'd say, or we realised
13 that--well, they put in something but it wasn't anything much.

14 Q. The other question I've got is, at some point in the
15 process, a gentleman called Mark Forte of Conyers Dill & Pearman
16 got involved. At what stage did Forte get involved in this
17 process?

18 A. To the best of my recollection, it was at the point
19 where things began to go south, so that would have after we made
20 the last transfer of funds, when we terminated, after we
21 terminated the escrow, and there were continued representations
22 from BVI Airways that we need to--they need extra funding,
23 looking for alternative arrangements and those types of things,
24 and then we began to press them on, well, I mean, that might be
25 fine, but did you put anything in? And then we eventually got

1 out of them what they put in was minimal, and then once it
2 became clear that the enterprise was in danger of falling apart,
3 then Forte began to just ramp up and ramp up, so he came in to
4 see if he could get an amicable agreement to, I guess to inspire
5 BVI Airways to make the Investments, and we'd understood him.
6 And then after that, I think he continued.

7 But I'm not so sure because, after I left Financial
8 Secretary or as things, I should say before that, as things
9 began to go more and more south, I was left out of most of the
10 discussions. I guess it was felt that best that I not be
11 involved.

12 COMMISSIONER HICKINBOTTOM: And so, Forte came in
13 then?

14 THE WITNESS: Yes, yes.

15 BY MR RAWAT:

16 Q. Thank you.

17 Let's turn to the fifth criticism, then, and this
18 relates to the fact that--and this is something that I think
19 you've accepted--that there was a conflict between you're role
20 as the person appointed on the one hand to be the official
21 liaison between or acting for the BVI Government in negotiations
22 with BVI Airways, and so wanting to secure the success of the
23 venture?

24 A. Um-hmm.

25 Q. And on the other, your role as Financial Secretary

1 carries with it an obligation to safeguard the public purse.

2 Your position, as you've set out, is that you did not
3 appoint yourself to that role--

4 A. Um-hmm.

5 Q. --of official liaison, Cabinet did. And Cabinet must
6 have been aware of the conflict.

7 And you say that they must have trusted you to take on
8 that role because such conflicts arise every day.

9 A. In the case of Financial Secretaries, it's something
10 we deal with all the time, every day, regularly.

11 Q. So, would it be fair to say that you were cognizant of
12 the conflict from the beginning?

13 A. Yes.

14 Q. Did you raise it with anybody?

15 A. No, I didn't raise it with anyone. I just--just had
16 to be extra careful, I guess you would say. You know, like I
17 represented before, even in the normal course of my duties as
18 Financial Secretary, being Chief Financial Officer and still an
19 Accounting Officer, that in itself was a conflict I dealt with
20 all the time. And there have been instances where you have
21 matters where a project or something runs into problems and the
22 Minister of Finance would take it over and get it back on track,
23 I guess we will get to that soon in a way, and hand it back
24 over.

25 So I was used to having to deal with that conflict in

1 my mind.

2 And like I represented before, there have been
3 situations where there have been, not serious infractions, but
4 infractions of the Public Financial Management Act. In my
5 Ministry, which is Accounting Officer, I would have had to take
6 responsibility, and as Financial Secretary, I would remind
7 myself, which sounds a bit odd, but because I was cognisant of
8 the need to make sure that the systems remain intact, even in
9 light of the challenges that you as an individual might have
10 doing those different roles that I was, I guess you would say,
11 hypersensitive to those conflicts. And that was no different
12 with the BVI Airways matter.

13 The problem that I have with the criticism or the
14 potential criticism is that it suggests or even states quite
15 clearly that there was--I mean, we know what the criticism is,
16 but the issue is that when a conflict of interest arises, the
17 matter is to, on the standard of conflict of interest, it's
18 clear to everyone that you have to make sure that everyone knows
19 there is a conflict of interest, and then have a way in which,
20 if it is manageable to manage it. If it's not manageable, then,
21 you know, you have to accept--you have to do something to
22 eliminate the conflict.

23 So, that is my issue. We're aware of it, and I did my
24 best to manage it. And again, I have a bit of concern with any
25 representation that would suggest that I was so laser-focused on

1 trying to make this Project successful that I abrogated by
2 responsibility as Financial Secretary. I really cannot accept
3 it because it's--not only is it a conflict that I dealt with all
4 the time but it's a conflict of which not only was I aware but
5 was cognizant of the need to manage it.

6 Q. And how did you manage it in reality?

7 A. Well, a lot of it was down to just basic simple
8 integrity. You look at the matter before you, and then you
9 consider what are the implications--I have like a ladder
10 approach. The first thing for me is what are the financial
11 implications to the Government of the Virgin Islands--yeah, it
12 says that. And then you say, okay, what is the objective that
13 we are trying to achieve on the other side. And then you
14 balance those things, not--I wasn't wedded personally to the
15 success of the venture; right? I had a duty to perform to do
16 everything that is possible to make it succeed and to protect
17 the Government of the Virgin Islands of any liabilities that
18 might occur if he didn't fulfill obligations, that's on one
19 side. On the other side, on the Financial Secretary
20 side--right?--I had an obligation to make sure that when we do
21 expend funds or when we get exposed to financial liability, that
22 we are able to manage that, or what do we do to manage or
23 mitigate against any financial liability? And that was
24 something that I would consider every time we're making a
25 decision, and that is the issue that I have with the potential

1 criticism.

2 Further, what I think--I didn't mention this earlier,
3 but one of the things that the Auditor General didn't seem to
4 touch on--I don't know whether it's--there's nothing in the
5 scope of the Audit Report, but why did Cabinet feel it necessary
6 for me to assume the two roles? I think that's an important
7 question again as to why was it felt necessary to do that. And
8 the wider implications of whether or not people would be willing
9 to accept it or not is that perhaps not only did the Cabinet
10 have confidence in me as an individual to perform those
11 conflicting roles, but that perhaps they felt that I was the
12 best choice in face of what the other options that they had
13 available to them.

14 So, it goes back to the issue again about the extent
15 to which Ministers are confident that have been supported to the
16 best of their ability by the Public Servants; right? And the
17 potential that happens. It could be a combination of all of
18 those things put together. But to suggest that I allowed one
19 role to usurp the other role, I think is a bit--I can't accept
20 it at all, really.

21 Q. What I should perhaps stress is that nobody should
22 have the impression that the potential criticisms that are being
23 raised are effectively being raised by the Auditor General. I
24 think I should make clear that they are formulated--they come
25 from the Commission, and as I've explained, they're part--

1 A. I accept that, I accept that, yeah, I accept that.

2 Q. But didn't your last answer illustrate the position
3 that you found yourself in because you pointed out that Cabinet
4 or you rely on that Cabinet didn't see this as a conflict that
5 it needed to resolve in a different way?

6 A. Um-hmm.

7 Q. But there is still a burden on you to recognize the
8 conflict?

9 A. Yes.

10 Q. And your conflict is, as Financial Secretary, you have
11 a duty and an obligation to advise your Minister--

12 A. Yes.

13 Q. --as to management of the public purse and what they
14 can and cannot do.

15 A. Um-hmm.

16 Q. And, on the other hand, as the negotiator, you're
17 then--you're placed under an obligation to deliver a policy
18 desire of the Government--

19 A. Um-hmm.

20 Q. --which is to have a successful venture. That's
21 essentially the tension?

22 A. Yes.

23 Q. And you've explained how you sought to manage it, but
24 was consideration ever given, or did you give consideration to
25 delegating that role to somebody else or suggesting to your

1 Minister that it will be more appropriate for someone else to
2 take on the role of liaison?

3 A. No. I never--we never really considered that. We
4 never really considered it. But I think I hear--I hear the
5 point about the conflicting roles, but I don't consider them to
6 be non-supportive of each other. So, you heard me mention
7 earlier, for example, the issue about my realisation of the fact
8 that we might be exposed to litigation on the other side from
9 the other Party. All of those things I had to consider.

10 And if the purpose of the Financial Secretary in which
11 I've had to make this differentiation several times in the past,
12 is that a Financial Secretary and an Accountant General are two
13 different animals, and sometimes we have to be careful that we
14 are not mixing the two up, meaning that a Financial Secretary is
15 not just about payments or not paying. A Financial Secretary
16 has economic considerations as well. It's a wide and deep
17 responsibility.

18 So, even though you may consider as Financial
19 Secretary spending \$10 might appear as a waste of money, the
20 same Financial Secretary would have to consider if I don't spend
21 \$10, it might cost me \$100.

22 Am I making sense?

23 So, you have to not spending \$10 on a technical
24 matter, might have a strategic implication that is hundreds of
25 thousands of dollars. And those are things I have to turn

1 around in your head and balance and discuss and assess.

2 And when you're done with all of that, you take that
3 and you look at it from a risk-based approach, and you say,
4 okay, on balance, all of these things are here. On balance,
5 based on the risks involved this is the course that we should
6 go, and that's the advice that you should give.

7 So, yes, the roles are there, but I think that on
8 balance I would proffer that the Financial Secretary in me
9 actually override everything, if you ask me. It seems that in
10 my role as Financial Secretary I allowed things to pass that
11 didn't pass--that should not have passed but if you examine it
12 carefully, there were legal authority to do whatever we did, the
13 Minister could make advances, and I could show you Legislation
14 to do it. We had represented a situation where the Government
15 of the Virgin Islands ran into a breach of the Framework
16 Agreement that it had, so I had to protect ourselves against
17 that.

18 So, all of those things in addition to trying to make
19 the arrangement successful were considered, but to say that I
20 was laser-focused on making the venture successful at the
21 expense of doing what I thought was in the best interest of the
22 people of the Virgin Islands would be--I mean, like I said, that
23 is simply not the case.

24 And in my view, to look at it in that way is looking
25 at it in a very myopic way, and not looking at it like in a

1 strategic way that Financial Secretaries, again, are sworn to
2 do.

3 Q. Let's move on to the final criticism on the BVI
4 Airways element of things, which relates to the early decision
5 or the decision to make early payment from the Escrow Account.

6 So those payments--and this is under--I think there
7 was an amendment, if you like, to the Framework Agreement.
8 Payments were due from the Escrow Account in May 2017 and
9 November 2017. You terminated the Escrow Account on the 11th of
10 January 2017, and then authorized release of all funds. And the
11 effect of that was that, by that time, then, the BVI Government
12 had paid over the amounts that it had agreed to pay and no more.

13 A. Um-hmm.

14 Q. Now, that was done without Cabinet approval.

15 A. Yes.

16 Q. And you've explained in the--your written response,
17 and I will take this shortly, if we may, but that I think you
18 said this on your earlier occasion when you gave evidence, but
19 was it authorized by the Premier or Minister of Finance to do
20 this?

21 A. It was authorized, yes, by the Minister of Finance,
22 yes, and he spoke to the Premier, I believe.

23 Q. And is this your point that--goes to your point that,
24 under the legislation, which will be the Public Finance
25 Management Act, the Minister of Finance has authority to

1 sanction advances being made.

2 A. Yes.

3 Q. And that's the basis on which you rely?

4 A. (Witness nods.)

5 Q. I see.

6 Did you advise--let's put it this way. At the time
7 that you did this, what did you understand the position to be in
8 terms of the stage that the Project had reached?

9 A. Well, we were moving along, albeit some delays, some
10 significant delays because as the regulatory approvals were a
11 bit delayed, but by that time, we knew that they were moving
12 along. They were at the stage where they were getting
13 Department of Transportation approvals, I believe, and those are
14 necessary to get FAA approvals which will be used to get PSA and
15 border control approvals.

16 We knew that they had had successful discussions with
17 the Miami International Airport to the point where the Miami
18 International Airport had actually published an ad saying that
19 the flights were going to commence, which BVI Airways pulled
20 back because it was a bit premature.

21 Q. They didn't actually have authorizations?

22 A. Didn't have authorizations yet, but were moving along
23 and doing what it had to do.

24 We had reached the point where, I don't recall if it
25 was before or after, but we knew that things were moving along.

1 But because of the delays, the plane wasn't in the air when it
2 was supposed to be.

3 So, the discussion with the Premier and the Minister
4 of Finance, essentially was that, okay, if we terminate this
5 escrow, we know that we will be ahead of the schedule that we
6 signed on the Framework Agreement, but what are the implication
7 of bringing the Project so far along and not giving it every
8 possible opportunity to succeed? That was--and that was the
9 things that we were discussing. You know, you discuss, okay, so
10 we're building, we had--trying to get the runway extension done,
11 you want to increase your tourism influx by improving access.

12 Should we just play hardball now, or should we give
13 the Project every possible success that we could, every
14 possible--every possible success, every possible opportunity--

15 COMMISSIONER HICKINBOTTOM: Chance?

16 THE WITNESS: Yes, chance, to succeed by even
17 front-loading or going above and beyond what the Framework
18 Agreement says we should do.

19 And it was difficult. I have to admit it was
20 difficult, but eventually based on what was at stake, based on
21 what we see, saw or could prove as progress, proper progress.
22 When you said okay, let's--my advice--and it was a struggle, and
23 I remember speaking to him--I remember two specific instances
24 when we were talking about it, the first instance, no, let's see
25 what happens and then we went back again. And in between that,

1 we still would have had discussions, I believe--not I believe,
2 but based on that, we decided that, okay, let us terminate that
3 extra early so that it could get the benefit of those early and
4 push it over the hump, and that's what we did. In a sense,
5 perhaps it give them the opportunity to come to the point where,
6 by July, they had all the approvals and all it needed to do was
7 to fly the airplane.

8 Q. But in doing that, at the time of the escrow, you paid
9 BVI Airways an additional 200,000 pounds--dollars, didn't you?

10 A. Um-hmm.

11 Q. And part of the variation of the agreement was also
12 that flight commencement dates were pushed back by a few--by
13 months, eight months, I think it is, from memory.

14 A. Yes.

15 Q. You referred just a moment ago to knowing what was at
16 stake at that time. What was it that was at stake?

17 A. What was at stake is that, I think probably I don't
18 want to bore the Commissioner again with that, but there were
19 economic implications. The Government of the Virgin Islands had
20 a clear view on how they expected to grow the economy--tourism,
21 business travel. The Financial Services industry, we felt was
22 constrained by the lack of air access, business opportunities,
23 so individuals who live in the BVI or wished to by air access.
24 We already mentioned the tourism aspect of it. That was stated
25 explicitly.

1 So just to use this as an example, of one of the
2 things we were considering, they were looking at a Prospect Reef
3 Hotel, and one of the nonstarters was the fact that we didn't
4 have the air access that we needed to have--there were other
5 hotels in Virgin Gorda, for example, that had articulated very
6 clearly and very robustly that they won't be good at business
7 unless there was increased access. So, those are the things
8 that we were considering. They were economic.

9 And on top of that, the reason why that was important
10 is that the Government had also determined that they weren't
11 wedded to the idea of raising tax rates and all of those type of
12 things, so in order to improve on a public finance view, in
13 public finance standpoint, their ability to have more revenues
14 to do more to improve the quality of life of other people in the
15 BVI, you know, have fixed schools, still have infrastructure
16 issues, all of those type of things, even to the point where
17 they were looking at, on several occasions, how they could
18 compensate Civil Servants, and a whole host of other things, but
19 they just didn't have the revenue to do it; right?

20 So, in addition to working on slimming or increasing
21 the expenditure efficiency on one side, they're trying to grow
22 the economic on the other side and using a bigger economy to
23 have a greater tax intake to meet their obligations, their
24 financial obligations within Government, all of those things
25 were taken into account. So, those are the considerations, let

1 us do the best that we could do to make this venture successful,
2 to get this access matter off and running as soon as possible.

3 And when you look--you would notice that concurrently
4 significant effort, very significant effort, was being made to
5 get the airport extension done. So, all of these things were
6 the considerations that we had in place.

7 So, if you look at the expectations of how you would
8 expect the--how you would anticipate the economy to go as a
9 result of increased air access and you compare that to \$7
10 million where you have the probability of it actually
11 kick-starting the benefit that you have. You know, it was--it
12 was something that you look at and you say, okay, I mean, you
13 know, I think people--not me necessarily, but the Minister at
14 the time thinks that the people of the BVI's worth, giving them
15 the best chance to get this thing going as fast as possible.

16 COMMISSIONER HICKINBOTTOM: Wouldn't it have increased
17 the chances of it happening, which was the focus of what you
18 wanted to do, was to put some risk on to the operators, either
19 financial risk, guarantee of flights, anything, but they were
20 just sitting there? They don't say they weren't doing nothing,
21 but contractually, they were just sitting there because they had
22 no contractual risk.

23 Might it not have--wasn't it in your mind that if you
24 put some commercial risk on the operators for a commercial
25 organisation that they might actually get this going?

1 THE WITNESS: Yes. That came to mind.

2 And then there's also the consideration as to whether
3 or not if you place too much risk on whether or not the venture
4 were--whether you would have had a chance of that venture going
5 anyway.

6 COMMISSIONER HICKINBOTTOM: But they weren't bearing
7 any contractual risk. If they weren't prepared to bear any
8 contractual risk, wouldn't that have been an indication that
9 they really were not optimistic that this was ever going to
10 happen?

11 THE WITNESS: Well, remember from the negotiations at
12 the beginning, it wasn't that they weren't--they were confident
13 there was something that was going to be profitable or something
14 that would work.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 THE WITNESS: But through the course of the events
17 that happened and after the Framework Agreement was signed is
18 where I could accept the proposal, that their confidence in the
19 venture obviously started to slide, but certainly wasn't the
20 case before or at the time that the Framework Agreement was
21 signed.

22 COMMISSIONER HICKINBOTTOM: But the \$2.2 million went
23 in at a time when you obviously wanted this to do the trick--

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: --and get the venture--I

1 mean literally off the ground.

2 THE WITNESS: Um-hmm.

3 COMMISSIONER HICKINBOTTOM: Wasn't it of some concern
4 that the operators had no risk in this venture not proceeding?

5 THE WITNESS: Yeah, like that's one of the things we
6 were considering.

7 COMMISSIONER HICKINBOTTOM: Yes, thank you.

8 BY MR RAWAT:

9 Q. Mr Smith, we've finished with BVI Airways now.

10 A. Okay. I thought it would never end.

11 Q. We will move on to the second.

12 You can put that to one side.

13 A. Yeah, okay.

14 Q. And if you fold up the large bundle.

15 I want to turn now to the Port Development Project.

16 Before I do, can I just pick your memory as the
17 Financial Secretary in 2015, the Commissioner has been taking
18 evidence in relation to what the Commission has called the
19 School Wall Project, which was the building of a perimeter wall
20 around Elmore Stoutt High School, and the second phase of which
21 began sometime in early 2015. The Commissioner has heard from
22 Myron Walwyn, who was then Minister for Education and Culture
23 and also Public Officers in the Ministry at the time, who were
24 directly involved in the Project. The evidence points to a
25 decision being taken towards the end of 2015 to stop all works

1 on projects that were being paid for from local funds, and by
2 that I mean that funds allocated to an individual Ministry's
3 budget. Can you remember the basis of that decision? Mr Walwyn
4 said that at the time Government was experiencing what he called
5 cash flow challenges, but can you remember a little bit more
6 about the circumstances of late 2015 that meant that that
7 decision was taken?

8 A. I vaguely remember it, and it would have been because
9 of cash-flow concerns, so what we tend to do is--in finance is
10 you have a pyramid, I guess, I'll say a letter of priorities,
11 and you come from the bottom up. So, if, for example, you face
12 with a situation where you realize that if you pay for these
13 projects, you wouldn't be able to meet payroll, you would drop
14 off the payments to the projects and pay payroll; so that was
15 one of those things that I had to follow.

16 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt.

17 THE WITNESS: Sorry.

18 COMMISSIONER HICKINBOTTOM: My fault.

19 And when projects are stopped in that sense, would it
20 matter as to whether the funds had been, as it were, allocated
21 to that Project in terms of the budget, so the Department had
22 actually got X hundred thousand dollars or X million dollars, or
23 whatever it is. Is there any difference between that
24 circumstance and the circumstance in which they got the X
25 million but they actually needed another half a million to

1 finish the Project, or would this--would the Project simply be
2 stopped either way?

3 THE WITNESS: It depends. It could be either way.

4 COMMISSIONER HICKINBOTTOM: Okay.

5 THE WITNESS: In one case because the public might
6 be--or whoever is listening to this might be shocked at this,
7 but when you put your budget at the beginning of the year, the
8 money isn't in the Treasury. So, if for some reason you have
9 some extra revenues or whatever anticipated or expenditures--

10 COMMISSIONER HICKINBOTTOM: Or whatever.

11 So, does that mean in terms of my example, it's more
12 likely that there would be a stop first on additional--on
13 supplementary grants?

14 THE WITNESS: First. That would happen first, yes.

15 COMMISSIONER HICKINBOTTOM: And because, as you say,
16 it's really a matter of prioritizing.

17 THE WITNESS: Yes.

18 COMMISSIONER HICKINBOTTOM: So those, as it were,
19 would be stopped first.

20 THE WITNESS: Right.

21 COMMISSIONER HICKINBOTTOM: But it's possible that
22 money would be stopped that had already been allocated in
23 budgetary terms.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: And can you remember which

1 of those two things it was in 2015?

2 THE WITNESS: I can't remember, but I suspect it was
3 the latter.

4 COMMISSIONER HICKINBOTTOM: So, you expect--you think
5 it was stopped, as it were, more money going out of the
6 Treasury.

7 THE WITNESS: Yes, except for high-priority items.

8 And the reason why I say that is that we come to a
9 time where the Ministry of Finance had to kind of get a little
10 draconian because the expenditures and their revenues
11 weren't--they weren't in relation to each other. There was a
12 part--

13 COMMISSIONER HICKINBOTTOM: And sorry to put that
14 question into context with the wall, the evidence that we have,
15 the firm evidence that we have is that the amount allocated to
16 the wall by Cabinet had already been spent, so it would have
17 been--

18 THE WITNESS: That could have been--

19 COMMISSIONER HICKINBOTTOM: It would have been a
20 supplementary allocation anyway?

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: Thank you very much.

23 BY MR RAWAT:

24 Q. Thank you.

25 If we turn to the Port Development Project now.

1 Again, I think when we asked questions of you on the last
2 occasions, Mr Smith, the Report that I took you to is that of
3 the Public Accounts Committee, which, following the issuing of
4 the Auditor General's Report, had also conducted its own
5 investigation, and the Commission has been provided not only
6 with the Report but also with records of the evidence that was
7 given to that Committee.

8 Now, in relation to that, and again, it's in the
9 connection of your position as the then-Financial Secretary, the
10 Commission sent you a second Warning Letter, and you have
11 provided a written response to that.

12 Can I ask you again formally, do you consent that that
13 written response form part of the evidence before the
14 Commissioner?

15 A. Yes, sir.

16 Q. Now, again, helpfully, you have set it out not only in
17 a user-friendly format which we would, in fact, as the
18 Commission commend to other, but also you have given a
19 significant amount of details. Hopefully I will try and take
20 things shortly.

21 Can I, first of all, just take you to the Preamble,
22 the sort of covering note that you provided. It's again, if you
23 look at the final paragraph on page 1, you point to systemic
24 issues?

25 A. Um-hmm.

1 Q. Which you say are potentially very relevant to the
2 specific events that are under review, and which may have caused
3 them to occur in the first place. The fact that the Minister
4 was able to take over a project that was rightly supposed to be
5 executed by the BVI Ports Authority raises a number of issues in
6 my view. These include, but are not limited to, first, the
7 boundaries that should or do exist on the powers of Ministers,
8 and secondly, the track record or current capacity of the public
9 sector, including Statutory Boards to instill confidence in the
10 Ministers to whom they are accountable, that they are, in fact,
11 fulfilling their statutory obligations for and to the benefit of
12 their stakeholders.

13 And you then point to, it's useful to establish the
14 ability of Public Officers to precipitate corrective action by
15 Ministers that they have assessed to be beyond the scope of the
16 Minister's legitimate authority under the law, and the
17 protections Public Officers if such actions should become
18 necessary.

19 Now, those are points that we canvassed with you this
20 morning. You certainly, in relation to the ability in reality
21 for a Public Officer to raise a concern of the sort that you've
22 outlined here, and also in relation to, I suppose, the
23 boundaries for a Minister, where does policy end and where does
24 administrative responsibility begin.

25 A. Sure.

1 Q. And then the apolitical and necessarily apolitical
2 nature of the Public Service.

3 It's more--I don't need, therefore, to ask you about
4 that, but I would just ask you two things: Firstly, can you
5 help the Commissioner a little bit more in relation to the
6 accountability of Statutory Boards to a Minister? I appreciate
7 that each Board will have its own statute, but the evidence that
8 the Commissioner has received is that they are autonomous. And
9 so in general, can you shed light, from your experience, as to
10 in what way they are accountable?

11 A. Okay. So, they're accountable in that they are not
12 laws unto themselves. They have to follow policy direction by
13 Central Government. That's the reason why they're there. They
14 cannot be allowed to just behave as they wish.

15 The reason why in a democracy we elect a government is
16 that supposedly the strategic direction of that group of people
17 is the one that, on balance, the people in the country wants to
18 follow. So, if the policy direction, or the strategic
19 direction, of a statutory body runs contrary to that, that
20 cannot be, cannot allow that to happen.

21 So, obviously whatever they are doing must follow
22 within the bounds of what the duly elected Government sets up.
23 Now, that is strategic direction.

24 There are things that they need to do in order to
25 effect those policies or effect the strategic direction. In my

1 view, the Minister shouldn't get involved in those things that
2 need to be done to support his strategy--his or her strategic
3 view. However, they also--and when I read, especially in this
4 particular one that we're dealing with, when I read in the
5 Legislation, it's easy for a misinterpretation to happen. But
6 it seems to be cleared up in the latter part of the legislation,
7 and it's something I agree with. The Minister also needs to be
8 with the whole statutory body to account. Meaning that if
9 they're doing something, the Minister should be able to ask the
10 question and get the information from the statutory body to
11 essentially, in loose terms, audit what they're doing; right?
12 That's a type of relationship. I hope I answered the question.

13 COMMISSIONER HICKINBOTTOM: I think you did, Mr Smith.
14 I think you've answered the question.

15 It seems to me, and this is not inconsistent with your
16 answer--it's consistent with your answer--the Statutory Board,
17 because it's a creature of statute, has to do what is written on
18 the label, or it has to do what is in the statute.

19 THE WITNESS: Right.

20 COMMISSIONER HICKINBOTTOM: Its powers and duties are
21 set out in the statute.

22 THE WITNESS: Yes.

23 COMMISSIONER HICKINBOTTOM: And as you say, it's
24 subject to policy or strategic direction.

25 THE WITNESS: Direction.

1 COMMISSIONER HICKINBOTTOM: And so, again, I don't
2 think an example is too close to this because you will be asked
3 about this particular project.

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: But the strategic
6 direction might be we want to increase the capacity of, I don't
7 know, the ports or the airport or whatever.

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: And then in implementing
10 that, that would be a matter for the Board.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: So the Board couldn't say
13 no, and we want to reduce it or--so that would give the
14 strategic direction.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: And then it would be a
17 matter for the--

18 THE WITNESS: For the Board to execute.

19 COMMISSIONER HICKINBOTTOM: For the Board to execute.
20 Got it. Thank you very much.

21 BY MR RAWAT:

22 Q. And if there is any other responsibility to a
23 Minister, would it not be to ensure that a Board is fulfilling
24 its statutory function? So, if there is a Board set up to
25 deliver, let's say, electricity supply--

1 A. Right.

2 Q. --then the Minister can presumably, sort of say, well,
3 are you delivering--are you fulfilling my requirements?

4 A. Yes, yes.

5 Q. And that, in part, is why you have ex officio Members
6 there?

7 A. Okay.

8 Q. Because they are there to--

9 A. They're in a funny position, but yes, I agree.

10 Q. Well, tell us why they're in a funny position?

11 A. Because they're there kind of to audit the actions of
12 the Board, but they're there also to be the Board. I mean,
13 they're not there to just be beating the Board over the head.
14 They're actually part of the decision-making body.

15 Q. So, they're the ones that come to the Board with two
16 hats?

17 A. Yes.

18 Q. Members of the Board?

19 A. Same type of funny tension there again in a sense.

20 And in addition, the ex officio Member, because of the
21 process of the manner in which they're supposed to be appointed
22 to the post which they hold in essential Government, would more
23 or less guarantee certain competencies that you might not
24 necessarily be able to guarantee by just a regular appointment
25 of somebody on the Board, unless, of course, you have

1 restrictions or criteria on how you appoint those Board Members.

2 Q. Let's turn to the potential criticism itself, which it
3 has a number of elements that I will ask you questions about.
4 But in essence, it relates to the involvement of the Ministry of
5 Finance in the Port Development Project, which really began as
6 from August 2012.

7 COMMISSIONER HICKINBOTTOM: I'm sorry to break in
8 quite early, Mr Rawat.

9 The way you've put it in the Preamble, the letter part
10 of your document, is that--I think this is right--that you, your
11 Ministry, intervened to correct a matter created in the another
12 Ministry. That's how you put it on page 2.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: So, without going into
15 detail, which we will go into, but did the Ministry of Finance,
16 as it were, take over this Project because there was at least a
17 perception that something was going wrong with it?

18 THE WITNESS: Yes.

19 And I had opportunity to peruse most of the bundle,
20 and I saw there where the PS, the acting PS at the time
21 indicated that the Minister of Finance did express some concerns
22 to her, and we had just signed the Protocol to effect the
23 financial management, which we had spent--spent some time
24 getting to that point. And as far as I recall, it came over due
25 to Cabinet; right? But I had expressed some concerns to the

1 Minister of Communications and Works and said, hey, we need to
2 fix this.

3 COMMISSIONER HICKINBOTTOM: Okay, thank you very much.

4 BY MR RAWAT:

5 Q. And what particular concerns did you have? Because it
6 seems to me from your response is that--whilst it wasn't just
7 you, it was others as well, and you say some within Cabinet
8 itself, but you felt compelled to act as Financial Secretary.
9 What were the concerns?

10 A. The concerns were that--and I'm not--I have to say
11 this, I'm not--I didn't have a lack of confidence in the good
12 intentions of the Ministry, but the matter on which they
13 were--they come to determine who they were going to be
14 negotiating with was--I mean, certainly didn't meet the
15 procurement standards of the Government of the Virgin Islands.
16 So, they might have done that in ignorance, they might have done
17 it in haste, but the fact is that it was what it was, and they
18 need it to be correct, I had a fiduciary responsibility to the
19 people of the BVI, to my Minister, to Cabinet, to at least point
20 out that issue and that we needed to correct it.

21 And then we refer to Members of Cabinet, the
22 Ministers--let me not advocate for them. But sometimes they
23 have a tension between wanting to get something done and wanting
24 to do it properly. And some of those Members had said look, we
25 just signed this thing. We just signed this agreement with the

1 UK Government saying that we are going to promote good
2 governance and transparency, but you have a policy here that
3 doesn't meet with those standards, I guess you would say. So
4 that was an issue.

5 And if I missed it, I remember having the Governor
6 himself at the time, being quite involved in making sure those
7 get over and making sure the steps that we laid out were
8 followed. He was like a second pair of eyes, in other words,
9 which I didn't have an issue with to set out the process. He
10 would back off after we laid out the process that we follow, but
11 at least you could see that there was some general concern with
12 Cabinet Members and the Chairman of Cabinet that, look, this
13 thing isn't meeting what we agreed to say we are going to do,
14 and we need to fix it.

15 Q. And the concern or one of the concerns that was raised
16 by, for example, the Public Accounts Committee, was that first
17 stage of the process was that when the Port Development Project
18 was, if you like, under the umbrella of the Ministry of Works
19 and Communications, essentially the Ports Authority were pushed
20 to one side. So, in step, in August 2012, the Ministry of
21 Finance, why was a decision taken not to hand the Project back
22 to the Port Authority itself?

23 A. Okay, so, that goes back to the Preamble to this
24 letter, the cover letter. I got the impression that there
25 was--well, two things, you give it to finance, they'll fix it,

1 and then they'll put it to who--that was the general impression,
2 is all right, you have the people who are supposed to know about
3 procurement, you have the people who are supposed to have a
4 heightened sense of responsibility and knowledge of governance
5 and transparency, that should be the Minister of Finance. Let
6 them fix it, and after they fixed it, then we'll decide what to
7 do with it after; right?

8 But there is also the underlying theme that I cannot
9 shudder to touch, but there's some concern at the time, there
10 was some concern at the time, there was--how to put it? There
11 was a lack of confidence in the Ministry of --by the leader of
12 the Ministry of Works and Communications which would be the
13 Minister, that the lines which he faced were not fully
14 appreciated by the Board of the BVI Ports Authority.

15 So that's why I made it a point to discuss that in the
16 letter, in the Preamble because there was always--

17 Q. In particular--I'm sorry to interrupt you, but just
18 where in particular you would draw that out?

19 A. Okay. Let me see.

20 Okay. The boundary that should or do exist on the
21 part of the Ministers and a track record or current capacity of
22 the Public Sector including Statutory Boards to instill
23 confidence in the Ministers to whom they are comfortable. That
24 they are, in fact, fulfilling their statutory obligations for
25 and to the benefit of their stakeholders.

1 Q. So, your recollection was that at the time the
2 Minister of Finance was involved, the Minister of Works and
3 Communications felt that or did not have confidence in the Ports
4 Authority Board to deliver to his deadlines?

5 A. To his deadlines. Not necessarily to do the Project,
6 that was a different issue, but to deliver to his deadlines.
7 Because apparently--not apparently. They were in negotiations
8 with the cruise lines to increase the number of cruise line
9 passengers that came to the BVI, and one of the things that it
10 needed to do was to instill a confidence in the cruise lines
11 that they would have a facility ready for them, a facility that
12 had certain amenities available to them and were able to
13 accommodate their ships safely by a particular date. So, he was
14 rushing to--I should say the Ministry, originally the Minister
15 was the lead--rushing to get to a point that he could convince
16 these individuals that, by a certain date, these things would be
17 ready. Because these, what you call them, boating agreements,
18 tended to be inked maybe two years in advance, so that was the
19 deadline he was up against.

20 Q. Let's look at the circumstances as they relate to the
21 Ministry of Finance because to summarise it, of course, you have
22 a number of stages, but they include Ministry of Works and
23 Communications essentially taking over the Project, and then as
24 we've said, Ministry of Finance stepping in.

25 Now, the first head under this criticism is that, in

1 delivering the process, the Ministry adopted an expedited
2 tendering process that was lacking in both transparency and
3 fairness. The points are made that the actual timeline that was
4 adopted was--timeline for the tendering process was inadequate,
5 and the other concern that's raised is that the provisions in
6 the invitation for an Expression of Interest mirrored that which
7 were contained in a--when the Minister of Communications and
8 Works were doing it previously accepted proposal from--

9 A. TPP.

10 Q. From TPP, which created an unfair advantage for them.

11 If we just review the timeline, please. If you turn
12 up, I think it's in the second of the two bundles, bundle 2,
13 536, please.

14 A. 536.

15 Q. Sorry, I might be in the wrong--there isn't a 536.

16 There is in bundle 1, sorry.

17 535, please.

18 A. Okay, yes.

19 Q. If you see at paragraph 51 at the bottom, the initial
20 Closing Date for the Expression of Interest was 16 of
21 August 2012, and that was extended twice, ultimately to the 12th
22 of September 2012.

23 A. Um-hmm.

24 Q. And then if you turn over, you can see that the time
25 given and this is at paragraph 54, for the--those who--and there

1 were three responses to the Expression of Interest, the time for
2 them to submit their tenders was 11th of October 2012.

3 If I just draw your attention, Mr Smith, just to
4 paragraph 57, which points out that the provisions in the
5 invitation for Expression of Interest mirrored the previously
6 excepted proposal from TPP to a considerable extent which may
7 have created an unfair advantage. Now, that's in the Auditor
8 General's Report. If you turn back in this bundle to page 11.

9 A. This bundle?

10 Q. In the same bundle, please, yes. Under the heading
11 "Tendering by the Ministry of Finance", this is the Public
12 Accounts Committee, they point out at 40(a) that the length of
13 time provided to tenderers to prepare for a complex high-value
14 long-term project was insufficient to allow for an adequate
15 investigation, technical evaluation and preparation. And then
16 at (b) that the Project requirements that were put to public
17 tender and subsequently amended by the Financial Secretary
18 closely resembled the Project details that were previously
19 submitted by TPP and accepted by the Government. Note striking
20 similarities in the required design, exit provisions and
21 training requirements. And the Committee recorded that it found
22 this to be suspect as it would put other potential tenderers who
23 entered the process at an immediate and severe disadvantage.

24 Now, just if we start off with this, who was it who
25 drafted the Expression of Interest?

1 A. If I recall, it was the Ministry of Finance in
2 consultation with the Ministry of Communications.

3 Q. But was there anybody specifically in the Ministry of
4 Finance who put it together?

5 A. Most likely on something so quick, it would have been
6 myself.

7 Q. And in terms of you said in consultation with the
8 Ministry of Communications and Works--

9 A. Yes.

10 Q. --two questions: Firstly, who in the Ministry would
11 you have consulted with?

12 A. It would have been Mr Cline. He was the one who the
13 Minister assigned to the Project. So, the Minister wasn't
14 involved in the details, that's why you had Mr Cline dealing
15 with the details.

16 Q. Mr Cline, as we know, was the--that's Claude
17 Skelton-Cline?

18 A. Skelton-Cline, yes. Skelton-Cline I should say, not
19 Cline.

20 Q. Who was at that time a consultant to the Minister?

21 A. Yes.

22 Q. But also, given that the Ministry of Finance had to
23 step in, if you like, why was the Ministry of Works and
24 Communications still involved in the process?

25 A. Okay, so, I'm actually kind of glad you asked that

1 question.

2 So, the Ministry of Communications and Works knew what
3 it wanted--right?--and the Ministry of Finance would need the
4 Ministry of Communications and Works to tell them what they want
5 built. My, the Minister of Finance's role was to make sure that
6 the process in getting to that point was fair and transparent,
7 so I could not come up with the criteria myself. I need the
8 Ministry to tell me or the ports, but in this case we
9 established that taking it from the ports. So, I needed someone
10 who was intimately aware of what the requirements were in order
11 to create something that we could put out for tender.

12 COMMISSIONER HICKINBOTTOM: So, you relied upon, then,
13 as it were, to give you those requirements?

14 THE WITNESS: Yeah. For the technical information;
15 right?

16 Now, I think I should say this, though, is that where
17 in respect to this the possible criticism that I had a bit of
18 issue is I think that in this Report there's some confusion
19 between an Expression of Interest and an Invitation to Tender,
20 and it is very relevant to the discussion because the Expression
21 of Interest is done to establish whether or not a Company can
22 actually do the work that is required; right?

23 So, if you--if you look at this carefully, you notice
24 or what the process was was to have an Expression of Interest
25 where a number of companies would express their interest in

1 doing this Project based on some broad provisions or what we
2 expect--be looking for, so they will send in--they should send
3 in things like their experience and technical capacity, maybe
4 some financials, a little bit of those, just to convince the
5 client or the potential client that they would be capable of
6 actually doing this Project should they be given it to do.

7 After that stage, and you sift out who you think is
8 capable or not, and who the highest score and that type of
9 stuff, then you go to a tender which is a more detailed
10 situation.

11 So, I think there is a bit of confusion here about
12 this because certainly the standard in this region and perhaps
13 around the world is that you give people 14 days for an
14 Expression of Interest. That was initially done. The day
15 between the 31st of July and the 16th of August, that's more
16 than 14 days. What we'd realised, I think I explained this, but
17 I'm just saying, what we'd realised is that, even though we put
18 up the Expression of Interest on the Ministry of Finance's
19 website, nobody was really looking at the Ministry of Finance's
20 website, so you had to find an alternate way of getting the word
21 out there that we're interested in getting this Project done.
22 So, that is why we had to publish it, and these are the things
23 that the Auditor General brought up; right?

24 Q. Which was a number of BVI--

25 A. And Canadian as well.

1 Q. It was published in the Canadian Daily and then it was
2 published in a number of BVI publications.

3 A. Right.

4 And I do accept that the dates in there were right,
5 and that is the reason why there were those extensions. So,
6 when you look at it, you realize that effectively there was, I
7 think, maybe 18 days, I think 18 days between when it was
8 published in other media besides the Ministry of Finance website
9 and when we actually closed. And the date between when it came
10 up in the Ministry of Finance website and we actually closed is
11 something like, what, six or eight weeks? So, that's four plus
12 two, that's six weeks.

13 Now, what I admitted in my submission, which I accept,
14 is that the point from there onwards was too short.

15 Q. Can I break that down with you, because as you've
16 explained, and you have set out, helpfully, in some detail as to
17 the basis of that--

18 A. Um-hmm.

19 Q. --your point is that the time elapsed for Expressions
20 of Interests conformed to required standards?

21 A. Exceeded the required standards.

22 Q. That's a fair point.

23 But let's say we'll agree to agree and say they were
24 in line with required standards.

25 A. Yes.

1 Q. And you make this distinction between the Expression
2 of Interest and then what follows.

3 A. Yes.

4 Q. And you say that what would follow is the detailed
5 technical and financial proposal.

6 A. Yes.

7 Q. Now, is that the tender itself?

8 A. Yes.

9 Q. I see.

10 Now, in this case, the closing date for Expressions of
11 Interest was the 12th of September 2012, and then you have the
12 11th of October as the time for that. Is that where you say
13 "yes, that was too short a period"?

14 A. That was too short, yeah. I mean, on balance--not
15 even on balance, that should have been something like six or
16 eight weeks. But--I mean, I don't recall why it was that short,
17 but I vaguely remember that it would have been conversations
18 with the potential tenderers. How many of them were left?
19 Three or two? And there was some discussion back and forth on
20 whether or not they could meet that timeline.

21 Q. I want--I'm sorry, I don't want to interrupt. Please
22 finish.

23 A. I don't want to hang my hat on that. It wasn't
24 something that we would have fought. There would have been some
25 conversations between us and the potential tenderers in light of

1 the fact that we needed to get this thing through the door at
2 that particular date, whether or not they could meet that
3 particular date.

4 And you would notice that it wasn't a formal--it was a
5 presentation; it wasn't an actual tender, if I recall. That's
6 what I got from reading this, they had to make a presentation
7 11th of October. So, you know, you could kind of accept that
8 might have been a little slacker, you might say, than a formal
9 tender that you have to check and sign off on, and all those
10 types of thing, but I do accept that was short.

11 COMMISSIONER HICKINBOTTOM: When you were going
12 through this process at this time, did you realize that TPP had
13 put forward a proposal under the previous--

14 THE WITNESS: Yes, I was aware.

15 BY MR RAWAT:

16 Q. I asked you just to look at the second bundle, though
17 you were in the first. Look in the second bundle and turn to
18 page 254, please.

19 A. Um-hmm.

20 Q. I think, in fairness to you, could I ask you just to
21 turn up, please, 253, Mr Smith. I'm taking you to part of your
22 earlier evidence. I just pick it up, if you like, at line 21
23 because this is part of an answer that you're giving.

24 And if we go down to line 24, you say: "There was
25 another constraint which I had to fight against--or we had to

1 fight against--which was that there was a timeline on the back
2 end, meaning that the cruise lines themselves were asking for
3 things to be done by a specific date or else there would be
4 repercussions for the industry and the BVI. They wouldn't call,
5 for example"--

6 And then you go into explaining the Expressions of
7 Interest. But at the bottom of page 254 at 21, you make the
8 point that you've just made today again, that the time frame was
9 too short, and that is why it was extended, and that's the
10 Expression of Interest time frame.

11 A. That would have been based on the publication outside;
12 is that right?

13 Q. Outside the Ministry's website?

14 A. That was too short, clearly.

15 Q. If you go over, then, to--give me a moment, to 255.

16 A. That's okay.

17 Q. You say at the top there, line 2, that the decision to
18 extend would have been the result of a discussion between the
19 Minister for the subject, the Minister of Finance, and also
20 Claude Skelton-Cline at the time.

21 In terms of the Minister for the subject, is that the
22 Minister for Works and Communications?

23 A. Yes.

24 Q. At the bottom there, at 12 of that page, you say: "I
25 also agree with your point that the terms not only reflected the

1 conditions that TPP had put up. They were taken from me, so
2 that was not--there was no--I'm not trying to, as it were,
3 avoid. That is true, that is true. And I think I agree with
4 you that it could appear to constitute--and materially, I think,
5 on balance, it did provide unfair advantage to TPP. But, in
6 addition, I'm not sure the Public Accounts Committee Report
7 addressed, eventually we scrapped the entire process, and it was
8 because of those concerns".

9 So, the reason I drew your attention to that, because
10 in your written response to the point about the fact that there
11 was a mirroring of an earlier proposal at this stage, your
12 take-home point is that that was irrelevant.

13 A. Yes.

14 Q. But you seem to be saying, on the last occasion, that
15 yes, you accept it did offer an unfair advantage to TPP. Are
16 you saying it was irrelevant?

17 Just to clarify your written response, are you saying
18 it was irrelevant because ultimately the Project was scrapped?

19 A. Yeah. It was reversed because ultimately--not to go
20 over the whole thing, but it was also material during the
21 process that, you know, you have to admit TPP had an unfair
22 advantage because they were negotiating with the Government
23 before, but they were negotiating with the Government--on
24 Government's requirement; they weren't negotiating on their
25 requirements.

1 I'm not sure you can understand.

2 So, they had intimate knowledge of what Government's
3 requirements were. So, it should not be construed that these
4 were TPP's requirements. These were the Ministry of
5 Communication's requirements. But because they were negotiating
6 on those terms, they had very close knowledge of it.

7 I don't know if you could see the distinction.

8 COMMISSIONER HICKINBOTTOM: What you're saying is that
9 these requirements originated from the Ministry.

10 THE WITNESS: Right.

11 COMMISSIONER HICKINBOTTOM: TPP made a proposal on the
12 basis of those requirements.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: But those requirements--

15 THE WITNESS: Didn't originate with TPP. They
16 originated from the Government.

17 COMMISSIONER HICKINBOTTOM: Yes. So, when TPP came to
18 you with another proposal under this new process--

19 THE WITNESS: They had a jump-start.

20 COMMISSIONER HICKINBOTTOM: --they had a jump-start,
21 yes.

22 THE WITNESS: Yes, but, naturally, you couldn't expect
23 the Government to change their requirements. That's not--that
24 would be nonsense; right?

25 BY MR RAWAT:

1 Q. I suppose another way of looking at it is that, having
2 gone through that first process, it wasn't--that first process
3 wouldn't necessarily have been Government going "here is what we
4 want", and TPP going "here it is". There may have been some
5 discussions and a compromise position reached?

6 A. True.

7 Q. And that's where the unfair advantage derives because
8 they are already a little further down the road in terms of
9 knowing--not only knowing what the Government wants but knowing
10 what Government is willing to give.

11 A. Yeah, yeah.

12 Q. And also knowing, more intimately than any other
13 potential tenderer, who to talk to in Government?

14 A. Very true. But by the same token, would it have been
15 fair to exclude them from having the ability to tender? I don't
16 know if that would have been fair, either.

17 COMMISSIONER HICKINBOTTOM: Well, whether the process
18 was fair, you have to look at the whole process, really.

19 THE WITNESS: Right.

20 COMMISSIONER HICKINBOTTOM: So, to be fair to the
21 other tenderers may well not have required the exclusion of TPP.

22 THE WITNESS: (Witness nods.)

23 BY MR RAWAT:

24 Q. That takes us quite neatly on to the second element of
25 the potential criticism, which is at your page 7, please,

1 Mr Smith. And that is that, as I understand the process, when
2 these tenders came in or when the Expressions of Interest was
3 responded to, you had proposals that went to an Evaluation
4 Committee, which was, I think, chaired by your Deputy at the
5 time, Mr Gaskin.

6 A. Um-hmm.

7 Q. A decision was taken to invite all three proposals to
8 submit tender. Two out of the three did. And then there was a
9 separate Committee to consider those tenders, and that was
10 chaired by yourself with others, but they included
11 Mr Skelton-Cline. And this is what takes us to the second
12 element, that Mr Skelton-Cline was--had, by that time,
13 obviously, already established a relationship with TPP because
14 of his involvement in the prior process when he was--when that
15 was being led by the Ministry of Communications and Works, and
16 so he was the Consultant there.

17 A. Um-hmm.

18 Q. And what that said is that created an obvious conflict
19 of interest which you did not give any real or any proper
20 consideration to, or otherwise manage properly. Now, again, if
21 we look at the--if we go to bundle 1 at page 12.

22 A. The second bundle?

23 Q. The first, please. If you look at page 12, at C--

24 A. Okay.

25 Q. --the Public Accounts Committee highlighted this and

1 described it as a prima facie conflict of interest for the
2 individual--I think that's a reference to
3 Mr Skelton-Cline--whose motivation and decision-making could be
4 compromised by the ongoing relationship. And the point is that
5 he was in a position where he couldn't be entirely objective.

6 Now, I think, as I understand your response--and it's
7 at page 10 of your written response.

8 A. Yes, this isn't lined up properly. I apologize for
9 that.

10 Q. I'll get let you get there.

11 A. Um-hmm.

12 Q. I think your response, if I summarise, is that it was
13 the--the relationship was known--

14 A. Yes.

15 Q. --and it was one that was and could be managed, and
16 you point to the fact that there were Technical Assessments made
17 by a law firm, Baker & McKenzie, and also accountants at
18 PricewaterhouseCoopers, and those were assessments on which the
19 Ministry of Finance would have relied--

20 A. Um-hmm.

21 Q. --on when making decisions when evaluating the
22 tenders. And you point there, no conflict arise.

23 You turn, then, to the specific matter of the position
24 Mr Skelton-Cline found himself in. You make the point that he
25 had an intimate knowledge of the Project, of the requirements

1 articulated by the Ministry at the policy level and its vision
2 for the cruise industry for the BVI. When you refer to the
3 Ministry there, that's the Ministry of Communications and Works?

4 A. Yes, yes.

5 Q. And that information was used to provide, or to better
6 understand, as you've explained, for the Ministry to better
7 understand what the intended outcome was to be.

8 You go on to say you weren't aware of any relationship
9 between TPP and Mr Skelton-Cline beyond him acting on behalf of
10 the Ministry of Communications and Works in negotiations with
11 TPP, and that any relationship or special relationships he may
12 or may have not had with TPP does not affect the decisions you
13 made or the advice that Baker & McKenzie and PwC rendered to
14 you.

15 So, you--and you conclude that if there was a
16 conflict, you query why it was relevant because the processes
17 employed were meant to eliminate the very issues that any such
18 conflict may create.

19 I mean, can we just clarify where you are on this
20 question, Mr Smith? Do you accept that there was a conflict but
21 then say that it wasn't managed, or is your position that there
22 wasn't a conflict?

23 A. I--I don't see where there was one. That's the
24 difficulty I'm having, unless there is--okay, so, for the lack
25 of better term, Mr Cline, Mr Skelton-Cline, had the knowledge,

1 the intimate knowledge of the requirements of the Ministry for
2 this Project. And in order for us, as the Evaluation Committee,
3 to describe the EOI, understand what issues we're looking for
4 and all those things, he would have been useful in actually
5 providing that type of information to us. So, that is why I'm
6 trying to figure out where the conflict is. Maybe I don't
7 understand, but that is the concern that I have. So, he was, in
8 effect--I don't want to call him a technical expert, but in
9 effect that's the role, type of role he's playing.

10 This is a specific request of the Ministry, and we can
11 query on those--query you on those requirements and you provide
12 us with information, the context, with issue, whatever the case
13 may be. But, on the other side, I have Baker & McKenzie and PwC
14 who are giving me the financial and legal advice that I need,
15 and it is on their advice that I'm making a decision.

16 So, I'm trying to--in the event that he might have had
17 some relationship that might have been a conflict of interest,
18 if indeed he had, then the relationship that I had with PwC and
19 Baker & McKenzie, in my view, would have neutralized the
20 influence that conflict of interest would have provided if,
21 indeed, there was.

22 COMMISSIONER HICKINBOTTOM: But isn't this conflict of
23 interest really linked to the last issues that we considered?
24 TPP had been through this process once before, and successfully.

25 THE WITNESS: Yes.

1 COMMISSIONER HICKINBOTTOM: In doing that, it wasn't
2 simply--I'm sure it wasn't simply the Ministry saying "this is
3 exactly what we want".

4 THE WITNESS: Um-hmm.

5 COMMISSIONER HICKINBOTTOM: "Off you go and bid for
6 it." There would have been some to'ing and fro'ing to finalise
7 what eventually became the TPP proposal, no doubt corresponding
8 with the Ministry's requirements.

9 THE WITNESS: 100 percent agree. 100 percent I agree.

10 COMMISSIONER HICKINBOTTOM: Possibly, they may have
11 persuaded the Ministry that the requirement should be--

12 (Overlapping speakers.)

13 COMMISSIONER HICKINBOTTOM: But it was a joint project
14 in that sense.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: But it was a joint project
17 in that sense.

18 THE WITNESS: Yes, yes, yes.

19 COMMISSIONER HICKINBOTTOM: And it was that TPP
20 proposal that formed the basis of all of this.

21 THE WITNESS: Um-hmm.

22 COMMISSIONER HICKINBOTTOM: And that meant the TPP had
23 a--

24 THE WITNESS: A leg up.

25 COMMISSIONER HICKINBOTTOM: --a leg up.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: And also Mr Skelton-Cline
3 would have dealt with them--

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: --successfully to get
6 the--

7 THE WITNESS: We understood--

8 COMMISSIONER HICKINBOTTOM: --the final proposal--

9 THE WITNESS: Yes.

10 COMMISSIONER HICKINBOTTOM: --that was accepted.

11 THE WITNESS: Yes.

12 COMMISSIONER HICKINBOTTOM: As those two matters seem
13 to be linked in my mind.

14 Is that--that I think, is where the conflict of
15 interest of Mr Skelton-Cline arose.

16 THE WITNESS: Right. So, essentially the Ministries'
17 requirements were influenced by the TPP's--

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: --more likely than not was influenced by
20 TPP's involvement, right?

21 COMMISSIONER HICKINBOTTOM: Yes.

22 THE WITNESS: I accept that, and I think I might have
23 accepted that. Well, I don't know but I accept that. A
24 hundred percent, I agree with that.

25 But then on the other side of that, would it have been

1 fair to have cut off TPP from any procurement process that you
2 had after? I mean--and the question is, how was that--how were
3 we to manage that? And what I'm saying is I believe that I
4 managed it as best as I could.

5 COMMISSIONER HICKINBOTTOM: But two separate things.
6 TPP, which we've sort of dealt with.

7 THE WITNESS: Mm-hmm.

8 COMMISSIONER HICKINBOTTOM: And as I say, to make it a
9 fair process, it meant abandoning TPP.

10 THE WITNESS: Right.

11 COMMISSIONER HICKINBOTTOM: But it may have meant
12 taking that history into account when dealing with the other
13 tenderer.

14 But moving to Mr Skelton-Cline where we are now, he
15 was part of the group, the committee, that assessed--

16 THE WITNESS: Um-hmm.

17 COMMISSIONER HICKINBOTTOM: --the--those who'd come
18 forward, and that's where--and having dealt with TPP before and
19 hammered out the TPP proposal under the previous scheme, that's
20 where the conflict might arise.

21 THE WITNESS: And I guess I could accept that, from a
22 practical sense, if you know what I'm saying. You know, people
23 are influenced by what they experienced and all that, so he
24 would have been influenced by those conversations. I accept
25 that. But the role that he was playing in being influenced by

1 those experiences was as a representative of the Ministry of
2 Communications and Works. So yes, I accept, I accept that the
3 criteria for the Ministry could have been, and more likely than
4 not, was heavily influenced by their dealings with TPP. I
5 accept that one hundred percent.

6 But whether or not the conflict of interest that arose
7 between Mr Skelton-Cline and TPP was one that should materially
8 affect whether we go through the process is another issue. In
9 other words, this conflict of interest arose because he was
10 doing his job, not because there was any--necessarily any skin
11 in the game to make sure that it happened the way that TPP put
12 it there.

13 So, in my sense, I see what you're saying because I
14 understand how that could affect it, and what I'm saying is
15 that, even though I see that, I didn't--I was looking at
16 conflict of interest from the standpoint that he would be acting
17 in a manner that is prejudicial to the Government of the Virgin
18 Islands necessarily.

19 Now, even with the best intentions and eliminating
20 what we understand to be the practical implications of what you
21 had been involved in, one would venture to suggest that there
22 was no conflict of interest if he was, you know, this special
23 person that wasn't influenced by conditions around him. But
24 then, notwithstanding that--notwithstanding that, because I was
25 depending on two professional firms that had nothing to do with

1 the BVI, from my assessment, I would have thought--and it was my
2 assessment that their involvement, their role, the fact that his
3 role was a minor one in terms of the actual assessment, that
4 that would have been eliminated through that particular process.
5 If I'm--if he was one of the individuals doing assessments, then
6 I could say that, yeah, we didn't manage that correctly. But
7 because he was there merely in an advisory role and I'm dealing
8 with who have come to a lot of respect for their professional
9 abilities, Baker & McKenzie especially they're in the middle of
10 it, I was confident that we eliminated that, if it existed, that
11 would have been eliminated.

12 BY MR RAWAT:

13 Q. The--I suppose the question, the issue goes to
14 process. Ministry of Finance has stepped in, in part, it seems
15 because of earlier failures, to put it--

16 A. Right.

17 Q. --to adhere by procurement process, and so you have a
18 two-stage process for evaluating the bids. And if you are a
19 tenderer making the bid--

20 A. Yes.

21 Q. --and wanting and relying on a fair process, you
22 have--and you have someone on the evaluation team that had
23 previously recommended a proposal, that might create a
24 perception of at least apparent bias. If you have an evaluation
25 team that is dedicated to try and get best value for money, the

1 fact that one member of that team has previously signed off one
2 of these proposals as offering best value for money could be
3 seen as not being sufficiently independent of a new part of the
4 process designed to try and comply with procurement processes.
5 Isn't that something that's a--

6 A. If I was a tenderer, I'll make--I'll definitely make
7 that--I'll represent to that.

8 Q. But also, if you're a taxpayer in the BVI, because the
9 Committee that you chaired is to there to get value for money.

10 A. Right.

11 Q. You've got one Member of that Committee who has said
12 actually these two proposals, this one from this company was
13 already good.

14 A. Fair enough.

15 So you understand that we're working in--we are
16 working in suboptimal situation because we needed advice on, you
17 know, the intricacies of what we should have been looking for.
18 And here's where bringing the point that I made in the first
19 submission about the currency of my reputation; right? The fact
20 that--and I'm not going to say much about it because
21 self-recommendation is--self-praise is no recommendation, is
22 that a fact that I was in the middle of that and Cabinet, the
23 Governor, I'm pretty sure the United Kingdom had confidence in
24 not just my ability but my integrity to make sure that even
25 though something might have had a propensity to go a certain way

1 or looked a certain way, that the currency of my reputation was
2 as such that it had confidence to believe that wherever possible
3 wherever it popped up, I would have made sure that those things
4 didn't happen.

5 And that is why it's so concerning because when we
6 write reports--I'm not going to speak longer--

7 COMMISSIONER HICKINBOTTOM: That's okay.

8 (Overlapping speakers.)

9 THE WITNESS: But when you write reports and we are
10 making assertions that are not based in fact or are based on
11 assertions that could be proven quite easily are not true,
12 you've taken a reputation that the very Government that you have
13 used as a Government--well, in a Government, obviously you've
14 taken a reputation that has been useful and you're devaluing it
15 and you're drawing a question of whole bunch of things that have
16 come afterwards that you've been able to do because of the value
17 of their reputation, but that's why it's so concerning to me.

18 COMMISSIONER HICKINBOTTOM: No, no, no, I understand
19 that. But given that you accept quite rightly that if you were
20 an unsuccessful contractor in these circumstances--

21 THE WITNESS: I do.

22 COMMISSIONER HICKINBOTTOM: --you wouldn't like the
23 look of it--

24 THE WITNESS: No.

25 COMMISSIONER HICKINBOTTOM: --if I could put it that

1 way.

2 Given that, and given that governance is about
3 openness and transparency, at least with the benefit of
4 hindsight, might it not have been better that somebody who was
5 involved in the assessment in the process which we're trying to
6 cure--

7 THE WITNESS: Mm-hmm.

8 COMMISSIONER HICKINBOTTOM: --because something was
9 not quite right with it, he might have been left out of the
10 process which was designed to cure that earlier process.

11 THE WITNESS: That would have been something we could
12 have done.

13 COMMISSIONER HICKINBOTTOM: I mean, as I say, at least
14 with the benefit of hindsight.

15 THE WITNESS: With the benefit of hindsight, I
16 probably agreed you.

17 COMMISSIONER HICKINBOTTOM: Maybe--

18 (Overlapping speakers.)

19 THE WITNESS: But then--sorry. But then there was who
20 would we have--you, where would you have gotten information
21 from?

22 BY MR RAWAT:

23 Q. As I--

24 THE WITNESS: Because I agree with what you're saying,
25 Commissioner.

1 BY MR RAWAT:

2 Q. As I understand your evidence, Mr Smith, I mean, you
3 saw Mr Skelton-Cline as essentially the voice of the Minister of
4 Communications and Works.

5 A. Yes.

6 Q. And that you described him as a Technical Expert.

7 A. Well, you know, in quotation marks.

8 Q. In--yes. Well, let's call--

9 A. Yeah.

10 Q. He was there to bring the views of the Ministry of
11 Communications and Works--

12 A. Yes.

13 Q. --into the presence.

14 But is it--again, it's a hindsight question, I
15 suppose, but could he not have--could you not have done that?
16 Could you not solicited those views with him not being on the
17 Committee?

18 A. Yeah, you could--should have--we could have him submit
19 something in writing, yeah.

20 Q. If you turn up--

21 A. In hindsight, yes.

22 Q. If you turn up bundle 1, page 408, please.

23 A. Which page, please?

24 Q. 408 in bundle 1, please.

25 If you look at paragraph 79, or point 79, this is part

1 of the record of the evidence that your Deputy, Mr Gaskin, then
2 Deputy Financial Secretary, gave to the Public Accounts
3 Committee when they were looking at the Port Development
4 Project. And I think, to be fair to Mr Gaskin, his memory of
5 this particular project has now faded a great deal. But if you
6 look at 79, he refers to a Negotiation Committee and noted that
7 the Financial Secretary had been appointed the Chair but--now
8 that appears to be that the Committee that met to consider the
9 tenders per se, and he said he couldn't be on the Committee
10 because he was the Chairman of the Public Tenders Committee, and
11 he noted that the Financial Secretary is absorbed in a number of
12 matters and noted that the decision made to have Mr Claude
13 Skelton-Cline act in his place whenever he could not make it.

14 The Chairman of the PAC then inquired about whether
15 Mr Skelton-Cline had been appointed to the Negotiation Committee
16 after he had been appointed Managing Director of the Ports
17 Authority, and the Deputy Financial Secretary responded in the
18 affirmative.

19 And then if you go through to 84 and 85 on page 409,
20 you have Mr Gaskin being asked if the Managing Director--that's
21 Mr Skelton-Cline--replaced the Financial Secretary on the
22 Negotiation Committee, and Mr Gaskin then explained that the
23 Managing Director had also been appointed a Member of the
24 Committee along with other persons. He further explained that,
25 in the absence of the Financial Secretary who'd been appointed

1 as Chairman by Cabinet, the Negotiation Committee appointed the
2 Managing Director as its leader.

3 So, I'm going to ask whether that's--accords with your
4 recollection. It was two things:

5 Firstly is that, and I think this is--there is other
6 evidence to this--when the process starts, and it was in the
7 hands of the Ministry of Communications and Works,
8 Mr Skelton-Cline was a consultant to the Minister. By the time
9 it gets to the Ministry of Finance stage, he's then Managing
10 Director of the Ports Authority. But perhaps the take-home
11 point is that on Mr Gaskin's recollection of time, that
12 Committee that had been set out and which you chaired to
13 evaluate bids, when you were not available appointed
14 Mr Skelton-Cline as its leader.

15 So, does that not suggest that, in terms of managing
16 the potential conflict of interest, appointing Mr Skelton-Cline
17 as--to Chair the Committee in your absence was perhaps not the
18 best way forward?

19 A. So, Mr Claude Skelton-Cline was Managing Director of
20 BVI Ports Authority; right?

21 Q. Yep.

22 A. And BVI Ports Authority was trying to negotiate
23 something according to the expectations of the Ministry.

24 Q. Well--

25 A. So he was appointed, he was appointed Managing

1 Director; right? So, it would appear to me that the Managing
2 Director of the BVI Port Authority responsible to the Chair of
3 the BVI Port Authority would have been the appropriate person to
4 be doing any negotiations for any project that you bid on, as
5 the administrative head of that organisation.

6 Q. What the evidence shows is that the Ports Authority
7 were essentially not involved in this process until the very
8 end.

9 A. Um-hmm.

10 Q. So, when the Ministry of Communications and Works were
11 involved, the Ports Authority was not involved. When the
12 Ministry of Finance were getting involved, even though its
13 Managing Director was on that Committee, it wasn't involved.

14 But I think my question was directed to, what I was
15 trying to explore with you is where you got this conflict of
16 interest, which isn't about Mr Skelton-Cline's job title but his
17 previous involvement in the Project, and you got--and you say,
18 well, it doesn't arise as a conflict because you had others to
19 lean on, does the fact that, in your absence, Mr Skelton-Cline
20 essentially chaired the evaluation, the Tender Evaluation
21 Committee? Does that not give you pause for thought as to
22 whether the conflict of interest was, in fact, properly managed?

23 A. That's not what I read here. I read that he's
24 appointed in Negotiating Committee, not the Assessment so--

25 Q. It's a different--it's the same Committee because it's

1 the Committee that you're chairing as Financial Secretary.

2 A. Okay. I don't recollect, but let's say that that is
3 the case. The point is is that my decisions came from Baker &
4 McKenzie and PwC, so my--any advice that I would have given
5 would have come from Baker & McKenzie and PwC and what their
6 Technical Assistance were.

7 Q. Can I ask you just to clarify one more detail, please,
8 and it's in bundle 2, please.

9 A. Bundle 2.

10 Q. That's bundle 1 that you're looking at, so it's the
11 next one. If you turn up page 256, please, at 256, line 21, I
12 put to you, and we're back in your Transcript of evidence on the
13 last occasion, I say (reading): You've dealt with a short
14 timeline, you've dealt with TPP and that creates an advantage,
15 but an element of the advantage was the fact that Claude
16 Skelton-Cline had a conflict of interest. Was that something
17 that was a factor at the time that anybody was aware of?

18 And you answered: It was something that I know we
19 are--I was concerned with as Financial Secretary, but I think by
20 the time the discussions had finished, some reliance was placed
21 on me to ensure that this individual did not unduly influence
22 anything.

23 A. Um-hmm.

24 Q. And I asked: How did, and you--I think we crossed
25 over each other--and you said not directly.

1 And I said how did you discharge that duty, that there
2 was reliance on you to make sure that there wasn't undue
3 influence? How did you manage that?

4 And you then answered: So he was on the Tender
5 Committee, and I would seek to control his opinion, so to speak,
6 make sure that in my view--I think there's a typo. I think you
7 intend to say--it did not unduly influence the other Members.

8 A. Um-hmm.

9 Q. That was what I would--but, well, I don't disagree and
10 I agree with you that that was an uncomfortable position.
11 That's something we should avoid.

12 And I asked: But at that time, was there any
13 mechanism in operation by which someone who had a conflict or
14 someone who others thought had a conflict could be removed from
15 a committee and asked to step down from a board.

16 And you said: Yes, definitely.

17 I said: Did that happen in this situation?

18 And you said: I don't think it did.

19 A. Um-hmm.

20 Q. And you continued on the other side, and it's the
21 point you've made today that your understanding was that
22 Mr Skelton-Cline had worked with TPP but was not part of TPP,
23 and so was an agent of government to negotiate an initial
24 agreement with TPP that was in the best interest of TPP, and I
25 think that's the thing that is unbalanced.

1 So you say: He wasn't an agent of the TPP. He was an
2 agent for the Government of the Virgin Islands.

3 But it's this point that you made on the last occasion
4 about the fact that you recognized that there was, to use your
5 words, an uncomfortable position.

6 A. Um-hmm.

7 Q. And it was one that you said you sought to manage by
8 ensuring that Mr Skelton-Cline did not unduly influence the
9 views of others. Is that something that you--remains your
10 position?

11 A. Well, remember when I said--when we were having this
12 discussion, I hadn't seen the bundle of evidence, we were
13 working off my recollection, and what I'm seeing in the first
14 part here is based on my recollection and, you know, I tend
15 to--I do things a certain way; right? So obviously based on
16 what we are discussing and my brief perusal of the information,
17 that is what I would have done. I would have expected him to
18 do, but I--remember since then I've been given the opportunity
19 to read through the bundle and see what actually happened, all
20 right?

21 So, I can't deny that that would have been an
22 uncomfortable position in the event that I felt that he had
23 some--I don't want to say incestuous relationship--inappropriate
24 relationship with TPP, but then when given the opportunity to go
25 through this and see the sequence of events; right? Then I

1 began to understand why things might have happened and the way
2 they happened.

3 So I have to apologize because this was--I don't know
4 if you recall, but it's gonna like happen on the fly, and if I
5 had said something there that's not true, then I thoroughly
6 apologize, but based on what I'm reading now, recollecting that
7 he was acting on--he was essentially the Ministry's Consultant
8 and all that type of stuff, and recognizing that, as a potential
9 tenderer, I would have been squealing, I mean squealing like a
10 devil because of this guy, right? But then looking at it and
11 what was actually done, based on the evidence that I see, I
12 understand; what I'm saying, I could why what was done was done.

13 But obviously you could see here that any inference
14 that he would have had that I was aware back it off, right?
15 Okay, it was there for this reason. And if you're trying to
16 tell a guy--people what to do, no. And then I didn't even
17 recall at that point, did I, that we were using Baker & McKenzie
18 and PwC, did I? I don't know if I recall that at the time, but
19 then when you go through the notes and you take your time and
20 you study what will have to be done, I know that Baker &
21 McKenzie and PwC were the ones that we we're using. We just
22 didn't--especially with the potential TPP project, that's a
23 re--that could get really complex, so that would be why Baker &
24 McKenzie would have been there, and PwC for the financial side.

25 So, if there's discrepancy between what I'm saying now

1 and what I said then on the fly, then, you know, I take that on
2 the nose, really. I would have to--

3 Q. And just so that we can clarify, if there is any such
4 discrepancy, you would say that what you'd rely on now is your
5 written response to the evidence--

6 A. Yes.

7 Q. --that you've given today.

8 A. Yes.

9 Q. Let's move on to the third element of this, which is
10 the autonomy of the Ports Authority Board.

11 A. Um-hmm.

12 Q. And what's said, in effect, is that you as Financial
13 Secretary are ex officio Member of the Board, and I don't think
14 there's any dispute about this, but you delegated, and I can
15 take you to where Mr Gaskin said this, if you need to see it
16 but--

17 A. Sure, go ahead, that's fine.

18 Q. --his recollection in--before the Public Accounts was
19 that he represented--you delegated to him the need to attend
20 Port Authority Board Meetings so that you could attend Airport
21 Authority Board Meetings.

22 A. It's possible, yes.

23 Q. And I can show you if you want to see it.

24 A. I wouldn't dispute that. That seems correct.

25 Q. Yeah. His recollection was he attended about

1 90 percent of those Board Meetings.

2 And that gives rise to the third sort of element of
3 the--of a potential criticism, which is that throughout the
4 process, including when the Ministry of Finance took over, the
5 Port Authority were excluded from it, and as Financial
6 Secretary, even in circumstance where you delegate to a Deputy,
7 you should have been aware of the need to safeguard the autonomy
8 of the Authority.

9 Now, your response to this we find at 12.

10 A. Yep.

11 Q. And you make the point that Accounting Officers, as
12 financial officers, often delegate authority to others, and you
13 did in this case delegated it to the Deputy Financial Secretary,
14 Mr Gaskin, and you expected him to understand the relevant
15 issues and to manage matters accordingly.

16 In terms of recognising relevant issues and managing
17 them accordingly, how did you and Mr Gaskin work together in
18 relation to the Ports Authority?

19 A. What did we work in terms of--what do you mean?

20 Q. Yes. Did he raise concerns with you? What would--did
21 you expect him to raise concerns with you, or was it simply that
22 you delegated to him and wanted him to get on with it?

23 A. I think basically latter.

24 Mr Gaskin was--before he became Deputy Financial
25 Secretary, Director of Internal Audit, so obviously that's a

1 position where he should understand what the issues are. And
2 because of the multiplicity of tasks that they had, I would
3 expect him if there--if something comes up that requires my
4 attention, that he had enough judgment to say, well, you know,
5 this is an issue. But because of where he came from, his
6 background as Director of Internal Audit, I had--for me, had no
7 cause for pause or cause of concern that he wouldn't raise an
8 issue if it came up that he couldn't deal with.

9 So, perhaps I had too much trust, but that is the way
10 it was. I mean, this is a Deputy Financial Secretary, which is
11 a heartbeat away from being Financial Secretary, you shouldn't
12 be concerned about that person's ability to perform.

13 Q. And would you see the--I mean, you've explained the ex
14 officio member is there as a Member of the Board.

15 A. Yes.

16 Q. And there to act as part of the Board. Would you
17 accept that part of that role as a Board Member is to seek to
18 ensure that the autonomy of the Board is preserved?

19 You said um-hmm, but could you just--

20 A. Yeah, but, I mean, we went through that before; right?

21 Q. Yes.

22 A. So--and when I say we went through that before we even
23 got into the potential criticisms, where we discussed my
24 position of what--how the relationship between the Board and the
25 Ministry should be, and we also discussed the issue about

1 Minister perhaps lacking confidence. So, obviously, my position
2 is that shouldn't have been done. Well, I don't know if that's
3 obvious, but that's my position, it shouldn't have been done.

4 No, but it happened nonetheless, and perhaps I didn't
5 register a formal complaint in the "earlies" (phonetic), my
6 concern, I guess, only came in when I had issues in the
7 procurement--the process that we took over, but I don't know
8 if--well, I could say, I don't disagree that it should have been
9 within the Ministry, but--in--within the BVI Port Authority.

10 But if the Minister had concern about the Port--BVI
11 Ports Authority to execute his strategic direction within the
12 specific time period, what recourse did he have? In my view,
13 even though I don't support it, Commissioner, right? Because I
14 think that the Board should be capable at what it's supposed to
15 do.

16 The impression I'm getting--I mean, I'm trying to
17 refresh my memory by going through these notes, is that he just
18 didn't have confidence that the BVI Port Authority understood
19 the importance, but they didn't place the level of importance
20 that he placed on getting this particular facility up and
21 running by a particular date, and I get the impression that
22 that's the reason it was taken away. Should not have been done,
23 I agree that a thousand percent, but the question that we
24 perhaps should be asking, you know, the Standing Finance
25 Committee speaks about how it was wrong and all of that, but I

1 don't see them discuss anywhere about what recourse the Minister
2 had, or discuss specifically why he felt it necessary to commit
3 the infraction, so to speak; right?

4 COMMISSIONER HICKINBOTTOM: Well, I mean, yeah, we'll
5 hear from the Minister, but your view is that the BVI Ports
6 Authority Board--

7 THE WITNESS: Um-hmm.

8 COMMISSIONER HICKINBOTTOM: --should have been fully
9 responsible for this.

10 THE WITNESS: Yeah, yes.

11 COMMISSIONER HICKINBOTTOM: It wasn't--I think this is
12 literally true, but correct me if it's not, it wasn't you that
13 took it away from the Board.

14 THE WITNESS: No.

15 COMMISSIONER HICKINBOTTOM: You were involved in the
16 decision--

17 THE WITNESS: Right.

18 COMMISSIONER HICKINBOTTOM: --that the Board should
19 not deal with it.

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: I mean, it seems to me
22 that the Minister, because the Board has these functions given
23 to it by statute, the Minister, if he was concerned about the
24 speed at which they--

25 THE WITNESS: Right.

1 COMMISSIONER HICKINBOTTOM: --were acting, should have
2 gone to the Board and moved them along.

3 THE WITNESS: I agree.

4 COMMISSIONER HICKINBOTTOM: If that was the policy
5 that's--as part of the policy. But I mean your written response
6 on those, reflected in what you've said today, is very clear.

7 THE WITNESS: Right.

8 BY MR RAWAT:

9 Q. But can I just, though, just drill down a little bit
10 into this. I mean, you've given your view that it shouldn't
11 have been done, but it goes back to the role of--it goes back to
12 two things, the role of a Public Officer sitting on a board.

13 A. Yes.

14 Q. Because here you have that it has been done.

15 A. Um-hmm.

16 Q. So, what recourse does the Public Officer who is the
17 Board Member have?

18 A. Well, I would think the Public Officer should squeal
19 somewhere. Something should be down in writing somewhere.

20 Q. So, should Mr Gaskin have squealed?

21 A. I suspect he did, but I don't know, but he should
22 have. I--some should have been--I can't dismiss the possibility
23 that we did speak about it, but I don't recall it, and I do
24 agree that something should have been put in writing somewhere,
25 registered somewhere, but, notwithstanding that, the ex officio

1 Members couldn't stop the move. I don't know if they could
2 have.

3 COMMISSIONER HICKINBOTTOM: Well, no, because the
4 evidence is that the Board is--were cut out.

5 THE WITNESS: Right.

6 COMMISSIONER HICKINBOTTOM: They were simply bypassed.

7 BY MR RAWAT:

8 Q. I mean, and the reason I'm exploring this with you
9 because in your written response, and I'm abbreviating it, but
10 say you delegated to the Deputy Financial Secretary on this
11 matter. You expect him to understand the issues and manage them
12 accordingly, and you expect him to exercise professional
13 judgment.

14 A. Yes.

15 Q. Mr Gaskin has--his position was that he was in your
16 shoes but reporting to you--

17 A. Um-hmm.

18 Q. --as the ex officio officer whenever the Committee
19 met, and so it's you as Financial Secretary who is the
20 Accounting Officer and, therefore, if there is any
21 responsibility, it lies on your shoulders.

22 Now, notwithstanding that you delegated it, would you
23 accept that, because under the statute, it's the Financial
24 Secretary who is the ex officio Member. If there's any
25 responsibility to seek to or take steps to preserve the autonomy

1 of the Board or, to use your words, "squeal", when a Minister
2 does that--

3 A. Yeah.

4 Q. --but do you accept that it's--it all still comes back
5 and lands on your desk?

6 A. Well, as my understanding of responsibilities, I could
7 delegate duties but not responsibility. So, that is important
8 because, in the Civil service--to be in the Civil Service today,
9 Accounting Officer should be--recognize that even though someone
10 is signing for you, you're still responsible, so don't pull
11 yourself out of it. So, I accept the responsibility from that
12 point of view.

13 Maybe my trust in the person who was a heartbeat away
14 from the post that I was in, if you understand what I'm saying.
15 I mean, for a Financial Secretary and a Deputy Financial
16 Secretary, there shouldn't be much difference between them in
17 terms of ability; right? Perhaps I place so much trust in them,
18 but because of the fact that I'm the Accounting Officer, because
19 of the fact that I am, by statute, I guess you'd say, ex officio
20 Member and somebody--I delegated my duties to someone else
21 because of that, I have to accept the responsibility. I can't
22 shirk that responsibility.

23 So, from that standpoint, yes, but it happened, and
24 the only recourse I knew that the Deputy Financial Secretary
25 would have had, we would have had was to register something in

1 writing that this is a problem and need to be fixed.

2 Q. And do you--I mean, you're clear in your view about
3 what should have happened and what shouldn't.

4 A. Very clear in my view on what shouldn't have--

5 Q. But do you recall, either yourself or Mr Gaskin,
6 registering a concern?

7 A. No, I don't recall. As I recall, I think--and don't
8 hold me to this, but as far as I recall, I just at some point
9 realized that Ministry was dealing with the Port Development
10 Project.

11 COMMISSIONER HICKINBOTTOM: Your Ministry?

12 THE WITNESS: Not my Ministry. Communications and
13 Works.

14 COMMISSIONER HICKINBOTTOM: Right. Okay.

15 BY MR RAWAT:

16 Q. The last element of the potential criticism is the
17 conflict of interest that arises in relation to--it's again back
18 to the TPP proposal. If I just give you the context, Mr Smith,
19 if you take up your bundle 1 again, please, just so we can
20 understand the factual context, and turn up page 31, please.

21 A. Page?

22 Q. 31.

23 Just to flag up two paragraphs of that Report from the
24 Public Accounts Committee, and it's 115 and 116?

25 A. Mm-hmm.

1 Q. So, in 115, there is a reference to Mr Gaskin, who did
2 appear in front of the Committee, being asked whether Tortola
3 Port Partners tender reflected an association with the BVI
4 Investment Club, and he replies--he's recorded as replying in
5 the negative.

6 What's--the Committee notes at 116 in its Report is
7 that the tender Assessment Report prepared by PriceWaterhouse,
8 dated 25th of November 2012, specifically names the BVI
9 Investment Club as prospective local partner for Tortola Port
10 Partners.

11 And if you turn through the bundle to 536, please,
12 looking it up there, this is--we're back to where the stage of
13 the process was when the Ministry of Finance were overseeing it.
14 And if you look at 59 at the bottom, so this is after the
15 Ministry of Communications and Works had been handed over to
16 Ministry of Finance, at 59 it notes that there is a requirement
17 in the submissions that there should be an opportunity to at
18 least 20 percent of local ownership in the venture.

19 And if you then go over to the next page, 537 at the
20 very top, the Auditor General, in her report, records that
21 Tortola Port Partners named the BVI Investment Club as its local
22 partner.

23 And at 60, that's where there's a reference to
24 potential issues of conflict of interest because there were two
25 aspects of that, firstly that the principal of a firm engaged to

1 prepare business case for the initial Tortola Port Partner bid
2 was a president and public figure in BVI Investment Club; that a
3 number of election candidates whose elections--Declarations of
4 Interests were Gazetted in October 2011 haven't shareholding
5 interests in subsidiary companies owned by the BVI Investment
6 Club. That's the background to that.

7 Now, it's not, therefore--you put it on the basis, I
8 think your response is really that, well, those on the
9 Evaluation Committee--yourself, Mr Skelton-Cline, PwC, Baker &
10 McKenzie--would not have had any kind of conflicts of interest,
11 themselves, and you say that you weren't aware of any such
12 conflicts at the time.

13 (Pause.)

14 A. Sorry, sorry about that.

15 Q. Sorry.

16 And you say that, if anybody, for example, a Member of
17 Cabinet, had such an interest, that wouldn't have influenced the
18 review that was taking place.

19 But it's--I suppose the thrust of the point that it
20 goes to is knowledge of a potential conflict of interest. Now
21 it's just that there is a reference from the PAC Report to a
22 potential conflict of interest, and to BVI Investment Club, and
23 given that that Report was being prepared by those involved in
24 Evaluation Committee that you chaired, does it not follow that
25 it was something that you should have been aware of?

1 A. The conflict with BVI Investment Club--

2 (Overlapping speakers.)

3 Q. Or that you have--you're considering a tender from

4 TPP.

5 A. Yes.

6 Q. The requirement is that they should have 20 percent--

7 A. Yes.

8 Q. --local involvement.

9 A. Yes.

10 Q. They partner with the BVI Investment Club.

11 A. Um-hmm.

12 Q. You have--as--I'm taking you to the Auditor General's

13 Report where they flag up--

14 A. Yeah.

15 Q. --backup why that creates a conflict of interest.

16 A. Um-hmm.

17 Q. Given that is mentioned in the PwC report, as the
18 Public Accounts Committee drew--highlighted, does it not follow,
19 then, as the Chair of that Evaluation Committee (a) you should
20 have been aware of it, and (b) you should have taken this into
21 account when assessing the bid because there is a potential
22 conflict of interest?

23 A. Okay, so--I got you.

24 So, when I speak about--I am not at-- I am aware of no
25 one who was a member of the BVI Investment Club being a member

1 of the Evaluation Committee. That's a po--that's the conflict
2 of interest I would be concerned about. If, for example, we'd
3 make a recommendation from the Evaluation Committee to the
4 Cabinet to which there might have been some connection to the
5 BVI Investment Club, and I think that's established; right? If
6 they had overturned a decision that we'd made as--went contrary
7 to a recommendation made to what we did as the Evaluation
8 Committee, then, to me, that would have been an issue because
9 that would have been a material--that would have been material.
10 But if their decision at Cabinet mirrored the recommendation we
11 made as Evaluation Committee, then as far as I'm concerned, the
12 conflict of interest that Cabinet had was immaterial.

13 Now, what was material for me was whether or not the
14 BVI Investment Club had inroads into my evaluation or the
15 evaluation that we were doing in order to make a recommendation
16 to Cabinet. To me, that is a material conflict of interest that
17 I was concerned about.

18 And what I'm saying here is I'm not aware of anyone on
19 the Evaluation Committee who would have had that conflict of
20 interest, if you see what I'm saying.

21 Q. Yes.

22 A. So, if I had made a recommendation, if we had made
23 a--Assessment Committee had made a recommendation for (a) and
24 Cabinet, having strong connections to the BVI Investment Club,
25 was connected to TPP, and which is their duty to do anyway, to

1 disregard a recommendation and instead make a decision in favor
2 of TPP, then I would have been concerned, but any--any event
3 their decision was based solely on the recommendations that we
4 made as Assessment Committee and Assessment Committee had no
5 conflict of interest with the BVI Investment Club, then I
6 wouldn't be concerned.

7 So, we're in a small society. What I'm more concerned
8 about is that the Cabinet Members had declared their interests
9 in BVI Investment Club. What I would be concerned about is that
10 they had--the BVI Investment Club had no--didn't influence the
11 decision, and the decision that was relevant to me was the
12 Assessment decision and the reflection of Cabinet of the
13 decision that we made.

14 So, it's there. And, you know, I'm going to say this
15 just easily, is that the member of the Public Account Committee
16 are made up of elected representatives, and they have--they all
17 have some--their goals will be different than mine, if you
18 understand what I'm saying. So if they see a little problem,
19 they might be expending a little more than what it's supposed to
20 be because, you know, that's all politics roles, so that's--

21 Q. I mean--

22 A. So I think--sorry, I think it was amplified because of
23 those concerns there. Sorry. Sorry, Commissioner.

24 Q. Well, perhaps I'll conclude by saying, of course, that
25 in taking you to aspects of the Report, it's a shortcut to,

1 rather than taking you through the detail of the minutes of
2 evidence--

3 A. Of course.

4 Q. --that's where one would get the facts from.

5 A. Right.

6 Q. I appreciate any report also makes conclusions based
7 on facts.

8 MR RAWAT: Commissioner, I think I've reached the end
9 of the questions for Mr Smith. Can I--it's been perhaps a
10 longer day for him than he expected, but can I conclude by,
11 first of all, thanking him for returning and giving further
12 evidence to the Commission. Also for thanking him for the way
13 that he has done so today.

14 COMMISSIONER HICKINBOTTOM: Yes. And can I echo that,
15 please, Mr Smith. Thank you for your time and thank you for the
16 clear way in which you've given your evidence. That's been very
17 helpful. Thank you.

18 THE WITNESS: Thank you.

19 (Witness steps down.)

20 COMMISSIONER HICKINBOTTOM: Good. Shall I--

21 MR RAWAT: If you could rise briefly--

22 COMMISSIONER HICKINBOTTOM: Yes.

23 MR RAWAT: --and we'll just reconstitute the room and
24 get on with our next witness.

25 COMMISSIONER HICKINBOTTOM: Yes. Thank, you Mr Rawat.

1 (Recess.)

2 Session 2

3 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat. We
4 are ready to resume.

5 Mr Gaskin.

6 MR RAWAT: Thank you, Commissioner.

7 Our next witness is Mr Wendell Gaskin.

8 BY MR RAWAT:

9 Q. Mr Gaskin, you had previously given evidence to the
10 Commissioner, and that was on, I think, the 15th of July of this
11 year.

12 A. Yes.

13 Q. And you made an affirmation on that occasion, so there
14 is no need for you to take the affirmation again. You're still
15 bound by it.

16 You will see that there are a couple of bundles just
17 to your left there, which we might need to look at.

18 Can I conclude just by asking you just to keep your
19 voice up, please.

20 A. Okay.

21 Q. There is a microphone in front of you, but it doesn't
22 amplify, and you might like to pull it a little closer to you so
23 that you can be heard clearly.

24 On the 15th of July, when you gave evidence, it was in
25 connection--

1 A. Point of information, before we start, I would like to
2 get something on the record.

3 COMMISSIONER HICKINBOTTOM: What's that, Mr Gaskin?

4 THE WITNESS: The fact that I'm a retired Civil
5 Servant who is running a small business, and the Government
6 don't pick up my costs of having my Attorney and I sitting
7 around for two hours waiting, so I would like for you to take
8 that into consideration in the future.

9 COMMISSIONER HICKINBOTTOM: We do our best, Mr Gaskin.

10 THE WITNESS: Thank you.

11 COMMISSIONER HICKINBOTTOM: Obviously, you've
12 requested that your attorney attends with you.

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: And Mr Daniels is here
15 remotely, and we welcome him.

16 And in terms of dealing with the evidence, we do our
17 best to stick to our timetable. Some witnesses, I'm afraid, run
18 over, but we do our best.

19 Thank you, Mr Gaskin.

20 Mr Rawat.

21 THE WITNESS: Thank you. Judge Hickinbottom and
22 Dr Rawat, thank you very much.

23 MR RAWAT: Commissioner, before I continue, can I
24 actually apologize to Mr Daniels because I haven't introduced
25 him properly. And if I can, just for the record, say that in

1 this session as well as Mr Haeri and Mr Rowe, we are joined by
2 Steven Daniels who appears at your direct on behalf of
3 Mr Gaskin.

4 COMMISSIONER HICKINBOTTOM: Thank you.

5 BY MR RAWAT:

6 Q. Mr Gaskin, as I was explaining on the last occasion
7 that you gave evidence, it was in connection to a time when you
8 were still in Public Service, and you then at that time were the
9 Deputy Financial Secretary, and in that context you had some
10 involvement in what we are calling the Port Development Project,
11 and in particular that you became involved in the Project when
12 the Ministry of Finance took it over as part of--to initiate a
13 tender process.

14 Following your evidence, on the 13th of
15 September 2021--

16 (Lost connection.)

17 COMMISSIONER HICKINBOTTOM: See if Mr Daniels comes
18 back. He's back. Let's just make sure that he's--good.

19 Mr Daniels, I think there was a break in the link
20 then. Are you back and can you hear and see us?

21 MR. DANIELS: Yes, Commissioner. There was a break,
22 and I could not hear you properly, so I had signed out and
23 reconnected.

24 COMMISSIONER HICKINBOTTOM: That's fine, Mr Daniels.

25 Can you see and hear us properly now?

1 MR. DANIELS: Just give me one second, please.

2 COMMISSIONER HICKINBOTTOM: Good.

3 Thank you, Mr Daniels. Thank you, Mr Rawat.

4 BY MR RAWAT:

5 Q. As I was explaining, following your evidence, the
6 Commission has sent you what we call a "Warning Letter", what's
7 historically sometimes describe as a "Salmon Letter", and the
8 purpose of that letter is to notify you of potential criticisms
9 of you that may arise from the available evidence, and the
10 reason for doing that is so that you can have then a reasonable
11 opportunity to respond to those potential criticisms. It's
12 important that I call them "potential criticisms" because they
13 do not form either a provisional or concluded view of the
14 Commissioner.

15 Now, you have taken the opportunity to provide a
16 written response to the Commissioner. Do you have that response
17 with you?

18 A. Yes, I do.

19 Q. And can you confirm that, on page 2, it carries your
20 signature and the date the 22nd of September 2021?

21 A. It certainly does.

22 Q. And can you confirm further, Mr Gaskin, that you are
23 content for that written response to form part of the evidence
24 before the Commissioner?

25 (Audio interference.)

1 REALTIME STENOGRAPHER: I'm sorry, there was an
2 overlap. Can we have the Witness come closer to the microphone
3 and repeat his answer, please? Thank you.

4 BY MR RAWAT:

5 Q. Let me put the question to you again, Mr Gaskin.

6 Can you confirm that you are content that the contents
7 of your role--that your written response should stand as part of
8 the evidence before the Commissioner?

9 A. Certainly.

10 Q. I'm not proposing to read out all of the criticisms to
11 you, but we can--what I want to do is to ensure, in fairness to
12 you, that your written response is put on the record.

13 So, as the letter explains, it arises in the context
14 of what we call the "Port Development Project". You've referred
15 to it in your written response as the "Cruise Ship Port
16 Development Project". In particular, your role as Deputy
17 Financial Secretary, which is the post you took up in November
18 2011; is that right?

19 A. Correct.

20 Q. And in that role you chaired the Public Tenders
21 Committee--

22 A. Correct.

23 Q. --which is also known as the Central Tenders Board?

24 A. Correct.

25 Q. And then you were attending as an ex officio

1 representative of the Ministry of Finance BVI Ports Authority
2 Board Meetings?

3 A. Never was an ex officio.

4 Q. I see.

5 A. Never.

6 Q. The point is that you were there as the designate of
7 the Financial Secretary?

8 A. Who was the ex officio.

9 Q. Who, under the statute, is the ex officio; is that
10 right?

11 A. Correct.

12 Q. I see. Well, we may come back to that in a moment.

13 Now, we know that there came a point in this process
14 when--and this was in late 2012, when the Ministry of
15 Communications and Works, having been the lead Ministry on the
16 development, the port the Ministry of Finance took over.

17 Now, one of the issues relates to the expedited tender
18 process that the Ministry of Finance then initiated, and the
19 concern is that that process lacked transparency and fairness.
20 If you go--if you take up bundle 1, and you turn up, please,
21 Mr Gaskin, page 535.

22 A. 535.

23 Q. We can see the timeline for the tender process set out
24 in a report that was prepared by the Auditor General because the
25 Ministry issued and published on its website Expressions of

1 Interests dated the 31st of July 2012. And the initial--the
2 original deadline for that was the 16th of August 2012, but that
3 was then extended twice to the 12th of September 2012.

4 And then if you turn over to the next page, 536,
5 please, you will see at 54 that we have the date of that tenders
6 following proposals being submitted in response to the
7 Expression of Interest, tenders were to be submitted by the 11th
8 of October 2012.

9 Now, there were two aspects of concern around that
10 process: First, the timeline, as I've indicated; and second,
11 the fact that the Expression of Interests mirrored in its detail
12 a previously accepted proposal from Tortola Port Partners, which
13 had been part of an earlier process of developing the port. And
14 the concern was that, by that mirroring, it created an unfair
15 advantage.

16 Now, these concerns were raised by the Public Accounts
17 Committee in its Report, and we went through that Report, I
18 think, on the last occasion that you gave evidence. Your
19 response to that criticism is as follows: You confirm, as you
20 have just done again, that you were Chairman of the Public
21 Tender Committee. You say: "I was not the Accounting Officer,
22 and I was acting on behalf of the Financial Secretary".

23 You then said you cannot recall--you recall that
24 whenever the Committee meets, all the Members that are
25 enumerated in section 174(1)(2) of the Public Finance Management

1 2005 Regulations would attend. You cannot speak, you continue,
2 for the Ministry of Finance because you were not the Accounting
3 Officer. And you say that the criticism doesn't particularize
4 how the process used by the said Ministry lacked transparency
5 and fairness.

6 And you then conclude: I'm not sure as to who
7 received an unfair advantage by the process outlined".

8 With respect, if one looks at the Warning Letter, it
9 does two things, which tells you that the issue was around the
10 time of the process, and secondly that the unfair advantage was
11 created to the benefit of TPP. That was the concern.

12 But can I ask you this way: In terms of being Deputy
13 Financial Secretary at the relevant time, did you have any
14 involvement in preparing the Expression of Interest?

15 A. No, sir.

16 Q. Did you have any involvement in overseeing the
17 progress of--the tender process from the time that the
18 Expression of Interest was published?

19 A. I can't recall.

20 The problem that I'm having is that you are asking me,
21 based on the information that you sent to me to Criticism No. 1,
22 and I stated in my response to you that I don't--I cannot speak
23 on the Ministry of Finance because the Ministry of Finance has
24 an Accounting Officer, and I was acting as the Deputy Financial
25 Secretary given the role of the Chairman of the Public Tenders

1 Committee.

2 If you look under the Article that I quoted in my
3 section, it says that the Financial Secretary or his designee
4 and all those other people. What I found--what I'm looking at
5 in terms of the criticism that is outlined here is that this
6 criticism that is outlined here indicts a whole group of people,
7 including the Attorney General's Office, because these are all
8 the people that sit in a committee. I never had a
9 meeting--never had a meeting--unless all the people were
10 present.

11 And so--I am completely refuting the criticism.

12 Q. But the point, Mr Gaskin, is that, I think, as I
13 understood what you were referring to, it's either the Tender
14 Committee that you're referring to as being indicted?

15 A. Yes.

16 Q. Well, the criticism isn't directed at the Public
17 Tender Committee. The criticism is directed to the Ministry of
18 Finance and those involved in it because the Ministry of Finance
19 oversaw the tender process.

20 A. But ultimately I'm not responsible for the Ministry of
21 Finance.

22 Q. Yes, but--

23 A. Dr Rawat, Commissioner Hickinbottom, there is no way
24 in the world that the Deputy Financial Secretary is going to
25 make those decisions.

1 The problem that I'm having, Dr Rawat, is a simple,
2 simple fact of life. I am telling you that, in my response,
3 that I cannot speak on behalf of the Ministry of Finance. That
4 was not my responsibility. Whatever I did, I still have to go
5 back and report to my superior.

6 Q. And did you do that?

7 A. Always.

8 Q. Right.

9 So, what was your role as Deputy Financial Secretary
10 at that time?

11 A. In the role of Deputy Financial Secretary I was
12 responsible for operations, which means that I was responsible
13 for the inner workings of the Ministry of Finance. What
14 happened in this situation, if the Financial Secretary is in a
15 position where he can't do certain matters, he would then give
16 those responsibilities to me, but that doesn't--those go to me,
17 but that does not absolve him of his responsibility.

18 Q. So, you were, on your evidence, in effect, always a
19 designate?

20 A. That's right.

21 Q. So, you would have--you would--no responsibility would
22 fall on you, but you may have to carry out certain duties at the
23 request of--

24 A. The Financial Secretary.

25 And Commissioner Hickinbottom, there is no place in

1 the world where the Deputy Financial Secretary is going to make
2 those decisions. Please, all these decisions were made above
3 me.

4 Q. Right.

5 That's helpful was because it then allows us to move
6 on to the second criticism, which arises in relation to the fact
7 that there was a team--as part of this tender process, as we
8 understand it, there were two stages to it: There was a stage
9 where a committee chaired by yourself evaluated the proposals
10 that came in, and then it went to another committee which was
11 chaired by the Financial Secretary which considered the tenders.

12 Now, the evidence is that Mr Skelton-Cline, who had
13 been a consultant to the Ministry of Communications and Works
14 but was then the Managing Director of the Ports Authority
15 Board--the Ports Authority, rather, was on that Committee. He
16 had been previously involved in dealings with one of those who
17 put forward a tender, and so what's raised is a concern over
18 managing a conflict of interest that arose in relation to
19 Mr Skelton-Cline.

20 But your answer is brief, and it's this: That you did
21 not pick the team assessing tenders and you, therefore, can't
22 speak on behalf of the team.

23 So that we are clear, Mr Gaskin, you had no
24 involvement in assessing the tenders; is that right?

25 A. I had no involvement.

1 And I can't speak on Mr Skelton's relationship to TPP.

2 Q. Yes, I was just about to move on to that one.

3 A. Yes.

4 Q. You said you had no knowledge of Mr Skelton-Cline's
5 relationship with TPP or otherwise.

6 And when you say "I had no knowledge", is it your
7 evidence that you had no knowledge at the time of
8 Mr Skelton-Cline's relationship to TPP or otherwise?

9 A. At that time and even up to this time.

10 Q. Well, we will take it in stages, if you don't mind,
11 but at the time you had no knowledge?

12 A. No, sir.

13 Q. And I think you pointed out on the last occasion that,
14 since then, your memory has faded even more.

15 A. Even more.

16 Q. And so you have no--no memory at all of
17 Mr Skelton-Cline; is that right?

18 A. No--when you say no memory of Mr Skelton-Cline, what
19 is the question?

20 Q. Well, did you have any memory of Mr Skelton-Cline's
21 involvement in this Project at all, today?

22 A. I can't recall what Mr Skelton-Cline's involvement in
23 the--in this Project.

24 Again, as I said to you before, Mr Rawat, whatever
25 decisions were made as to Mr Skelton-Cline and his relationship

1 to the Project was not made by Wendell Gaskin as Deputy
2 Financial Secretary, so you're asking the wrong person those
3 questions.

4 Q. Well, Wendell Gaskin, as Deputy Financial Secretary,
5 must have been present at Board Meetings, mustn't he?

6 A. At which Board Meetings?

7 Q. Board Meetings of the BVI Ports Authority.

8 A. Yes, I was present to Board Meetings, but are you
9 asking me, Mr Rawat, to go back into the recesses of my memory
10 to tell you which Board Meeting and what Board Meetings?

11 Q. Not yet.

12 A. Oh, okay.

13 Q. But what I'm trying to do to, as politely as I can, is
14 just try and see what you can remember to assist the
15 Commissioner.

16 The point is that at that time, as the designate of
17 the Financial Secretary on the BVI Ports Authority, did you have
18 dealings with Mr Skelton-Cline?

19 A. I'm trying to find out what you're asking me because I
20 don't understand you. You're asking me whether I had dealings
21 with Mr Skelton-Cline after he became the Director of the Port
22 Authority?

23 Q. Yes.

24 A. Of course.

25 Q. And what was the nature of those dealings?

1 A. I would attend Board Meetings.

2 Q. And I've asked you what was the nature of your
3 dealings with Mr Skelton-Cline. You said that you attend Board
4 Meetings.

5 A. I don't understand your question.

6 Q. Well, in what way does your attending Board Meetings
7 amount to dealing with Mr Skelton-Cline?

8 A. Well, Mr Skelton-Cline is on the Board as a Managing
9 Director, as an ex officio.

10 Q. So, having established that, do you have any memory of
11 the nature of the type of interactions that you had with
12 Mr Skelton-Cline?

13 A. No, sir.

14 Q. Okay. If we can move on to the third criticism, which
15 was as part of the process--and we know from the evidence that
16 we have that the first part of the process was led by the
17 Ministry of Communications and Works, and that the Ports
18 Authority Board were not involved in that.

19 A. Excuse me, if you see me lean, I'm not hearing you
20 exactly on one side of my--

21 Q. That's fair enough. Thank you. Lean away.

22 A. Okay. All right.

23 Q. During the Ministry of Finance stage, again although
24 Mr Skelton-Cline, as we've now told you, was involved in the
25 process, again the Ports Authority, as a Board, were not

1 involved in the process.

2 Now, the question goes to whether you, as a Public
3 Officer, sitting in the shoes of the Financial Secretary on that
4 Board, had any obligation to preserve the autonomy of the Board
5 and take steps to preserve that autonomy. Did you see your
6 role, when you sat on the BVI Ports Authority, to ensure that it
7 maintained its autonomy as a Statutory Board?

8 A. My role as Deputy Financial Secretary, and when I go
9 to represent the Ministry of Finance, was the Ministry of
10 Finance first and everybody else after; that was my role. My
11 role was to protect the Ministry of Finance; that was my
12 responsibility.

13 Q. So, just elaborate on that, if you can.

14 In functioning as a Member of that Board, you did it
15 from the perspective of being there to protect the Ministry of
16 Finance and nothing more?

17 A. I protected the Ministry of Finance because I believe
18 in the Ministry of Finance. It's a place that I worked for for
19 a number of years, and I believe it was my duty and my
20 responsibility.

21 COMMISSIONER HICKINBOTTOM: What about the Ports
22 Authority Board as an autonomous body set out by statute? What
23 about the functions that it has, the independent functions that
24 it has? When you were sitting on the Board, did you bear those
25 in mind?

1 THE WITNESS: Yes, sir.

2 COMMISSIONER HICKINBOTTOM: Thank you.

3 BY MR RAWAT:

4 Q. Let's put on the record your response to that
5 potential criticism, and that you say: "I do contend I was
6 reporting to the Financial Secretary who was the ex officio
7 officer whenever the Committee met. Thus, it is the Financial
8 Secretary who is the Accounting Officer".

9 Now, it's a point you made before. Was your role,
10 then, simply to just go to meetings of the Ports Authority
11 Board, represent the interests of the Ministry of Finance and
12 then come back and report to the Financial Secretary?

13 A. That was exactly my role.

14 Q. And in terms of what the interests of the Ministry of
15 Finance was, was it the Financial Secretary who would identify
16 those to you?

17 A. The Financial Secretary would not only identify those
18 to me. When there was a specific meeting that needed his
19 presence, he would come to the meetings.

20 And once the Financial Secretary is in the room, my
21 mouth is shut.

22 Q. So, you did not, therefore, exercise any independent
23 professional judgment?

24 A. I don't understand that question.

25 Q. Well, if you exercised independent professional

1 judgment, there is a risk, isn't there, that you would be acting
2 outside the ambit of the instructions given to you by the
3 Financial Secretary?

4 A. I tried my very best at all times not to act outside
5 the ambit of the Financial Secretary.

6 Q. So, what you saw your role was, was to take
7 instruction from the Financial Secretary, take that to Board
8 Meetings, represent those instructions as being the position of
9 the Ministry of Finance, and then return to the Financial
10 Secretary and say, "I have done that job. Are there any more
11 instructions?"

12 A. Exactly.

13 Q. Right.

14 And I think the thumbs up doesn't get recorded on the
15 Transcript.

16 A. Exactly.

17 Q. Thank you, Mr Gaskin.

18 The last--it's an aspect of an overarching criticism
19 that you split them up into four, but it raises links to this:
20 Potential issues of conflicts of interest arising. If I give
21 the background, Mr Gaskin, when the Ministry of Finance became
22 involved in this process, one of the tenders that it was
23 considering was one from TPP, or Tortola Port Partners. One
24 requirement of those making tenders was to have at least
25 20 percent local involvement, and TPP partnered with the BVI

1 Investment Club.

2 The Auditor General, in her Report, flagged this up as
3 a potential criticism--as a potential conflict of interest,
4 and--but you say: "I have no knowledge of the criticism herein,
5 and therefore I cannot add to the discussion".

6 Is that right?

7 A. Based on the information that I gave you before, when
8 I testified July the 15th, you have my answer there.

9 Q. Let's go to page 31 in that bundle.

10 A. Bundle 1?

11 Q. Bundle 1, yes.

12 A. Page?

13 Q. Yes.

14 A. 31?

15 Q. Yes.

16 You will see, Mr Gaskin, that I have taken you to a
17 portion of the Report of the Public Accounts Committee,
18 where--and you appeared in front of the Committee when it was
19 looking at the Port Development Project. It published its
20 report in 2014, its final report. But there--and I will
21 summarize this--they record that you were asked whether the
22 Tortola Port Partners tender reflected an association with the
23 BVI Investment Club, and you then replied in the negative and
24 said there was nothing to suggest a connection.

25 The Committee noted that there was a Tender Assessment

1 Report prepared by PricewaterhouseCoopers which specifically
2 named the BVI Investment Club as the prospective local partner
3 for Tortola Port Partners. They noted the, as Deputy Financial
4 Secretary and Chairman of the Tender Board, you would have had
5 access to that Report and to tender submissions on which the
6 Report was based, and therefore would have known about the
7 relationship between TPP and the BVI Investment Club. And they
8 were critical of your telling them, in fact, that you did not
9 know about the connection between BVI Investment and TPP.

10 Now, that was obviously then in 2014. Do you
11 have--you said that you have no knowledge of the criticism
12 herein. Is it your position that you can't remember giving that
13 evidence?

14 A. I can't recall what took place. All I can tell you is
15 simply this: All what is written here is based on some form of
16 speculation or somebody assuming that I would have access or
17 knowledge of whatever the information is. I'm going based on
18 what is written here.

19 Q. Just a moment, Mr Gaskin, you said that all that's
20 written here, and we need to make that clear for the Transcript.
21 Are you saying all that was written by the Public Accounts
22 Committee in its Report?

23 A. I can't say that. I'm talking about the matter that
24 you are--that we are addressing here.

25 Q. Yes, that's fair enough.

1 Let me be more specific.

2 So, the portion of the Report which is critical of you
3 and the knowledge you had of the link, you say, was based on
4 speculation.

5 A. That's exactly what I'm assuming.

6 Q. Because at the time you had no knowledge?

7 A. Because at that time I had no knowledge.

8 Dr Rawat, Judge Hickinbottom, remember, I am the
9 Deputy Financial Secretary. Besides dealing with these matters,
10 I have a whole lot of other matters dealing with it. To make
11 those criticisms of me here, to me, is unfair, but I'm not here
12 this afternoon to add or take away.

13 Q. I did not take you to this piece of the Report,
14 Mr Gaskin, in order to go over the criticisms.

15 A. Okay.

16 Q. I was careful not to say precisely what they said.

17 A. Okay.

18 Q. The purpose of it was to remind you that there was
19 evidence that at one time in 2014 you appeared to know of the
20 connection, and it was in the hope that it might prompt a
21 recollection as to it.

22 A. Not this afternoon.

23 Q. Not this afternoon.

24 Today, Wendell Gaskin still doesn't remember?

25 A. Don't remember. Don't recall.

1 Q. Right. Thank you.

2 I want to ensure that you are treated fairly. You
3 have given your written response. Is there anything else you
4 would like to say or add in terms of information in relation to
5 those responses to the Commissioner today?

6 A. No, sir.

7 Q. Thank you very much.

8 MR RAWAT: Commissioner, I have reached the end of my
9 questions. Can I conclude by thanking Mr Gaskin for making
10 himself available this afternoon, and also for the way that he
11 has given his evidence. Thank you very much.

12 COMMISSIONER HICKINBOTTOM: Thank you for your time,
13 Mr Gaskin.

14 THE WITNESS: And I thank you very much, and I finally
15 get to meet you all.

16 COMMISSIONER HICKINBOTTOM: Yes. Mr Rawat.

17 MR RAWAT: That concludes our evidence this week. We
18 resume on Monday at 10:00.

19 COMMISSIONER HICKINBOTTOM: Okay. Thank you very
20 much.

21 (End at 4:23 p.m.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in cursive script, reading "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN