

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 40

(MONDAY 27 SEPTEMBER 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Solicitor General Mrs Jo-Ann Williams-Roberts (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 Denniston Fraser of DenJen Law appeared for Hon Mark Vanterpool.

Mr Paul Dennis QC of O'Neal Webster appeared for Dr Daniel Orlando Smith.

Counsel to the Commission Mr Bilal Rawat also appeared.

Hon Mark Vanterpool gave evidence.

Dr Daniel Orlando Smith gave evidence.

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Those present:

Session 1

Mrs Jo-Ann Williams-Roberts, Solicitor General (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Denniston Fraser, DenJen Law

Mr Bilal Rawat

Hon Mark Vanterpool

Ms Juienna Tasaddiq, Assistant Secretary 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

Mrs Jo-Ann Williams-Roberts, Solicitor General (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Mr Paul Dennis QC, O'Neal Webster (attending remotely)

Mr Bilal Rawat

Dr Daniel Orlando Smith

Ms Juienna Tasaddiq, Assistant Secretary 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

Session 1

COMMISSIONER HICKINBOTTOM: I think we're ready to start.

Just before we hear any of the evidence, we're going to hear from Honourable Mark Vanterpool this morning, just two points to do with his evidence.

Firstly, Honourable Vanterpool, you wrote through your lawyers asking about the Cabinet Minutes for the relevant period. We will come on to what the relevant period is. And having done that, we have contacted the Attorney General, and Cabinet Minutes have been disclosed to us, and we've put them on to the GoAnywhere site so that you will have them. We've only just received them. We haven't looked at them yet, and you certainly won't have looked at them yet.

What I'm going to suggest to you, Mr Fraser, is that we will deal with the evidence this morning, and then once you've had a chance to look at those, perhaps you can come back to us by the end of the week, 4:00 p.m. on Friday, with anything further that you might want to say as a result of looking at the Cabinet Minutes.

THE WITNESS: Sure.

COMMISSIONER HICKINBOTTOM: Yes. Is that good?

THE WITNESS: 888this on?

1 COMMISSIONER HICKINBOTTOM: Secondly--

2 THE WITNESS: Mr. Commissioner, if I may?

3 COMMISSIONER HICKINBOTTOM: Certainly.

4 THE WITNESS: Mr. Commissioner, if I may, in my
5 testimony I may refer to certain dates not necessarily contents
6 of Cabinet meetings. Is that okay?

7 COMMISSIONER HICKINBOTTOM: Yes.

8 THE WITNESS: Thank you.

9 COMMISSIONER HICKINBOTTOM: Yes, because you're right,
10 I should have added that the Attorney General, although these
11 Cabinet Minutes have been disclosed, and she's content for you
12 to see them as a former Cabinet Minister, she's not willing for
13 them to be disclosed in a public hearing at the moment. But as
14 I say, for practical reasons, that would be difficult in any
15 event, but we'll deal with these in the way that I've suggested.

16 THE WITNESS: But I may from time to time, I may
17 reference this.

18 COMMISSIONER HICKINBOTTOM: Fine.

19 THE WITNESS: Without contents.

20 COMMISSIONER HICKINBOTTOM: Sure. That's fine, thank
21 you very much.

22 THE WITNESS: Thank you.

23 COMMISSIONER HICKINBOTTOM: And in any event, the
24 Solicitor General is here, there is a three-minute delay. So,
25 if we go into areas which she considers we shouldn't go into,

1 she can stop us.

2 THE WITNESS: Yes, I appreciate it.

3 COMMISSIONER HICKINBOTTOM: Secondly, Mr Denniston
4 Fraser, has sent us some legal submissions on what we're going
5 to be dealing with today. What we will do, Mr Fraser, thank you
6 for those, and then we can deal with any oral submissions at the
7 end, firstly as to whether you want to add anything to those,
8 and secondly, if I would like any further assistance on those.

9 THE WITNESS: Very well, sir. Thank you.

10 COMMISSIONER HICKINBOTTOM: Yes. Thank you very much.
11 Mr Rawat.

12 MR RAWAT: Thank you, Commissioner.

13 Our first witness today is The Honourable Mark
14 Vanterpool. Before I continue with my questions of him, can I
15 just introduce the legal representation this morning. We have
16 Mr Denniston Fraser present in the hearing room to represent the
17 interests of The Honourable Vanterpool, and attending remotely
18 on behalf of the Attorney General and elected Ministers is the
19 Solicitor General Jo-Ann Williams-Roberts. The representation
20 for the remaining Members of the House of Assembly who have
21 participant status are not present this morning.

22 BY MR RAWAT:

23 Q. Honourable Vanterpool, thank you for returning to give
24 evidence today. You first appeared before the Commissioner on
25 the 14th of June when you made an affirmation. You are still

1 bound by that, and so there is no need for you to take it again.

2 You'll be familiar with some of the processes of the
3 Commission given that you have now given oral evidence a number
4 of times. As is routine, we've prepared a Hearing Bundle, and
5 you will see that the bundle is there just to your left. There
6 are two bundles in particular, the smaller ones that we might
7 need to look through as we go through your evidence.

8 Could I just ask you, as I have been doing of every
9 witness, pretty much, is just remember to keep your voice up.
10 It's always better to speak more loudly than not. You might
11 want to draw the microphone a little closer to you because it
12 actually doesn't amplify; it just records.

13 And also, something that you and I will both need to
14 avoid is speaking over each other, but in that instance, if that
15 happens, I will stop, and I will let you finish your answer.

16 Now, your most recent appearance before the
17 Commissioner was on the 30th of June, when you were asked
18 questions about the Project to extend the cruise ship pier at
19 Wickhams Cay. You'll recall that I put to you a number of
20 issues which arose from a report that had been issued by the
21 Auditor General on the 31st of January 2013, and also from a
22 report issued by the House of Assembly's Public Accounts
23 Committee on 13th of June at 2014.

24 On the 13th of September 2021, the Commission sent to
25 you what we have termed a Warning Letter. It's also

1 historically known as a Salmon Letter, and its purpose is to set
2 out potential criticisms that may be made of you and which arise
3 from the evidence obtained by the Commission. Now, those
4 criticisms or those potential criticisms concern the Port
5 Development Project, and they were made of you in your former
6 capacity as Minister of Communications and Works.

7 I should emphasize that they do not constitute either
8 the provisional or concluded views of the Commissioner. The
9 purpose of such letter is to ensure that you are fairly treated.

10 You have, as had requested, provided a written
11 response to the Warning Letter which you have signed and dated,
12 and it also carries a Statement of Truth in the form that is set
13 out in the Commissioner's Protocol in the provision of written
14 evidence. Can I thank you for the helpful way in which you have
15 provided your written response, Honourable Vanterpool. But if
16 we go to the last page of that response, please. Can you
17 confirm that it is dated the 23rd of September 2021 and carries
18 your signature?

19 A. I confirm.

20 Q. Now, the Warning Letter itself is a confidential
21 document. It is not one that has been published by the
22 Commission--but obviously your written response is important,
23 can you confirm that you're content that that written response
24 should form part of the evidence before the Commissioner?

25 A. Yes, I do.

1 Q. Now, what I propose to do, particularly because in
2 June we did go through some of the material in detail, is just
3 to ask you some additional questions based around your written
4 response. I will take you to some evidence that might assist
5 you in answering the questions that I put to you.

6 Now, as the Commissioner has just indicated, Cabinet
7 Minutes in relation to the Ports Development Project have just
8 been received, and you will obviously have an opportunity, if
9 appropriate, to raise that with the Commissioner in due course,
10 but can I ask you this: Did you, yourself, retain any documents
11 relating to the Port Development Project when you left
12 ministerial office?

13 A. You mean Cabinet documents?

14 Q. Or ministerial documents?

15 A. No, I don't have any of those in my possession. They
16 were turned over to at the time my private secretary. I turned
17 them over.

18 Q. So, you essentially when you left ministerial office,
19 which I think was an earlier stint in ministerial office, wasn't
20 it? You left all papers behind and did not keep any copies
21 yourself?

22 A. No--I mean, in the sense of truthfulness, I'm sure
23 there may be documents scattered about that I don't have--I
24 don't have any recollection of any proper retention of such
25 documents.

1 Q. Thank you.

2 Let's turn, then, to your--the first element, if you
3 like, of the criticisms, which is that--

4 A. Sorry, just before I go off from that initial question
5 you asked me because I want to make sure. In terms of my
6 evidence that I gave, I did try to get certain documents that I
7 thought was relevant to my evidence, such as in reports that
8 dealt with the analysis and so on of the Project, which I'll
9 refer to when I speak to you today, and some of them I report to
10 in here, so those are documents that I've tried to get access to
11 since I have been subpoenaed.

12 Q. I see.

13 Can we break that down a little, please, Honourable
14 Vanterpool.

15 So, 13th of June you came and gave evidence.

16 A. Yes.

17 Q. If I could explain what we have collected. We,
18 obviously, not just only the Auditor General's Report and the
19 Public Accounts Committee's Reports, but we have--and this has
20 been provided to you--the minutes of the meetings with witnesses
21 that the Public Accounts Committee held. We also have the
22 interim report that the Committee issued together with the
23 dissenting report of The Honourable Marlon Penn, and that's the
24 sort of totality of the documents that we have.

25 A. Yeah.

1 Q. Were you able to secure additional material?

2 A. Yes. As I said before I came to this area and I tried
3 to get--these are copies, for example, this is called the
4 business case of British Virgin Islands Port Authority dated
5 October 2013.

6 Q. Is that the BDO Report?

7 A. Yes.

8 Q. All right.

9 A. And this one is another BDO Report dated January 2016,
10 BVI Ports Authority Cruise Pier and Park Project Financial
11 Analysis, and you're free to have those also, Mr Commissioner.

12 And this one is Tortola Pier Park Financial Memorandum
13 that was done before that we have here.

14 Q. What's the date of that?

15 A. This is May 2013.

16 Q. All right. Well, obviously, thank you for offering to
17 provide them to us. They are documents that we haven't seen, so
18 it may not be possible to ask any questions about them.

19 A. Yes.

20 Q. But let's try and get on and see where we are.

21 A. Sure.

22 Q. The first element of the criticism--and you've split
23 them up into individual criticisms in your written response but
24 the first element of it is that, from November 2011, what we've
25 called the Port Development Project, was directed and controlled

1 by yourself, knowingly and unlawfully to the exclusion of the
2 statutory governing body and decision-maker for the port, the
3 BVI Port Authority and its Boards. Now, if we give that some
4 context, in November 2011, you became Minister for Communication
5 and Works, didn't you?

6 A. That is correct.

7 Q. And at that time, following the election, the BVI
8 Ports Authority, which had been previously under I think either
9 the Premier's Office or under the Minister of Finance--

10 A. Premier's.

11 Q. --was transferred to your ministerial portfolio?

12 A. That's correct.

13 Q. Was that a decision made in Cabinet, or was it a
14 decision of the new Premier?

15 A. That was a decision made by the new Premier. We had
16 not met in Cabinet yet. That was a portfolio that was given to
17 me as the Minister.

18 Q. And when the Ports Authority came under your Ministry,
19 was the Port Development Project seen as a priority?

20 A. Yes.

21 If I may, the at-the-time National Democratic Party
22 manifesto indicated very clearly that this was a priority for
23 government, and if I made read from--a short snippet from the
24 manifesto, if I may. "The National Democratic Party", this is
25 page 14 of the NDP manifesto, "the National Democratic Party

1 Government will be committed to developing and expanding the
2 cruise ship periods so that we can attract more ships with a
3 view of building a year-round cruise tourism sector. This will
4 include proper and adequate Shoreside facilities, expansion and
5 provide opportunities and partners with local businesses in
6 offering attractive products and services would be vital to the
7 access of this expansion.

8 So, yes, it was a very high priority for the
9 Government at the time.

10 Q. You explain in your written response that you were
11 briefed by Jeremiah Frett, who you identify as being then the
12 Ports Development Liaison in the Premier's Office. Now,
13 Mr Frett was one of those who appeared in 2014 before the Public
14 Accounts Committee, and he confirmed that he had shared
15 information with you including via e-mail. Does that accord
16 with your recollection?

17 A. Yes.

18 Q. If you take the first of the smaller bundles, so
19 bundle 1, please, and you could turn up page 299, it's using the
20 numbering that's in the middle of the page.

21 This is part of the Minute of the evidence that
22 Mr Frett gave before the Public Accounts Committee, and if you
23 look at 49, he says that he was on the Ports Authority Board
24 from 2008 to 2011. And then at 51, that he received a letter
25 telling him that he would no longer represent the Ministry of

1 Finance on the Board, nor would he be having any dealings with
2 Port matters.

3 So, it seems to be that his evidence is that he was on
4 the Board as a representative of the Ministry of Finance. So,
5 can you just explain why it was your understanding that he was
6 Ports Develop Officer in the Premier's Office?

7 A. I think from the evidence I gave, and you will find
8 that I will stick to my evidence today very closely. I'm not
9 going to--while I'm sure you rely on a lot of other evidence,
10 I'm going to stick to my evidence that I provided. And what I
11 said here in my evidence is that Mr Jeremiah Frett came to me
12 from the Premier's Office to introduce the Project as he and
13 that the Ministry at the time had envisioned and had prepared it
14 and presented a file to me, and I took the file from there, as
15 Minister.

16 Q. Honourable Vanterpool, when you say Mr Frett came to
17 you from the Premier's Office and from the Ministry, which
18 Ministry are you speaking? Are you speaking of the Premier's
19 Office or the Ministry of Finance?

20 A. As I recall, the Premier's Office.

21 Q. Thank you.

22 Now, in your written response, what you say is that,
23 based on my knowledge gained from the cruise company, it became
24 very obvious--it became obvious very early that the Pier
25 Development Project was planned by the previous governments and

1 the Port Authority was designed for smaller ships than the more
2 modern ships operated by the cruise companies.

3 Now, how did you gain that knowledge?

4 A. In the course of perhaps December and early January,
5 and certainly confirmed in February on my visit to the FCCA, the
6 Florida-Caribbean Cruise Association office in Miami, at what
7 they call an operations vice president's meeting that they have
8 once monthly.

9 During the course of that time in December and that
10 time in conversations with most of the cruise lines they I
11 met--with whom I met individually, on the phone and various
12 conversations, it was very clear from what they spoke to me at
13 the time, was that the cruise pier that we were pursuing at the
14 time was much too small for the new class of ships that were
15 developing and they attended to deploy in the Caribbean, and
16 that we needed to revisit the scope of what we were going to be
17 developing.

18 That was made even distinctly clearer when I visited
19 the meeting at the--in Florida at the time, and were told,
20 unless we change course with what we were developing, the cruise
21 companies would not be interested in calling because the smaller
22 ships were not economical anymore to be used in the Caribbean,
23 and they were all pursuing and, in fact, had already built the
24 bigger ships to be deployed in the Caribbean.

25 Q. Did your discussions at these meeting that you

1 attended involve meetings with Disney?

2 A. Yes. Disney was part of it. The particular person,
3 if I can recall, I met with the CEO of Disney at the time, I
4 don't recall his name but I also met with the Operations Chief
5 who indicated that they were pursuing a project with the BVI to
6 accommodate their smaller ship which carried about 2,000
7 passengers but they were deploying some bigger ships and were
8 looking for other Caribbean destinations to take those ships
9 that the BVI couldn't.

10 They particularly mentioned that they were talking
11 with the Dominican Republic and I think Sint Maarten to deploy
12 those ships, but BVI was going to be left out of the larger
13 ships that they would deploy. That was Disney, yes.

14 Q. Did that prompt you to ask how the BVI Government had
15 got to the point where in negotiations with Disney they had a
16 very evolved and detailed plan, which was the plan you
17 inherited, which is I think 184-foot extension with two
18 additional mooring dolphins. How things got to that point, when
19 by, if you like, October 2011, when you assume office in
20 November 2011, what you're hearing from cruise companies,
21 including Disney, is actually the plan is not going to fit the
22 modern ships?

23 A. Yep. Quite clearly. The discussions we had with
24 Disney at the time indicated clearly that, from their point of
25 view, the Government of the BVI felt that they weren't in a

1 financial position to develop a bigger dock, and therefore,
2 Disney pursued a smaller dock that could handle a smaller ship
3 where they would have exclusive on one side of the dock for
4 their smaller ship. However, they made it very clear that their
5 preference would have been to be able to accommodate their
6 bigger ships, and that's when--that's part of why we started
7 pursuing, not only their point of view, but we got that from
8 every single carrier that we dealt with, which included Royal
9 Caribbean, Carnival Cruise Lines, Norwegian Cruise Lines,
10 Holland America, and I think there was one that was there that
11 represented--I don't remember the name of that company--but they
12 all made that very clear and gave me details of their ships that
13 they were intending to deploy and what the requirements were,
14 the length and width and tonnage, and so on that they were
15 talking about. The tonnage difference was mostly a difference
16 between the older, smaller ships of around 77,000 tons up to
17 170,000 tons for the bigger ships. Some are one 160, some are
18 170. Those are some of the details that I got from the meetings
19 that I went to there.

20 Q. And can you help us with sort of dates of those
21 meetings? You said that it ran from December 2011 into
22 February 2012; is that right?

23 A. Yeah, the main--there were discussions by phone and
24 otherwise in December and in early January. I was invited to a
25 meeting by the Florida-Caribbean Ship Association in February--I

1 think specifically February 16, 2012.

2 TECHNICIAN PETERS: I'm sorry, Commissioner.

3 (Pause.)

4 COMMISSIONER HICKINBOTTOM: Solicitor General, can you
5 see and hear us?

6 SOLICITOR GENERAL: Yes, I can.

7 COMMISSIONER HICKINBOTTOM: Good. Thank you very
8 much.

9 BY MR RAWAT:

10 Q. If you just turn up 362 in that bundle, please,
11 page 362, Honourable Vanterpool.

12 A. 362 or 360?

13 Q. 362.

14 A. 362, thank you. Yes, I'm there.

15 Q. This is part of the Minute of I think it's Gene
16 Creque, is it?

17 A. "Creek-ee" (phonetic).

18 Q. Creque, is that the right way to pronounce it?

19 A. "Creek-ee" (phonetic), you're correct.

20 Q. Thank you, Honourable Vanterpool.

21 A. We had a chat last time.

22 Q. Yes, we did.

23 Now, he was, I think, a long-standing employee of the
24 Ports Authority, I think one of the longest-serving employees,
25 and he served as Deputy or his position was Deputy Manager

1 between August and November 2012. Mr Creque was the acting
2 Managing Director.

3 And if you look at 125, he refers to attending an FCCA
4 convention.

5 Do you see that?

6 A. Yes.

7 Q. At which Mr Edward DeCastro attended but before his
8 official appointment as Chairman of the Board, yourself and
9 Mr Claude Skelton-Cline, who was an advisor to you. And we'll
10 come back Mr Skelton-Cline.

11 But can you shed any light about that meeting? Was
12 that one of the conventions at which you were meeting cruise
13 ship companies?

14 A. Yes. That was--that was a meeting--I don't remember
15 the date of that meeting, but it was a meeting I attended. I
16 met with several of the cruise companies and inviting them to
17 propose to help us develop the cruise pier. I met with just
18 about everyone at the time, and in fact, that's why those
19 meetings are usually called for. It's not that regular, what we
20 call the big sea trade meetings, a meeting where Ministers and
21 Boards of all the Caribbean countries, and other countries are
22 invited to meet with officials of the cruise companies, and we
23 met there. We met with Carnival, we met with Royal, we met with
24 Disney, we met with Norwegian. Holland wasn't there, Holland
25 America, but I think those are the main ones we met with at that

1 meeting, yes.

2 Q. And we've briefly mentioned what the proposal that you
3 inherited; as we understand if from the documents that the
4 Commission has received. As I said, it's an 84-foot deck
5 extension, with two additional mooring dolphins. So the effect
6 is that the functionality of the deck is extended to 207 feet,
7 and then there was an intent to build a welcome center. Or it
8 was a plan to actually build a welcome center. So that was what
9 you inherited, wasn't it?

10 A. Yes.

11 Q. But was there at least an intent to develop the
12 landside as well at some point in time? Were you aware of that?

13 A. Yes.

14 In the Report there was discussion about the
15 possibility of developing the landside in the future.

16 And if you may allow me, my perspective of that very
17 immediately was, and it came from the discussions out of those
18 meetings with the cruise companies, that just having a welcome
19 center and having what they call the--I forgot the word that
20 they used, and it was very important, and there was a false
21 impression you get when you're landing a cruise ship off the
22 city of Road Town. It was very poor, old tents, people vending
23 and so on, and made it very clear that that wasn't the
24 impression they wanted for their customers.

25 So, to just fix the welcome center and not develop the

1 area, that was from my point of view rather junky in looking.
2 We decided to take a very urgent look at developing the landside
3 also, and that's what we did.

4 Q. Now, when you came into office and inherited this
5 Project and inherited the plans that had been developed, were
6 you aware that the Ports Authority Board had able to put
7 together a team, which included Mr Frett, which had negotiated
8 Disney?

9 A. According to the files, yes, sir, I'm aware.

10 Q. Sorry, I didn't catch your first--

11 A. According to the files that I got, yes, I'm aware that
12 the Project was--the Project, in fact, if you permit me, I
13 discovered from the file that Heads of Agreement was signed with
14 Disney on the 5th of October 2011 during the elections campaign,
15 which personally I would consider to have been not the right
16 thing to do on the eve of the election but that was done, and
17 that was the agreement that was there with Disney to build a
18 dock of the size that we spoke about.

19 Q. And why do you say personally it was not something
20 that you--something that didn't--that made you feel
21 uncomfortable?

22 A. Well, one Government, signing a document of that
23 nature and for such an important development three days before
24 elections would mean that that Government would be effectively
25 making the next Government adhere to such an agreement, and I

1 didn't think that was the right thing at that time.

2 Q. But nonetheless, I think you agree that because the
3 team that negotiated with Disney would not have involved just
4 politicians, it involved what I think many elected--

5 A. May I say that was signed by the Premier.

6 Q. No, I accept that--

7 (Overlapping speakers.)

8 A. --that it was involving politicians. If I may.

9 Q. I mean, I can take you to Mr Frett's evidence, if you
10 wish.

11 A. I don't wish to. I think I want to make it very clear
12 that my testimony here today is to give you a full account of
13 what I did to move this Project forward. I'm not going to go
14 back to what we said and who did not say and what was suggested.
15 That's for you to consider, I'm sure you will in your
16 considerations, but I'm here to give evidence of what I did to
17 execute the Project, if I may.

18 COMMISSIONER HICKINBOTTOM: I think Mr Rawat's point
19 is that that agreement signed just before the election was
20 negotiated by Public Officers, signed by the Premier. I
21 understand that, obviously, it had to be, but it was negotiated
22 by Public Officers.

23 THE WITNESS: And that is fine, however, the new
24 government's policy, Mr Commissioner, if you allow me to say, I
25 felt we want--what is the word?--we want committed--we didn't

1 have to be committed to carry out the same project as we felt we
2 wanted to carry out a different scope of project. And
3 therefore, that agreement, which was non-binding was eventually
4 canceled, as I'm sure you're aware from the evidence that was
5 given before by--

6 COMMISSIONER HICKINBOTTOM: You've indicated the
7 policy of the new government, which was that policies set out in
8 the manifesto.

9 THE WITNESS: Yes, to develop a pier that accommodated
10 the modern ships.

11 COMMISSIONER HICKINBOTTOM: Yes.

12 BY MR RAWAT:

13 Q. Were you aware of the expertise that there was on the
14 Board itself?

15 A. I would say very clearly, that if the expertise on the
16 Board was paying attention, they would have known that the
17 cruise ships coming to the Caribbean at this time were not the
18 ones that had been in that dock for us, I would simply say so.
19 I would not challenge the expertise, I would not investigate it,
20 but I would say that very clearly from the evidence that I got
21 from the cruise companies, whatever they were going to build,
22 would not have lasted and sufficed the country's growth and
23 cruise tourism for which I felt I had just become responsible.

24 Q. I think, Honourable Vanterpool, it's drawing that line
25 between the elected official and the Public Officer, isn't it?

1 Because the point I'm trying to explore with you is, it may have
2 been the policy of your predecessor Government in 2011 to build
3 a smaller dock or to build a dock--

4 A. Yes.

5 Q. --or to spend a certain amount of money, you came into
6 office, and as you've explained to the Commissioner, your
7 manifesto had a different policy initiative. When questions are
8 directed towards the expertise that Public Officers had in
9 delivering policy objectives on policy objectives, so in this
10 case it would take the policy objective of the previous
11 government which had resulted in a Heads of Understanding, leave
12 aside the timing of the signing of that, but the point is that
13 within the BVI Ports Authority there had been a negotiating team
14 capable of negotiating with the cruise ship lines, specifically
15 Disney. You would accept that, wouldn't you?

16 A. Repeat that because I want to make sure I don't accept
17 anything that you're saying that I may accept but not agree
18 with, so let's hear what you're saying.

19 Q. Well, sometimes acceptance--

20 A. Can have a wrong connotation, yeah.

21 Q. Acceptance can be construed as agreement. Let's see
22 make sure what you agree or accept.

23 A. Exactly.

24 Q. Go to 302 in the bundle, please.

25 A. Yes.

1 Q. If you look at 70, we're looking at Minutes of the
2 evidence of Mr Frett, so he speaks then about his involvement in
3 let's call it the predecessor project, so he speaks there to
4 details with Disney, Royal Caribbean Cruise Line had been one of
5 the first companies they had met with. He said the negotiations
6 had been taken to a higher level and things had got a bit
7 tedious and heated because the Board conducted the meetings
8 themselves without having a consultant to represent them. He
9 said--he concludes that there had been several persons on the
10 Board who had expertise, including the Chairman of the Board,
11 Deputy Chairman of the Board, Financial Controller--comptroller
12 rather--Mr Paul Webster representing O'Neal and Webster, and
13 others.

14 And then if you go to 321 in the bundle, in response
15 to questions, Mr Frett then said that the Board had been well
16 advanced because the Project had been studied and overstudied.
17 He further states that the Board felt that there was no need to
18 go and spend any more money. He indicated that they had felt
19 competent enough to conduct document reviews, and noted that
20 most of the time the information was already available.

21 The Auditor General then, who was the advisor to the
22 Public Accounts Committee then stated that the decision had
23 basically been made by the Board. Mr Frett over the next page,
24 322, responded in the affirmative, and stated there had been an
25 effort by the team which had consisted of the Chairman, Deputy

1 Chairman, Managing Director himself, Mr Franklyn Walters, who
2 was the head of the Ports Authority's Finance Committee,
3 explained the team would always go back to the Board, provide
4 updates on what was taking place.

5 When asked--then at 236, he confirmed that the team,
6 the negotiating, had gone back to the Board for ratification and
7 that they provided the Minister. And at that time, they were
8 obviously under a different Ministry but they provided the
9 Minister with updates.

10 If you go back to 95 in the bundle--

11 A. Chairman, Mr Commissioner, if I may.

12 Q. Pause there.

13 A. The point I want to make is going to suggest that we
14 don't need to go all those because I'm going to make a very
15 clear point. I'm not challenging the expertise of the Board or
16 Public Servants. I'm just saying very clearly the government
17 that I was involved at the time directed that this Project be
18 changed in scope, and doesn't matter was it exposed before
19 whatever they were doing, in our view what they were about to do
20 was not the right thing that suited the Territory and the policy
21 of the new government that I was involved in decided to change
22 course. Whatever those experts may have said, they may have
23 been right about it at the time, but I am letting you know that
24 from my point of view in the investigation that we were doing at
25 the time. All that they have said and all they were doing to me

1 as Minister were futile in terms of satisfying the needs of the
2 Territory at the time for cruise tourism as was clearly stated
3 to me by the group of users that will use the facility. So, I
4 want to make it clear that whatever they've said before, I'm not
5 going back to all those and answering questions on them. I'm
6 very clearly stating that, as I stated in my statement that you
7 asked me to respond, I took a different view and presented it to
8 the Government at the time and the Cabinet, and that is the
9 direction we decided to go. I'm not going to continue arguing
10 or saying whether they were right or wrong. You make your
11 conclusions in that, if I may say, but I am letting you know
12 what I give you evidence on and what direction we felt we should
13 go. I just hope that you respect that from me.

14 Q. I think--

15 A. We want to be clear on that.

16 Q. --the Commissioner has that point now.

17 A. Yes, thank you.

18 Q. The purpose of the question was to a different thing.
19 You said that you inherited--you spoke to Mr Frett. You said
20 that you inherited a file that you looked through. Let's put
21 the questions that way.

22 The reason I took you to the evidence is because you
23 drew a distinction between accepting and agreeing with
24 something. So the point is this: When you took on the Project,
25 when you read the file, were you aware that the Ports Authority

1 Board had put together a negotiating team that had negotiated
2 with Disney?

3 A. Yes, I answered that. I was aware.

4 Q. Yes. Were you aware of the expertise in terms of who
5 was on the Board? Were you aware of the expertise that that
6 Board offered?

7 A. As I said before, the expertise is a matter of
8 opinion. In my view, when I became Minister, I wanted to
9 consult in a different way in terms of where the Project was
10 expert team, but the expert team at the time had been correct,
11 but--you know, I'm unaware of what was necessarily the
12 qualification of that expertise. But I'm saying that very
13 quickly I drew the conclusion as Minister in the interest of the
14 public that that project based on what was proposed was not the
15 right project at the time, and that was the new policy of the
16 Government, and I took it in that direction.

17 Q. Were you aware that the BVI Ports Authority Board had
18 access to legal and technical support?

19 A. I'm sure they would have. I don't--I wouldn't
20 specifically remember, but I'm sure they would have.

21 Q. Were you aware that they had been able to take the
22 Project which was one that you no longer felt was valid, that
23 they had actually been able to take that point, that put it to a
24 point where they were ready to go to tender?

25 A. I'm not aware of all that. Perhaps it's in the file,

1 yes, in fact, I believe they might have tendered the Project
2 already, as far as I recall.

3 Q. Because you say in your written response--this is at
4 page 3--that you had begun--you say "we" had begun--began
5 immediately to gather information and invite proposals for a
6 suitable pier expansion and landside development. Our intention
7 was to develop the scope of the project, receive proposals,
8 establish a Heads of Understanding and then present the Project
9 as proposed to the BVI Ports Authority and the public for
10 consultation and suggestions.

11 The question is this: Given the experience that--the
12 recent experience that the Board had and that the file would
13 have shown you that they had been able to gather a negotiating
14 team, that they had expertise on the Board, that they had access
15 to legal and technical support, that they had been able to take
16 a Project to a point where it could be tendered, there was no
17 reason, was there, to do what you did do, which is to exclude
18 the Board from the process entirely once you became Minister?

19 A. That is not my account of what I gave, if I can
20 respectfully say. I would reiterate.

21 The course that the previous Board and Government was
22 taking was, in my view and the view of the Government at the
23 time, not the course that we were prepared to go with. We
24 scrapped that course and began to gather information, as I said
25 in my statement there. We immediately began to gather

1 information and by proposal for suitable pair expansion and
2 landside development. Our intention was to develop a scope of
3 the Project, receive proposal, establish a Heads of
4 Understanding then present the Project as proposed for the BVI
5 Port Authority and the public for consultation.

6 If you're suggesting that I was incorrect to stop the
7 Project at a point and go to a project that we envisioned would
8 be the correct project, I would say that I think I did the right
9 thing and, therefore, I was not going to continue with the
10 Project as envisioned and with the Project at the state it was,
11 and therefore that's the position we took.

12 I don't know if you want me--this is my evidence. If
13 you want to have a different conclusion, surely it's up to you,
14 but this is my evidence.

15 COMMISSIONER HICKINBOTTOM: Let's just focus on--I
16 think that the real thrust of the question. What had happened
17 was the previous administration had a policy to increase the
18 size of the pier and to have a welcome center. That was their
19 policy. And the Ports Authority Board developed that,
20 negotiated it, and by the time that you came to--your
21 administration, it had signed Heads of Agreement with Disney,
22 and they were ready to go with--to tender.

23 Your Government came in and changed the policy, the
24 policy changed from having a pier of particular size to cater to
25 particular ships to a longer pier, something that would in

1 effect last longer because the ships were going to increase in
2 size, and also to develop the landside a lot more than a welcome
3 center, change of policy. That's absolutely fine.

4 But the previous Administration's policy had been
5 developed and negotiated by the Ports Authority Board because
6 that was their job. When you came in--and that's the paragraph
7 that we've been referred to in your response, we--and by "we" I
8 assume you either meant "I" or at least the Ministry,
9 immediately began to gather information and invite proposals for
10 a suitable pier expansion and landside development. Our
11 intention, that's your intention, was to develop the scope of
12 the project, receive proposals, establish a Heads of
13 Understanding then present the Project as proposed to the Ports
14 Authority and the public for consultation and suggestions.

15 That's the point, isn't it? It wasn't simply your
16 policy. You were going to run with the policy.

17 THE WITNESS: I think, if I may, Commissioner, to be
18 fairly explicit. The Board that we met was going in one
19 direction along with the Minister who was then responsible for
20 the Project. We came in to office and as Minister we took the
21 opportunity to halt the Project as it was, establish a different
22 scope, investigate how we would go forward with the Project,
23 invite proposals, and then take it forward. The Board I met
24 there was not, in my view, prepared to go along with that kind
25 of project. But we wanted to get the right scope and present it

1 to the Board for their execution and approval of the Project
2 which we did in due course, in July of 2012.

3 But this is what--this is the position that we took.
4 And I took that position under my authority as Minister--

5 COMMISSIONER HICKINBOTTOM: We will--

6 THE WITNESS: --of the Port Authority.

7 I'm answering you, Commissioner. I took that position
8 from that point of view.

9 And the evidence will show that that's what we did.
10 We may have changed course as to how we did it in the ensuing
11 six months, but that is what we did. And I just want to make
12 that very clear as a position.

13 COMMISSIONER HICKINBOTTOM: But you see--can you see
14 the difference between an Administration having a policy, as the
15 old administration and your new administration had different
16 policies, but you had a policy, and in the one circumstance, the
17 Ports Authority Board running with that policy and negotiating
18 the contracts and so on and presenting the Project which was
19 then signed off, and in your case you had the policy, but the
20 Port Authority did not run with the policy. They weren't
21 allowed to run with the policy, you ran with the policy. It was
22 your intention it says here to develop the proposal and present
23 it to the Port Authority Board. There is a difference there in
24 approach.

25 I know that you say you had power to do it, and it was

1 the right thing and a lawful thing, but it was a difference in
2 approach.

3 THE WITNESS: And, Commissioner, yes, but you must
4 consider the circumstances to adopt such an approach, and that
5 here was a Port Authority Board 30 days before going in one
6 direction, a new administration takes over and immediately wants
7 to change that direction, and therefore, while there was no
8 disrespect to the Port Authority Board because we did have
9 discussions with individuals at the Port Authority Board until
10 it was time to present what we considered to be the scope of the
11 Project we wanted to pursue, but the circumstances were
12 different. They were already going in a direction that we think
13 wasn't right. We had to put a halt to it as Minister and a
14 Ministry who, in consultation with the other Members of the
15 Government decided that this was a policy we want, these are the
16 things in terms of scope that we want to pursue.

17 And while one may think that we didn't go and have the
18 Board take it over. At the point when we considered that we
19 would, we decided to take the scope at that point. Now, that's
20 a judgment that one may make, but that's a judgment that we made
21 at the time, to move it in that way until we were satisfied that
22 we could present it to the port as what we wanted to pursue, and
23 let the Port take it from there, which is what we did.

24 COMMISSIONER HICKINBOTTOM: But was the Ports
25 Authority Board, before your administration, pursuing the policy

1 of the previous administration. They were then presented, or
2 they would have been presented if they had been given a chance,
3 with a new policy?

4 THE WITNESS: And there were. At the time that I felt
5 that it was needed to present it to them, which we did.

6 COMMISSIONER HICKINBOTTOM: Thank you.

7 BY MR RAWAT:

8 Q. Honourable Vanterpool, can I just explain, the purpose
9 of my questions is to ensure that you are treated fairly. Now,
10 I recognize you have told the Commissioner more than once that
11 your evidence is your evidence and that he can draw whatever
12 conclusions he wishes from any other evidence, and you're just
13 going to stick to your evidence. But what I'm trying to ensure
14 is that I draw to your attention relevant matters and give you
15 an opportunity to respond today so that we can ensure that you
16 are treated fairly.

17 And there is, on the evidence--

18 A. I'm not sure if I may understand what you consider to
19 be treated fairly for me. As far as I'm concerned as I've said,
20 I have given you a recollection of this Project as best I could.
21 I'm not sure what you're talking about being treated fairly.
22 All the things that you're talking about, I must say, may be
23 relevant, which I have considered, but I have given you the
24 evidence as to what I did to pursue the Project. I do hope that
25 you are respectful enough to understand that whether it was the

1 correct direction or not, I'm giving you the evidence of how the
2 Project was pursued.

3 Q. The potential criticism doesn't go to whether--to the
4 policy decision. It is about how the Project was pursued.

5 A. And I have given evidence of how it was pursued. That
6 was the policy.

7 Q. Well, can--

8 A. If you don't mind, the nine criticisms that you asked
9 me to respond to.

10 Q. If your answer to my questions is just to say to the
11 Commissioner that you have nothing further to add or you don't
12 wish to comment on something or you don't wish to comment on
13 something, then you can give that answer.

14 A. That is precisely what I'm saying, without being
15 disrespectful to you--

16 Q. Good enough.

17 A. --consider all the evidence that you presented to me
18 and I have given the responses and I wish that you would accept
19 my response and look at what I said.

20 Like I said very clearly, I have done, in my view
21 unlawfully. I have made--I have given evidence that this
22 Project was done in a public way. I went to various public
23 meetings on this Project between January and July and
24 thereafter, and this is the way to pursue it.

25 The Project began where we invited proposals at the

1 beginning. We felt later on after the Protocols for Financial
2 Management was signed in April or March of 2012 that we should
3 change course in how we invite the proposal or how we bid the
4 Project, the Project went out to bid later. We made a selection
5 later on in the year, and we pursued that. The selection turned
6 out that the--what was considered to be needed to finalize the
7 Project with that group who were not satisfied, and we took a
8 different angle, the Cabinet decided to have the Project pursued
9 entirely by the Port and built by the Port at the time. That is
10 very simple how that Project went--went forward. That is my
11 evidence.

12 I am not here to discredit any of the evidence, and
13 I'm not here to add any more evidence. I have given you my
14 evidence as best I could in the statements I gave you.

15 Q. Well, let me prevail on your good nature a little bit
16 more.

17 A. Okay.

18 Q. And see whether you--at least try and give you an
19 opportunity to respond to some details.

20 Now, in your written response, you've told the
21 Commissioner that you had several meetings with the Managing
22 Director. If you turn up page 496 in the bundle.

23 A. I'm not going to--you can imagine there is a statement
24 there. I read it. I have had meetings with him. The Managing
25 Director has signed an agreement with the environmental

1 specialist we hired to do an environmental study with the new
2 scope. The General Manager's testimony, I'm not going to refute
3 it, but I know the meetings that I had in my office and
4 elsewhere with him, and I'm not going to go back to refuting.
5 I'm not going to go in that direction. This is my testimony. I
6 met the Managing Director. You may accept that or not accept
7 it, but I'm not going to go back and forth with that,
8 Mr Commissioner.

9 Q. So, you don't wish to take an opportunity to respond
10 to the evidence that the Managing Director, which was Vincent
11 O'Neal, gave in 2018 to the Public Accounts Committee that said
12 he had had one meeting at the Ports with the current Ministry of
13 Communications and Works, and that was when he came to a Board
14 Meeting?

15 A. I gave my evidence in here. This is my position.
16 That is his position. I gave you my evidence that I met with
17 him several times, including his signature in April on a
18 document requiring Dr Cassandra O'Neal to conduct an
19 environmental study on the new scope of the Project. That's--my
20 evidence is there.

21 Q. You referred to that the Ministry's representative on
22 the Board had responsibility to appraise the Minister of various
23 decisions at the Board level. Is that the Permanent Secretary
24 who had been ex officio Member?

25 A. At different times it was perhaps different persons.

1 I recall when I became Minister, it was the Deputy Permanent
2 Secretary who was sitting on the Board.

3 Q. Well, Arlene Smith-Thompson, who was your Permanent
4 Secretary, confirmed that she was the ex officio representative
5 on the Board, but her evidence could lead to the Commissioner to
6 draw the inference that as Permanent Secretary, she was
7 sidelined?

8 A. Mr Commissioner, there is no way anybody could be side
9 lined in the project in my Ministry that was front and center,
10 and that was not so, is my evidence.

11 Q. Well, you've gone a bit further than your written
12 response now, Honourable Vanterpool. Do you want me to take you
13 to her evidence so that you can--

14 A. No, I would not.

15 I'm saying that all Officers in my Ministry were
16 involved in the Project.

17 Q. The Chairman of the BVI Ports Authority, Greg Adams,
18 said that he had received no instructions in writing in relation
19 to the Port Development Project, he did say that Claude
20 Skelton-Cline was fully involved in the Project, did you give
21 instructions in writing to the Chairman of the--the Then
22 Chairman of the Ports Authority?

23 A. No, I did not.

24 Q. Vincent O'Neal, whose evidence we were looking at,
25 said he never received instructions in writing. That was his

1 evidence to the Public Accounts Committee. Did you ever give
2 instructions to Mr O'Neal, in writing?

3 A. I said I met with the Managing Director many times.
4 We were pursuing the Project to the point where he was involved
5 in several aspects of it.

6 And at the right time we took the Project to the
7 Board, the person who was consulted immediately went to the
8 Board, and meet with the Board, my Permanent Secretary would
9 have known what was happening with the Project and should have
10 informed the Board. And the right time, I myself went to the
11 Board and gave them a full account in July of what we were
12 pursuing. And at that point the Board passed a resolution to go
13 in the direction that we were pursuing. That is my evidence.

14 Q. An inference can be drawn from the evidence that the
15 answers that those on the Board gave to the Public Accounts
16 Committee was that they were placed in a position where they had
17 nothing to do other than sign off the Resolution?

18 A. You may accept whatever inferences you want. I have
19 given my evidence that I had informed the Board properly at many
20 times, the Managing Director, and the Board was informed as well
21 what was happening. Whatever inferences were taken otherwise,
22 I'm not going to refute but I'm telling you what my evidence is.

23 COMMISSIONER HICKINBOTTOM: But nothing in writing?
24 No instructions in writing?

25 THE WITNESS: Not that I--not written instructions

1 that I can recall, Mr Commissioner, if I may. But my evidence
2 is that my appearance at the Board in person to give specific
3 directions, in my view, sufficed even more than something in
4 writing. I gave explanations, I gave the Board an opportunity
5 to question me. In that meeting, if you check the Board Minutes
6 of that meeting, and that was clear instructions from my point
7 of view, according to the law, where the Minister can direct the
8 Board. If we say in writing in the law, but it was very clear
9 at the Board Meeting of all Board Members what the Minister
10 wanted by my evidence that I took there and by my direction that
11 I asked. Those were the clear directions in the Board Meeting.

12 Minutes were taken of my directions. That should
13 suffice more than even something in writing from me to the
14 Board. That is my--it may not be your evidence,
15 Mr Commissioner--

16 (Overlapping speakers.)

17 COMMISSIONER HICKINBOTTOM: Mr Rawat's question was
18 any instructions in writing, the answer is no.

19 THE WITNESS: I wouldn't say no, but not--not that I
20 can recall.

21 COMMISSIONER HICKINBOTTOM: Yes, thank you.

22 BY MR RAWAT:

23 Q. And following up on that, when you were not, if you
24 like, appraising the Board of developments directly,
25 Mr Skelton-Cline was doing it on your behalf?

1 A. Yes, there were times when I think--I can recall one
2 or two meetings when it was done that way, yes, Mr Commissioner.

3 Q. I won't take you to it, given your position of other's
4 evidence, but for your notes, Commissioner, it's in the first
5 bundle at 230. One of the points that was made by a Member of
6 the Board, Naomi Turnbull, to the Public Accounts Committee was
7 that Mr Skelton-Cline went to the Board with detailed plans and
8 diagrams and put them in front of the Board. So, when he was
9 doing that sort of detail, when he was involving himself in this
10 project, that was at your direction?

11 A. Yes.

12 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt
13 again. I'm looking at your written evidence because you say
14 that this really is it. What that paragraph does is it says
15 that Board Members were informed of the development.

16 THE WITNESS: What paragraph are you on?

17 COMMISSIONER HICKINBOTTOM: It's the big paragraph on
18 page 3.

19 THE WITNESS: Page 3. Okay, good.

20 COMMISSIONER HICKINBOTTOM: The second paragraph.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: You say that Board Members
23 were informed of the development at one meeting, at the 26th of
24 January. They were briefed, it says, on the 8th of March. The
25 Report informed the Members. Again, you attended a Board

1 Meeting on the 3rd of May to provide information to the Members
2 about the selected proposal.

3 So, this was you informing them of what was going to
4 happen.

5 THE WITNESS: Yes. And this is on the Auditor
6 General's Report.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 THE WITNESS: The exact words are from the Auditor
9 General's Report, but it is what happened.

10 COMMISSIONER HICKINBOTTOM: But you, as the Minister,
11 were informing the Board as to what was going to happen?

12 THE WITNESS: Yes, Mr Commissioner.

13 COMMISSIONER HICKINBOTTOM: Thank you.

14 BY MR RAWAT:

15 Q. The Commissioner has made the point to you that
16 obviously your reliance on certain elements of the Ports
17 Authority's Act or certain sections is something that we will
18 have to return to under any legal submissions.

19 So, let's move on to the second criticism that you
20 deal with.

21 COMMISSIONER HICKINBOTTOM: Can I just ask one
22 question which I think is a proper question. We will deal with
23 the law with your legal representatives.

24 You rely most heavily I think on section 19. I know
25 you refer to other sections in there as well, but mainly

1 section 19. And you say that this gave you the powers to do
2 what you did, and you explained what you did in your written
3 evidence and also in your oral evidence.

4 Did anyone advise you as to the effect of section 19
5 at the time?

6 THE WITNESS: Mr Commissioner, I can't recall
7 specifically, but clearly from my point of view, the spirit of
8 the Act when it refers to the Minister's Authority when it comes
9 to Port development activities for me was very clear. Any
10 capital project that the Ports would undertake had to be
11 approved by the Minister and, in our view, it was the Minister
12 and Cabinet, which is how we operated. Therefore, that
13 indicated to me that any capital development projects could come
14 under the purview of the Minister. And it is not only in that
15 number 19 that--as I pointed out in other areas, I wanted to
16 point out the other areas to show that the Minister in that Act
17 had several aspects of authority in dealing with the Port
18 operations and the Port's development projects, and that's what
19 I wanted to point out.

20 COMMISSIONER HICKINBOTTOM: I understand that. And as
21 I say, that, as a matter of law, would be a matter for your
22 legal representatives.

23 THE WITNESS: It is not only a matter of law,
24 Mr Commissioner, from my legal representatives. I'm the
25 witness. So, it is a matter for me also.

1 COMMISSIONER HICKINBOTTOM: No, no, two separate
2 things.

3 THE WITNESS: Yes.

4 COMMISSIONER HICKINBOTTOM: Firstly, as a matter of
5 law, we'll hear submissions on the law.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: But where you can give
8 evidence is how you understood the law to be, which you've done.

9 THE WITNESS: Yes.

10 COMMISSIONER HICKINBOTTOM: And also whether you
11 sought or were given any advice, to which the answer is no.
12 This was your understanding from reading the Act.

13 THE WITNESS: I said I don't recall having any
14 specific--I think what you're asking is any specific legal
15 advice.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: I don't recall having that.

18 COMMISSIONER HICKINBOTTOM: It's quite proper for you
19 to give evidence as to what you understood the law to be and how
20 you acted.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: What the law is we will
23 wait for Mr Fraser.

24 THE WITNESS: I accept that. I accept that,
25 Mr Commissioner.

1 BY MR RAWAT:

2 Q. Honourable Vanterpool, you just told the Commissioner
3 that you can't recall receiving any legal advice. You had, I
4 think, been out of government, and I think out of House of
5 Assembly for four years before returning.

6 A. Sabbatical.

7 Q. Sabbatical.

8 A. Yes.

9 Q. On return, did you seek, actually seek any advice
10 about your powers under the Ports Authority?

11 A. My answer would be no. I don't recall any specifics,
12 you know--I was aware of the Act. I made myself familiar with
13 the Act when I got the portfolio, and that is how I operated
14 based on what the Act--

15 Q. On your understanding of what the Act allowed you to
16 do as Minister?

17 A. Yes.

18 Q. Let's turn to page 4 of your written response, please,
19 Honourable Vanterpool. What the criticism goes to is a
20 substantial change in project scope was made at the direction of
21 Honourable Mark Vanterpool and without prior Cabinet decision.
22 Now, this is the Project that developed under your Ministry,
23 which was, as you've explained, a much bigger expansion of the
24 pier than originally--than envisaged under the previous
25 administration.

1 Now, you point again to section 19 but--and the powers
2 that that gives you as a Minister. But was it your
3 understanding of what you could do, as a Minister, with the
4 Ports Authority under your ministerial portfolio, was it your
5 understanding that you could expand the scope of what the Port
6 was going to do, what the Authority was going to do, without
7 Cabinet's agreement?

8 A. No, not at all. That was not my understanding.

9 Q. So, you didn't see section 19 as giving you the power
10 to act to change the scope?

11 A. Yeah, well, that might have been the law, but we
12 always operated, if I may, as a government. I don't think it's
13 just my Government at the time or other governments. Always
14 operated as Minister in Cabinet, that's the way I understood it.
15 So we had a way, a direction that the Minister wanted to go on
16 such a major Project. We needed the Cabinet's approval and the
17 Cabinet's involvement. That's the way I understood it.

18 COMMISSIONER HICKINBOTTOM: I understand that, that's
19 perfectly sensible, but my understanding of your view of section
20 19 is that it gave you as Minister the power to increase the
21 scope of the Project. You may well have gone to Cabinet to make
22 sure that that was fine, but you didn't have to under
23 section 19. I'm sorry, that's my understanding of your view of
24 your powers.

25 THE WITNESS: That is not a correct understanding.

1 It's probably legal, but I said my understand, as I just stated
2 it. My understanding was that I was off-written in terms of
3 carrying out the change in the scope as Minister in Cabinet. I
4 had to get Cabinet's approval, in my view, to change the scope.

5 COMMISSIONER HICKINBOTTOM: Your view was that--well,
6 your view was that, to change the scope under section 19, I
7 think, but to change the scope, you could only do that with
8 Cabinet approval?

9 THE WITNESS: I don't know if I could only, but I'm
10 saying, Mr Commissioner, that that was the way we operated.

11 COMMISSIONER HICKINBOTTOM: I know, Mr Vanterpool, and
12 I'm sorry to press this point.

13 THE WITNESS: That's okay.

14 COMMISSIONER HICKINBOTTOM: The first thing is your
15 powers, what did you think your powers were. My understanding
16 was that you thought your powers under section 19 enabled you to
17 do this. The powers in section 19 are powers in the Minister,
18 full stop. You may well have wanted for all sorts of reasons,
19 including comfort, to take a project--the huge change in the
20 project, to Cabinet for them to give it a nod, but your powers,
21 if you're under section 19, were your power, not powers in
22 Cabinet.

23 THE WITNESS: Thank you, Mr Commissioner.

24 Let me just explain a little more, a little
25 differently, if I may.

1 The initial stage of how we operated and how I
2 operated was to gather the information, gather the needs, gather
3 the scope, and my understanding is that, as Minister, I could
4 not change the scope and direct a project like that as Minister
5 only. That was not my authority. I could not do that.

6 One, I would need the Cabinet's approval and the
7 Ministry of Finance approval to fund a different project,
8 especially, and, therefore, there is no way of my understanding
9 that I could have done this without Cabinet. That's all I'm
10 saying in my witness. I could not have done it without Cabinet.
11 And all along the way, all Members of Cabinet were informed or
12 were involved in the hearings and in the presentations. And in
13 the end, on July 11th, when the Board Resolution came to
14 Cabinet, Cabinet authorized me to move forward with the Project.
15 I did not move forward with the Project as a Minister, as number
16 two is indicating, I clearly refuted that in my evidence.

17 BY MR RAWAT:

18 Q. And what you say, so we can be clear, is that Cabinet
19 authorized the change of scope in the project in February 2012,
20 so can I check with you how that happens? So, as we understand
21 the process, a ministry would put together a memorandum which
22 the Minister then takes to Cabinet, Cabinet makes a decision,
23 and action is then taken.

24 So, in this case having done the investigations and
25 sought the information that you had, would a paper have been put

1 together for you to present to Cabinet to say "I would like
2 authority to now take the Project in this direction"?

3 A. Yes, and this is where, Mr Commissioner, I ask to see
4 Cabinet Papers to refresh my memory as to when all that would
5 happen.

6 So, I would change what I said in the context that a
7 report was given to Cabinet in February but Cabinet authorized
8 the Project in July 11, 2012. When I was writing this, I didn't
9 have any evidence of it. I was able to get--as to when this
10 happened.

11 So, Mr Commissioner, I could change that from what I
12 said, Cabinet authorized change. Cabinet was made aware of the
13 requested change in February of 2012. However, Cabinet
14 authorized this change of scope in July 11th of 2012, following
15 the Board resolution that was presented to Cabinet. That is the
16 evidence I would like to offer, Mr Commissioner.

17 Q. I see.

18 What is recorded in the Public Accounts Committee
19 Report--and I'm going to quote it, it's at page 9 in the bundle,
20 Commissioner--but at paragraph 33(a), the Public Accounts
21 Committee records that on the 26th of January 2012, the Minister
22 attended a Board Meeting of the Authority and informed the Board
23 that he had decided a new direction for the Cruise Ship Port
24 Development Project. The Minister also advised Members that he
25 had already received two proposals for the upland development

1 and was expecting a third.

2 So, doesn't that suggest that you had rather moved
3 quite some distance along the way even before you took the
4 matter to Cabinet?

5 A. Precisely. I said to you that during the months of
6 December, January, February, we were exploring the Project and
7 getting proposals. That is what I reported to the Port. That
8 is what I reported to the Cabinet. In fact, the Cabinet heard
9 the proposals themselves, if I may say.

10 So, yes, that is the evidence that I presented, and
11 you are correct.

12 Q. I see.

13 But--and what Cabinet there--so, your evidence now is
14 that there was a report presented to Cabinet in February 2012.
15 Who prepared that Report?

16 A. No, I said I informed Cabinet of where we were. That
17 Cabinet Meeting basically, as I recall, was a report that I gave
18 on my--Parliament meeting at the Florida-Caribbean Cruise
19 Association in February 16th, 2012, and I came back and reported
20 to Cabinet what direction I think we should go based on what was
21 presented to me at that meeting, and that's what the Cabinet
22 Minutes reflect.

23 It wasn't a Resolution or a written proposal to
24 Cabinet. It was a report to the Cabinet of what had gathered
25 and where we think we should be going.

1 Q. A more accurate way of putting it is that on 16th of
2 February 2012, your recollection is that you made a verbal
3 report to Cabinet?

4 A. That would have been--I was in Florida on the 16th, so
5 that would have been the following week, I believe it was,
6 either the 20th or 23rd. I can't recall the exact date, but it
7 was in that context, yes, and within that time frame.

8 Q. But Cabinet did not make a decision until July 2012?

9 A. That's correct.

10 Q. You say that the Board was expected to be appraised of
11 the change in scope of the Project by my Permanent Secretary.

12 Who expected the Board to be appraised by your
13 Permanent Secretary?

14 A. Well, I think it's fair to say that, as was indicated
15 and as you just pointed out, the Board was appraised in
16 January 26th according to the evidence that you've just reported
17 there, and the understanding is that there is a monthly Board
18 Meeting, and whoever is representing the Ministry at that Board
19 Meeting would have appraised the Ministry of the direction we
20 were going, and that's what I'm indicating there,
21 Mr Commissioner.

22 Q. Now, what you say is, as Minister, I appraised the
23 Board of the full scope of the Project in a Board Meeting dated
24 8th of October 2013. The Board approved a Resolution to move
25 forward accordingly.

1 What happened in October 2013 was that, according to
2 the Public Accounts Committee, you attended a meeting of the
3 Board, and informed them that the arrangement with TPP, which
4 you had been negotiating with Mr Skelton-Cline, had ultimately
5 been unsuccessful, and also that the tender process overseen by
6 the Ministry of Finance had not been unsuccessful, and now the
7 matter was coming back to the Board.

8 A. That's correct.

9 Q. That's what happened in October 2013, wasn't it?

10 A. Yes, as I recall.

11 Q. So it wasn't--so, what you're saying where you say I
12 appraised the Board of the full scope of the Project in a Board
13 Meeting, effectively is that almost two years after you assumed
14 office was when the Board got to know the full scope of the
15 Project?

16 A. That is not correct.

17 Let us go through the period of time that brought us
18 to that point, if I may; my opinions that I gave. My evidence
19 is clear there.

20 The Project was, as I said, between December and July
21 we did research, we had presentations. We had three groups
22 presented, the Government decided to move forward negotiations
23 with one group. That process was discontinued in, I don't
24 recall, could have been July. And a broader tender process was
25 pursued in 2012.

1 And I think it was October or some point there in
2 October when a Negotiation Committee was selected to review the
3 proposals made by two of the companies who presented--who bid on
4 the Project at that time in the second round of bidding. There
5 were TPP and Royal Caribbean. That negotiation team came back
6 to the Cabinet through the procurement process, and recommended
7 that we select Tortola--TPP group.

8 We met--the TPP group presented their proposals, and
9 during that time, an agreement was paid based on certain
10 Conditions Precedent, if I recall there were nine conditions
11 that they had to meet before you would make any final
12 arrangements with them.

13 In some time in the following year--I don't remember
14 the exact date--they failed to meet--if I recall two or three of
15 the Conditions Precedent. The one of those was very important
16 to us, and that was whether they could finance the Project that
17 they had proposed. And it was at that time, that the Minister
18 of Finance gave the notice of discontinuation. And that's how
19 we got to I believe October 2013, is what I may say as my
20 evidence, as I recall.

21 Q. But be clear about this, please. And I've taken you
22 to a date or two, and you've given others where you say there
23 was meetings with the Board. It's just that--and this is your
24 words in your written response--"As Minister, I appraised the
25 Board of the full scope of the Project in a Board Meeting dated

1 October 8th, 2013".

2 So, on your words, it appears that it wasn't until
3 October 2013 that the Board got to hear the full scope of the
4 Project?

5 A. I think--if it's--I just take it to you how we got to
6 that meeting, Mr Commissioner. And through that process, the
7 Board was involved, there were Board Meetings before that, the
8 Chairman of the Board discussed the Project. If you go to the
9 Minutes of the Board between July of 2012 and October of 2013,
10 you would see lots of Minutes regarding this Project that were
11 directed by the Board. So, I would suggest that you get the
12 Minutes of the Port Authority and look at how the Board was
13 involved during all that time while we were in this process.

14 Q. What the Commissioner has is Minutes of answers that
15 Members of the Board gave to the Public Accounts Committee?

16 A. I suggest we get Minutes of the Board Meetings during
17 that time. What Members said in these discussions I would not
18 be willing to attest to. I would like you to go to the Board
19 Minutes between that period of time and see how we got to
20 October 2013.

21 Q. What they did attest to was that, during the time that
22 you were leading the Project with Mr Skelton-Cline, so
23 November 2011 to July 2012, they were nothing more in effect
24 than a rubber-stamping body. Their only job was to sign up to
25 Resolutions that were put before them. They had no other

1 involvement in the project at all.

2 A. That may be the evidence, but they were given
3 opportunities, from my point of view in the various meetings or
4 when I was present at the meetings, to give suggestions, ask
5 questions, there were public meetings which they attended. That
6 information at the public meetings was shared with them, so it
7 behooves me to understand that they weren't aware. They may not
8 have been involved in the full research as it were in the hands
9 of those who handled the previous project. But after we turned
10 it over to them, Port took control of the Project and went
11 forward with it. That is my evidence that I have. I'm sorry,
12 but that is what I have to offer.

13 Q. Thank you, Honourable Vanterpool.

14 MR RAWAT: Commissioner, if I could ask now for a
15 short break for the Stenographer.

16 COMMISSIONER HICKINBOTTOM: Yes. As you know, we have
17 a Stenographer, and he needs a break after about an hour, so we
18 will have a five-minute break now. Thank you.

19 THE WITNESS: Thank you.

20 (Recess.)

21 COMMISSIONER HICKINBOTTOM: Mr Rawat. We are ready to
22 resume.

23 MR RAWAT: Thank you, Commissioner.

24 BY MR RAWAT:

25 Q. Honourable Vanterpool, can I take you to the next

1 potential criticism, which is at your page 4 of your written
2 response, and it is that you retained Mr Claude Skelton-Cline as
3 a consultant for the purpose of liaising with the Port Authority
4 and advising on Port related matters without a transparent
5 selection process and without evidence of Mr Skelton-Cline
6 having any relevant experience and without him, in fact, having
7 any relevant experience. And you've said this: At the time it
8 was my considered view that it was the Minister's discretion to
9 appoint consultants under the budgeted amount allocated to the
10 Ministry. At that time, it is my knowledge that consultants to
11 Ministers were not posts that would normally be advertised. I
12 pointed to consultants who would liaise with experts and focus
13 on the urgent need to move the Project to the development stage
14 after which it would be turned over to the BVIPA.

15 I was not seeking consultants and experts on Port
16 matters but rather one who would be the Chief Liaison to myself
17 and the Ports Authority experts and stakeholders. Now, on 30th
18 of June when you gave evidence, I took you in some detail to
19 that, and you gave your answers about Mr Skelton-Cline's
20 appointment to the Commissioner, so I don't want to go over the
21 ground again. Could I just ask you some questions, however?
22 You say in your response: "It was my considered view that it
23 was the Minister's discretion to appoint consultants". What did
24 you take into account to reach this "considered view" about the
25 appointment of consultants?

1 A. I'm not sure what your question is. I apologize, but
2 can you repeat that question so I may understand it.

3 Q. Yes. The first sentence of your response goes to not
4 just Mr Skelton-Cline, but the appointment of consultants, and
5 you say that there is a budgeted amount allocated to a ministry
6 that it can use to appoint consultants.

7 A. Yes.

8 Q. Now, would it be right to say it like this, that it's
9 at the discretion of the Minister whether a consultant gets
10 appointed or not?

11 A. Yes. That was my view.

12 Q. Right. But this was the purpose of the question. You
13 say--not only do you say it was not only your view, but it was
14 your considered view, and it was the word "considered" that my
15 question was directed to.

16 So, what factors did you take into account when
17 considering your view?

18 A. I considered that I needed a person who would be
19 focused on, as I said in my notes here, focus on--both on expert
20 rather one who would be a liaison between myself, the Ports
21 Authority expert and stakeholders and would be focused on trying
22 to execute what we wanted to do, and that was what I considered.

23 Q. The question was not about Skelton-Cline, it was about
24 your considered view as to the Minister's discretion to appoint
25 consultants?

1 A. Yes.

2 Q. How did you come to that considered view that a
3 Minister had the discretion to appoint consultants?

4 A. I don't know what would be your technical
5 understanding considered view, but it was in my opinion my
6 discretion, and that's the way I saw it, that as Minister coming
7 in to take over the portfolios that I wanted to do, and I needed
8 someone to work with me to carry out some of my missions such as
9 this one that that's the view I took to have a consultant to do
10 it, if I may say.

11 Q. Now, you obviously had more than one mission as
12 Minister?

13 A. Sure.

14 Q. Did you appoint other consultants?

15 A. In due course, yes.

16 Q. During that administration?

17 A. Yes, I did.

18 Q. How many other consultants did you appoint?

19 A. I appointed a consultant to deal with energy, and
20 renewable energy. Those are the two main ones that I can
21 recall. Yeah. I don't recall any, but those are the two main--

22 Q. Presumably because you'd appointed Mr Skelton-Cline
23 from a budget allocation within the Ministry, he would have had
24 a contract with the Ministry?

25 A. Yes.

1 Q. And is that the sort of contract that's signed by a
2 Permanent Secretary or is it signed by you as the Minister?

3 A. I can't recall, but I think as Minister, I signed it
4 at least as one signature.

5 Q. And he was I think your first Consultant. There may
6 have been another one, there was another one later on in time?

7 A. Yes.

8 Q. But how was he expected to report?

9 A. He was expected to report to the Minister. I'm not
10 sure what your question is, but if that's what you're asking,
11 yes, he was reporting to the Minister.

12 Q. Just directly to the Minister?

13 A. Yes.

14 Q. And was he expected to report by producing a written
15 report, or did you just expect verbal updates?

16 A. There were various updates, some were written, some
17 were verbal.

18 Q. What was the expectation?

19 A. Written and verbal.

20 Q. Let's go on, then, to criticism number four, please,
21 at page 5 of your written response, which is that despite the
22 change in scope and the scale of project there was no suitable
23 project appraisal, no comprehensive planning, no detailed
24 development proposal, no needs assessment, no cost benefit
25 analysis, and no cost estimate.

1 And you explained that the initial phase of the
2 Project was a mission to gather information to further develop
3 the Project scope. So, let's pause there.

4 Who embarked on that mission to gather information?

5 A. My Consultant and myself.

6 Q. The two of you worked in tandem?

7 A. Yes, along with the Ministry persons, and we had
8 discussions, like I said earlier, with Members of the Port,
9 including the Managing Director of the Port. Several
10 discussions.

11 Q. But certainly Mr Skelton-Cline was leading on that?

12 A. Yes, yes.

13 Q. And discussions you say with people within the
14 Ministry. Who would those have been with?

15 A. My Permanent Secretary, as I recall, and--primarily my
16 Permanent Secretary.

17 Q. You go on, then, that you don't accept the
18 Comprehensive Planning was not done because you point to a
19 business case being provided by BDO. Is that one of the
20 documents that you produced today?

21 A. Yes.

22 Q. Remind us of the date of the BDO document?

23 A. That would have been October 2013.

24 Q. Right.

25 Now, we know that October 2013 was when the Port

1 Development--Port Authority took--albeit the Project was handed
2 to the Port Authority, was the BDO Report prepared for the
3 meeting that occurred on the 8th of October 2013?

4 A. No.

5 Q. What was it prepared for?

6 A. Let me bring you back, if I may, in understanding how
7 this Project was intended to be executed early on, and give you
8 an understanding that these appraisals and these proposals were
9 being done--were expected and proposed to be done and, in fact,
10 information was submitted through the Public/Private Partnership
11 arrangement.

12 Let me explain.

13 Under the Public/Private Partnership arrangement, the
14 Government was not undertaking any financial aspects of the
15 development or the Government was not undertaking any capital
16 responsibility for the Project. The Government's involvement
17 was to provide the land for the development in the
18 Public/Private Partnership arrangement, and the developers were
19 to raise the money, develop the Project and then the Government
20 would engage in an official agreement over a period of time.
21 After that period of time, the land and the Project as was
22 developed would be handed back to the Government. That was the
23 proposal, and that is why I say it wasn't until the Government
24 took over the Project, the Port Authority took over the Project,
25 is when we asked and we got a development business case to be

1 done by BDO.

2 Prior to that, a business case was presented in I
3 think it was, I don't know if I have it. By TK something. And
4 I think that was reported in the Auditor General's Report also.
5 Did I mention it here?

6 Q. This is PFK (BVI) Ltd who were engaged to prepare a
7 business case for the initial TPP.

8 A. Yeah.

9 Q. Public/Private Partnership.

10 A. Yes.

11 That was the case you were dealing with at that time,
12 but that was being interpreted through the PPP arrangement, and
13 that would have been the business case, which is what we were
14 relying on.

15 Q. Help us with this, though: Firstly, was the PFK
16 document prepared for the project in which you were involved or
17 the Project--the part of the Project in which you were involved
18 or the part of the Project in which the Ministry of Finance was
19 involved?

20 A. I don't recall the exact nature of that, but I know I
21 was aware of the Report, the business case that was prepared.

22 Q. Okay. Thank you.

23 So, you've explained, and you touch on it in your
24 written response, but clearly the BDO Report--I mean, if I
25 explain, one can split up the Port Development Project into a

1 number of sections, and obviously there is the efforts that were
2 made prior to you coming in to post as Minister, then there's
3 the period from November 2011 to July 2012 when your Ministry is
4 leading it.

5 A. Yes.

6 Q. Then, in July through to October 2013, the Ministry of
7 Finance has taken over, and there's a tender process, and then
8 after October 2013, it goes back to the Ports Authority.

9 So, obviously the BDO Report is prepared at a time
10 when whilst the Ports Authority still sit under your Ministry,
11 it's now the Ministry of Finance that is leading on the tender
12 project, isn't it?

13 A. Always was the case in Government, procurements of
14 that nature were handled by the Ministry of Finance.

15 Q. But just bear with me--humor me, and let's adopt those
16 different categories of time.

17 A. Yes.

18 Q. The point is that after July 2013 there is a tender
19 process that is led on by the Ministry of Finance.

20 A. Yes.

21 Q. And so, by that time, your Ministry isn't, if you
22 like, the lead Ministry?

23 A. Yes, we were lead Ministry, except that we weren't
24 leading in the procurement process.

25 Q. Let's accept that--

1 A. I was still the Minister--

2 Q. No, you're still the subject Minister.

3 A. Yes.

4 Q. Let's accept that distinction.

5 A. Yes.

6 Q. So, the BDO document is not prepared for time--it's
7 not a time when you are formulating or gathering information or
8 preparing a proposal or doing all of the other steps that you
9 and Mr Skelton-Cline did that took you up to July 2012, is it?

10 A. Yes.

11 Q. Because it's dated after that?

12 A. Yes, correct.

13 Q. So you've referred to the PFK document, but other than
14 that, were there any other studies done?

15 A. Yes.

16 Q. You say project appraisal, planning, development
17 proposal, needs assessment cost benefit analysis and estimates
18 followed. Who prepared those?

19 A. There was the Port Authority requested an
20 environmental study be done based on the scope that we were
21 proposing, and the document should be available from the Port as
22 to what was prepared in April of 2012.

23 I don't recall other documents that might have been
24 prepared then, but like I said, Commissioner, the Project was,
25 at the time the Public/Private Partnership group were the ones

1 making the assessments, providing the Project. I know at the
2 time there were architects who were involved in designing the
3 Project, Roger Diamond and Co (phonetic), and there were other
4 persons involved in providing the scope of the Project.

5 Q. That was on the side of the selected bidder, wasn't
6 it?

7 A. Yes, yes.

8 Q. So, if we split it, what your response comes back down
9 to is that you're aware of three reports, which you've
10 presented, the BDO Report and then the couple of others. You've
11 presented a financial evaluation, I think. You're aware of
12 those, and you're aware of the PFK report, and then you've
13 spoken of an Environmental Impact Assessment, which was done by
14 I think Dr Cassandra Titley-O'Neal, and that is referred to in
15 the Minutes of the PAC meetings because there was a resolution
16 about it, but that's on one side. That's on Government's side.

17 And the other side, what you say is that effectively
18 Tortola Port Partners would have had architects involved, would
19 have had to do a complete analysis and appraisal to submit to
20 Government in due course; is that right?

21 A. Correct.

22 Q. At what point in the process were they going to submit
23 this complete analysis, planning and project appraisal?

24 A. It was submitted. In fact, it was even submitted to
25 the point where it was taken to the public. It was presented.

1 Q. But at what point would that occur--did that occur?

2 A. It was before July.

3 Q. Before July 2012?

4 A. Yes.

5 Q. All right.

6 A. In fact, as I recall there was a public meeting in
7 March, there were other public meetings, but there was a major
8 public meeting that the plans that they were presented to the
9 public. Accordingly, these are the PPP plans that they were
10 presenting to the public for input that we had, and that was
11 done in March, as I recall.

12 Q. March 2012?

13 A. Yes.

14 On the 27th of June 2012, another public meeting was
15 held for the Project, 27th of June.

16 Q. You're reading from a document, Honourable Vanterpool?

17 A. No. I'm reading from the notes I made about the
18 chronology of other projects, so I recall the Project.

19 Q. What information are you drawing on to put that
20 chronology together?

21 A. From various pieces, but those notes you would find
22 that--either would be at the Port Authority Minutes or would be
23 at the level of the Ministry or would be at the Cabinet notes,
24 Minutes notes.

25 Q. But you say you put that chronology together from

1 various pieces of information. What pieces of information?

2 A. I just said, from my recollection of Cabinet meetings,
3 from my recollection of Ministry meetings, and from my
4 recollection of the public meetings that were advertised. Most
5 of those meetings that I'm talking about, Mr Commissioner, were
6 press-released gazetted.

7 Q. Do you have documents--if you've taken it from Press
8 Releases or the Gazette or a diary?

9 A. I don't have those. These are recollections that I
10 have.

11 Basically, this is when we were debating the Public
12 Accounts Committee Report, my Ministry at that time provided me
13 with a chronology of the Project, and that's mostly where it
14 came from.

15 Q. And do you still have that chronology?

16 A. I can provide that. I can give you that.

17 Q. Thank you.

18 Now, if we move on to Criticism 5--

19 A. I will provide you the chronology.

20 Q. Thank you very much, Honourable Vanterpool.

21 Criticism 5 is this: That the public tender process
22 was disregarded. No public tender or open solicitation for the
23 project. No competitive procurement procedures, no proper or
24 transparent process by which the three bidders and contractors
25 were identified or selected, and no assessment made of whether

1 there were better or more cost-effective options available. Now
2 this, as a criticism, relates specifically, Honourable
3 Vanterpool, to the process at which you were involved. Because
4 the process in which you were--I'm going to say you were
5 leading.

6 But November 2011 to July 2022, the process that you
7 take this process through to results in approaches from three
8 entities, which then on 27th of March 2012, you signed Heads of
9 Understanding with TPP, Tortola Port Partners, and that that was
10 done without, as a process, there is a lack of clarity as to how
11 that--how it came about that these three entities were asked to
12 make proposals or how it was selected.

13 But what is clear is that, in identifying who would be
14 the successful partner in a Public/Private Partnership, you did
15 not put it out to tender?

16 A. No. It wasn't put out to tender, but Mr Commissioner,
17 as you might--may be aware, Cabinet has--has in the past and had
18 that they could do select--select tendering, and three persons
19 were invited to present proposals, those proposals were
20 presented. One of those proposals was selected as to where we
21 think we would like to go. We did not--we did not give full
22 direction for that group to go forward. They were to present
23 their proposals, we were to continue to receive their positions
24 as to what they would do, and then Cabinet would have decided,
25 which they did in July, as to whether they should go forward.

1 And then once, having given direction to go forward at
2 that point, Cabinet asked them to meet nine Conditions
3 Precedent, and that was put forward. Later on, they didn't meet
4 those conditions, and that's when we halted the Project from
5 their point of view. But that's how it happened.

6 COMMISSIONER HICKINBOTTOM: But there was no public
7 tender process.

8 THE WITNESS: Initially, no.

9 BY MR RAWAT:

10 Q. And did Cabinet make a formal decision to waive that
11 tender process?

12 A. I don't recall not having access to those, but I
13 recall that that's the direction we were given. The Minister of
14 Finance and myself signed after that the Heads of Understanding,
15 non-binding Heads of Understanding, and that's where it reached.

16 Q. I accept, Honourable Vanterpool, that that's where it
17 reached. It's how it got there. That's the question.

18 And just so that we can be clear because you just said
19 that's the direction I was given, so did Cabinet--did you make
20 an application to Cabinet before finding three bidders for a
21 tender waiver?

22 A. I don't recall that.

23 Q. Well, it's a multi-million dollar deal. You're going
24 from inheriting a 12 million-dollar deal to one that is now much
25 more ambitious in the presentation. We're talking 50,

1 eventually it gets up to \$70 million. So, you know, not only is
2 your pier being extended significantly so that you can
3 accommodate much larger ships, but in terms of landside
4 development, it's much more ambitious.

5 So, surely you would remember, having to go to Cabinet
6 and say "I would like a tender waiver for a project that is
7 going to be upwards of at least \$50 million".

8 A. Yes. The process were that the three bidders were
9 invited to present to Cabinet. The Cabinet was aware of it,
10 even the Government in Cabinet at the time made comments that
11 were made, and the Cabinet Minister, that I recall, did there.

12 And whether there was a specific--and I believe there
13 was, but whether there was a specific waiver of tender at
14 Cabinet, I cannot recall exactly when or what it was. But I
15 know that the Cabinet was involved in the decision.

16 Q. But Cabinet issue a decision that the Ministry of
17 Communications and Works could proceed along this route without
18 the need for a tender?

19 A. I don't recall exactly that, no.

20 Q. Because on the evidence, the reason the Ministry of
21 Finance became involved at a point where you had signed, and the
22 Premier, but you had signed non-binding Heads of Understanding
23 with Tortola Port Partners was because there were concerns about
24 a failure to follow a proper procurement process?

25 A. I think it is accepted that--I don't know what would

1 be considered a proper procurement process, but it was accepted
2 that, by that time, the process should have been taken to a
3 wider and a more acceptable bid, according to the Protocols that
4 were established afterwards.

5 Q. Help us with this, then. You have three proposals in
6 early 2012. You have proposals from CaribInvest, Trident
7 Development Enterprise LLC and Tortola Port Partners?

8 A. Yes.

9 Q. How did--who approached those three companies?

10 A. I don't remember specifically, but I think it was more
11 that those three companies approached us.

12 Q. Who is the "us"?

13 A. The Government, the Ministry, and then we presented
14 those three companies to the Cabinet.

15 Q. You say they approached the Ministry. Did they, in
16 fact--was the approach made to you and Mr Skelton-Cline?

17 A. I don't recall exactly, but that's possible the case.
18 I met--I met--I think you must understand the context of this.
19 I met many of these persons within the cruise industry and
20 persons who were presenting to us. In fact, when--when the
21 Tortola Port Partners group approached us, it was an approach
22 with the support and direction of the Disney group who were
23 involved in the process before, and that is what I recall. Then
24 we invited them to present their case to us, and we haven't
25 presented them, we made a selection at the time.

1 Q. But would a fair summary be that--I mean, you and
2 Mr Skelton-Cline are going out, having meetings with different
3 cruise operators, you're going to conventions, you're having
4 discussions, you're obtaining information. Is it possible that
5 you and/or Mr Skelton-Cline would have approached one or all
6 three of these companies and invited them to make proposals?

7 A. As I recall, we--those proposals came to us as
8 presentations as proposals, and I believe a lot of it was
9 instigated through the Disney group and what they were doing
10 before, and then we told them we wanted to change. They came to
11 us through the TPP group as a joint venture. The Royal
12 Caribbean group came to us as a joint venture with a local tour
13 operator who represented Royal Caribbean. I believe that is the
14 Trident group. And then the CaribInvest group came to us with
15 proposals about the landside of the development, and those are
16 the proposal that became--

17 How it all began and how they came to present, I just
18 don't recall all of it, if you allow me, but I know it was--they
19 came to us.

20 Q. Do you remember giving them information as to what
21 they should propose?

22 A. No, no.

23 And there wasn't an official call going out to invite
24 for bids, correctly so, it wasn't the case.

25 Q. So, you didn't publish an invitation for Expressions

1 of Interests?

2 A. Not that I recall, no.

3 Q. As a result of conversation, these proposals then came
4 in?

5 A. No, it occurred that way.

6 Q. I see.

7 A. And that's why I say, the change that was made later
8 on, we felt that we should change the course of how we were
9 receiving proposals, and that was done, but--

10 COMMISSIONER HICKINBOTTOM: That sounds extremely hit
11 and miss.

12 THE WITNESS: I don't know whether it was--you may
13 want to describe it that way, Mr Commissioner, but it was an
14 urgency that we felt and based on what the cruise ships were
15 suggesting and having them involved, but there were several
16 ports that were developed in the Caribbean. The one that we
17 were following to be closely was one that was developed in
18 Jamaica, where there was a proposal made to us as to how this
19 was done, and we felt that was a good course. However, they
20 showed us port developments in Sint Maarten they had just done,
21 Royal Caribbean in this case. They showed us Port Developments
22 that were done in St Thomas, and there were some proposals that
23 Disney we were looking at in the Dominican Republic.

24 Those were some of the scope of proposals that we look
25 at. And we felt it was urgent to move on because the cruise

1 groups did sign agreements forward into three or four or five
2 years, and we felt we needed to get in on it and get on with the
3 Project.

4 There was, in my Ministry, I know designs and scopes
5 that were developed by a group called CH2MHILL document that the
6 Government has provided and as to the Ports developments, we
7 followed some of that, and there were some other documents such
8 as those that we were following.

9 But in terms of the pier and the landside development
10 as a combination, that's what we were looking for.

11 Now, the process, yes, it could have been done better,
12 and we adopted that later, but this is what we were looking at
13 at the beginning.

14 Q. CH2MHILL was the technical support that the Ports
15 Authority had had in terms of design for the pre-2011
16 development.

17 A. Yes.

18 Q. That must have been of limited assistance because you
19 were imagining a development of a much grander scale by then,
20 weren't you?

21 A. That's correct.

22 Q. Just help me with this before we move on, July 2012, I
23 think it seems to be agreed that essentially that the Heads of
24 Agreement--the Heads of Understanding with TPP comes to an end.
25 A decision is made within Government to have a public tender

1 process.

2 A. Um-hmm.

3 Q. And that is then led by the Ministry of Finance?

4 A. Yes.

5 Q. Now, you're still the subject Minister.

6 A. Yes.

7 Q. So, to what extent were you then involved in that next
8 phase of the process?

9 A. Well, the Ministry of Finance, following that point,
10 went to make and did their tender process. That was done. I'm
11 aware of what was happening there. I didn't have a lot, major
12 role in what was happening, but I was aware of it, and that's as
13 far as I know.

14 Q. Now, we know from other evidence, and that includes
15 Neil Smith, the former Financial Secretary gave evidence last
16 week, and evidence before the PAC that Mr Skelton-Cline was
17 involved in that phase as well. There is some suggestion on the
18 evidence that he was involved, in effect, to represent the
19 interests of your Ministry. Is that your recollection?

20 A. That is correct.

21 Q. If you move on, please, Honourable Vanterpool, just to
22 Criticism 6, which reads that the process of stakeholder
23 consultations took place after TPP were chosen as contractors so
24 preventing input from relevant stakeholders to ensure that the
25 best option was pursued.

1 Now, we're again back to the process, time between
2 November 2012 and July 2012 when the Ministry of Communication
3 and Works was progressing the Project.

4 What you say is: "Before a full agreement was made,
5 following a non-binding Heads of Understanding, the Project as
6 proposed by TPP was submitted to public hearings for
7 stakeholders and public input".

8 So, I think that what the criticism is directed to is
9 why this could not have been done before signing the Heads of
10 Understanding?

11 A. Signing the Heads of Understanding gave us the
12 opportunity to present a Project as was envisioned. Prior to
13 that, there was no project that we had that we could go to
14 stakeholders about and go to the public about. Once we signed
15 with TPP, and said this is what we are proposing, we said to
16 them, take it to the public, let's get public input. That is
17 how we should appoint. Before that we had nothing to go to the
18 public about.

19 Q. You say you relied on--when you get to the stage of
20 Heads of Understanding stage, your reliance on TPP is to
21 effectively produce something as a proposal that can actually be
22 presented to stakeholders and presented to the public?

23 A. That's correct.

24 Q. That's their job to do?

25 A. It was their job to do, right, and we were involved in

1 the public meeting.

2 Q. Yes.

3 A. It was their job to present that, yes, and they did.

4 Q. Now, when you were explaining what--the sort of
5 Public/Private Partnership aspect, you said Government has to
6 give them the land, and that they then--they put the money in,
7 and after a period of time, Government gets the land back. But
8 in this case is it the Port Authority that owns the land?

9 A. Yes, but they could not authorize the transfer of the
10 land or the lease of the land without Government's authority.

11 Q. Now, when you did that post Heads of Understanding
12 approach to the public and stakeholders, did it result in
13 changes to the proposal?

14 A. Sorry, I missed that. Say it again, please.

15 Q. What you respond is, well, the proposal--TPP's
16 proposal was put to public hearings so stakeholders and the
17 public could have input into it. Did that process result in
18 changes in the proposal?

19 A. Yes, there were different suggestions and ideas that
20 were taken into consideration.

21 Q. Well, can you give the Commissioner some examples?

22 A. I don't recall. There were some very simple ones.
23 There was a big ferrous wheel suggested, and the public felt
24 that's not the--the London look isn't what the BVI look is. We
25 should have palm trees instead on our coastline, different

1 things like that, I recall.

2 There wasn't any particular substantial change to what
3 was being proposed. The decision were concerned, for example, I
4 think, that they couldn't be right up to the dock as guests come
5 out. They were to be a distance away, and they wanted to have
6 discussions about that. Things that those we were entertaining
7 and had discussions on them after.

8 I don't recall any of the major substantial change
9 suggested at the time.

10 Q. If we move on, Honourable Vanterpool, just to the next
11 potential criticism, which says that the Town and Country
12 Planning Department was not involved in the cross-agency
13 consultations solicited for the development. The Project moved
14 forward without their input in spite of the fact that the
15 development involved prime land in the middle of Road Town.
16 Again, this is focused on that period November 2011 to July 2012
17 when you were leading the charge, so to speak.

18 And your response is that you recall at least one
19 meeting with Town and Country Planning in your office. You were
20 reliably informed that the TPP group would have had several
21 meetings with Town and Country Planning, and you returned back
22 to the point that Dr Cassandra Titley-O'Neal conducted an
23 Environmental Impact Assessment.

24 Just remind me of this: Does Town and Country
25 Planning sit as a department under your Ministry?

1 A. No.

2 Q. Where does it sit?

3 A. The Ministry of--

4 Q. At the time, departments and portfolios can move
5 around?

6 A. I know, it was under the Premier's Ministry.

7 Q. Thank you.

8 And where did you learn that TPP had had meetings with
9 the Town and Country Planning department.

10 A. This is information that came back to me from the
11 Consultant, and I think the Consultant would have been at some
12 of those meetings.

13 Q. So, during that process, was Mr Skelton-Cline having
14 regular meetings with TPP?

15 A. Yes.

16 Q. And even after the bid was, if you like, their
17 proposal was accepted, did those meetings continue?

18 A. They certainly did, the idea that we were trying to
19 develop exactly what would be the final product, there were
20 meetings with them, yes, and I believe that some of those
21 meetings were with Town and Country Planning Department as I
22 recall.

23 Q. So obviously you have a recollection of at least one
24 meeting that you attended. How involved were you in meetings
25 with TPP and the Town and Country Planning Department?

1 A. I only recall, as I said, one meeting where there was
2 a discussion in my office about a project. It was surrounding
3 not just with the pier development but the City's development
4 relation to the Project, traffic and that kind of stuff that we
5 were looking at that concerned me as Minister in terms of what
6 happens in the City, and the City came under my purview at the
7 time, also.

8 Q. Now, when you, obviously, November 2011 you begin, as
9 you say, gathering information. How early in the process did
10 you involve Town and Country Planning?

11 A. I don't recall exactly. It wasn't--certainly wasn't
12 November, December or January. I can't recall after that. It
13 might have been soon after that when we did it.

14 Q. So, the best you can do is some time after
15 January 2012, Town and Country Planning Department would become
16 involved?

17 A. Yes.

18 And it was mostly, if I may, Mr Commissioner, after
19 the proposal of what the Project would have been is when we
20 started engagements in that direction.

21 Q. So, once you had a clear idea from TPP of what they
22 were going to build--

23 A. Yes.

24 Q. --that's when you started discussions?

25 A. Yes, yes.

1 Q. I see.

2 Let's move on to the next criticism, please,
3 Honourable Vanterpool, and that is that the knowledge of
4 Honourable Mark Vanterpool, there were serious flaws in the
5 proposed project development agreement, the Heads of
6 Understanding agreement, and the Ground Lease as between the BVI
7 Government and TPP.

8 Now, I think I'm going to ask you just to turn up 533,
9 which is the Auditor General's Report.

10 A. I was in the second one.

11 Q. It's in the first bundle, right at the back.

12 A. Yes, 533. I'm with you.

13 Q. Thank you.

14 It's under a heading "Independent Legal Review". Can
15 you see that?

16 A. Yes.

17 Q. And what you've said in your response is that you were
18 not aware of any serious flaws in the drafting of such
19 documents, so no one brought them to your attention?

20 A. I was not aware.

21 Q. And you point to that I just want to clarify that
22 there's any typos in the next sentence because you say: As I
23 understood it these were negotiations between the Attorney
24 General's and TPP. That's right, is it?

25 A. Yes.

1 Once the Heads of Understanding was made, the
2 agreements were turned over to the Attorney General for
3 negotiation and discussion. They were the ones who were leading
4 that, so yes, that is not a typo.

5 Where were you suggesting there might be a typo?

6 Q. I'm not suggesting it is a typo. I want to be clear
7 that there isn't a typo.

8 A. Yes, yes.

9 Q. The first sentence of your response is that you were
10 not aware of any serious flaws?

11 A. Absolutely not.

12 Q. The second is that, as you understood it, these were
13 negotiations between the Attorney General's Chambers and TPP,
14 and you then go on to say that a UK firm with expertise in
15 Public/Partnership Agreements then became involved?

16 A. Yes.

17 Q. It's just that allows me to then take you to 533
18 because at paragraph 42, what's recorded in the Auditor
19 General's Report was that throughout the process, the Attorney
20 General's Chambers was consulted with respect to the
21 Government's interest. All of the legal arguments, however--all
22 the legal documents originated from the Developer's lawyers.
23 That's TPP's side. And in June 2012 the Financial Secretary
24 sought independent legal advice from specialists in
25 Public/Private Partnership, which was Baker & McKenzie in the

1 UK, and they reviewed the Project Development Agreement, the
2 Heads of Understanding agreement, and the Ground Lease and
3 raised a number of concerns. So the concerns was raised in or
4 around June 2012 by Baker & McKenzie.

5 A. Yes.

6 Q. Following, it seems, instructions from the Financial
7 Secretary.

8 A. Um-hmm.

9 Q. But you were at that point, was any of the concerns
10 that Baker & McKenzie were raising drawn to your attention?

11 A. Yes, I was aware of them. I mean, I was aware as
12 Minister, yes.

13 Q. Because what they are identifying, Honourable
14 Vanterpool, is serious flaws in the Project Development
15 Agreement, the Heads of Understanding agreement, and the Ground
16 Lease.

17 A. Yes.

18 Q. You're saying you're now aware--you were aware, but
19 how does that reconcile with your first answer, which was "I was
20 not aware of any serious flaws"?

21 A. I think you're misunderstanding.

22 Let me be very clear. I was not aware of any serious
23 flaws because I was not involved in the discussion and anything
24 with the Attorney General's Office and the group. It was felt
25 that the Attorney General--in fact, the Attorney General's

1 Office expressed their view that they didn't think they were
2 sufficiently equipped to handle the Public/Private Partnership
3 negotiations under these agreements and therefore, we made the
4 determination through the Ministry of Finance to hire Baker &
5 McKenzie group to advise on the matter. When that group came to
6 the BVI, they met and made negotiations and pointed out to the
7 Government certain matters that the Government needed to be
8 aware of. I was a part of that Government, or was a part of
9 that group that would receive those Commentaries from Baker &
10 McKenzie group, and that is the time I became aware of flaws.

11 But I'm saying the original, which is the indication
12 of what the criticism said, that originally I was aware of these
13 flaws. I was not.

14 Q. I see.

15 So, we can distill it down to this: When the Attorney
16 General's Chambers was involved, you were not aware of serious
17 flaws. After Baker & McKenzie were instructed by the Financial
18 Secretary and undertook a review, you then at that point became
19 aware of the flaws?

20 A. Yes, yes, that is--

21 Q. Thank you.

22 A. That is my evidence.

23 Q. All right. Let's turn to the last criticism or
24 potential criticism, I should say, is that there was a concerted
25 effort on the part of Honourable Mark Vanterpool to obscure

1 information regarding the processes undertaken on this Project
2 from the Public Accounts Committee. Now, that obviously flows
3 from the report of the Public Accounts Committee, and in
4 fairness to you, you should have an opportunity to respond to
5 it, and you gave some comments about the process undertaken by
6 the Public Accounts Committee on the last occasion you gave
7 evidence but you say now that you strongly deny the validity of
8 this potential criticism, all persons under your authority were
9 asked to fully cooperate with the Public Accounts Committee. I
10 was not summoned to the Public Accounts Committee. However, I
11 made several statements to the House of Assembly and answered
12 the Public Accounts Committee Report through the House of
13 Assembly.

14 May I just break that down a little bit with you.

15 Was there any reason that you know of that you were
16 not summoned to the Public Accounts Committee?

17 A. I don't have any specific reason, Mr Commissioner, but
18 I don't think it was normal that--I don't think of any instance
19 before where a Minister was summoned to the Public Accounts
20 Committee at least here in the BVI, but certainly if I was
21 summoned, I would have been happy to go and give evidence.

22 But I don't recall--I don't think it was normal that
23 that happened.

24 Q. Right.

25 So is there, if you like, a convention in the House of

1 Assembly that you don't summons the Minister to come before the
2 Public Accounts Committee?

3 A. I don't think there was a convention but I don't think
4 there was precedents.

5 Q. I see.

6 A. But certainly once the report is prepared, the
7 Minister gives a conflict in the House, which is what I did.

8 Q. And so, there was a debate in the House of Assembly?

9 A. Yes.

10 Q. And you then responded on the recommendations and
11 conclusions of the Public Accounts Committee report?

12 A. Yes, I did.

13 Q. And would a fair summary be that there were aspects of
14 that Report that you did not agree with?

15 A. Absolutely.

16 Q. And did you--just going back to actually the potential
17 criticism, so in terms of persons under your authority, you were
18 asked to fully cooperate, did you make that request of them?

19 A. My view, Mr Commissioner, was that, a Public Accounts
20 Committee is conducting an investigation of a project like this,
21 and it would be--I think it would be--I don't want say "foolish"
22 of me, but it would be--not proper for me to try to stop someone
23 from doing that. And that would not be my--would not be my
24 modus operandi.

25 Q. But did you tell officers in your Ministry--

1 A. Not necessarily.

2 Q. --not to cooperate?

3 A. Well, officers are summoned and they went to the
4 meeting, it was not for me to tell them to cooperate or not, but
5 I certainly did not prevent them. I was happy that they went
6 and gave account.

7 If somebody presents some evidence to me that I tried
8 to prevent it, I would be happy to defend it, but I just said,
9 it says on the criticism nobody has given any evidence of where
10 that might have happened. I was actually surprised about that.

11 Q. But I think it's a conclusion of the Public Accounts
12 Committee.

13 A. That's what I'm saying. I can't comprehend on what
14 basis?

15 Q. On the evidence that they gathered?

16 A. What is the evidence that I did it? That I prevented
17 it? Give me evidence. What is the basis of the evidence? It
18 just said so or there was a basis that showed that I prevented
19 anybody from giving evidence? I would not have done that. If
20 there was a basis, I would more than happy, Commissioner.

21 Q. The wording is to obscure information, but what you're
22 saying is--

23 A. Where's the basis for that?

24 Q. Again, Honourable Vanterpool, what the letter does is
25 to give you all of the evidence you've explained today--

1 A. Yes, I appreciate it.

2 Q. -- we've been through it. You've also explained today
3 that you responded to the Public Accounts Committee in the House
4 of Assembly. It was explained today that you wished to just
5 respond on the basis of your written response rather than
6 getting into a position where you might either be seen to be
7 accepting or agreeing with other people's evidence.

8 A. Yes.

9 Q. But can we, in terms of focusing on what you did at
10 the time, is the position this: Where you say "or persons under
11 my authority was asked to fully cooperate with the Public
12 Accounts Committee", you did not, in fact, ask any official or
13 person in your Ministry to fully cooperate with the Public
14 Accounts Committee?

15 A. As long as I know Members of my Government under my
16 purview were going to give evidence, I would encourage them to
17 give evidence, yes.

18 Q. Did you instruct officials to provide all documents to
19 the Public Accounts Committee--

20 A. Yes, yes.

21 Q. --you actually formally gave that instruction?

22 A. No--I don't know what you mean by formally. I didn't
23 write to them or tell them to do it, but I know that if there
24 was someone, I would say to them go and give evidence.

25 Q. So, you relied on the professionalism of the officials

1 in the Ministry to behave properly when summoned to a Committee
2 of the House of Assembly.

3 A. Yes, the: Public Accounts Committee is a very serious
4 committee of the House, and anyone who is summoned--if I was
5 summoned, I would have to go myself, but obviously this wasn't
6 the precedent, but I think it's a respected Committee that has
7 to be given. It's a committee that's political, and I must make
8 that clear, and that's why I said at the end there, unless there
9 were evidence that I tried to obscure--in other words, a report
10 that comes to anyone that says the Minister tried to obscure
11 information without giving evidence of what that was, I don't
12 even consider it to be--that was my position. Because there is
13 nothing substantially there. I tried to obscure. I'm answering
14 nine. There's nothing there that suggested I tried to obscure
15 information. If there was something, I would be happen to
16 respond to it.

17 I don't even think it's dignified to give a response
18 to that, to be honest with you, Commissioner.

19 Q. And in terms of your dealing with the BVI Ports
20 Authority, would they be persons under your authority?

21 A. The BVI Ports Authority?

22 Q. Yes.

23 You described the Board of the BVI Ports Authority as
24 person who fall underneath your authority?

25 A. That's not my authority, but because the Board is

1 appointed by me or by the Government, they should be encouraged
2 by me to give evidence.

3 Q. Did you, in fact, encourage them to give evidence?

4 A. I don't recall specifically that I had to. I think
5 most of them gave, as far as I know. And gave freely. I think
6 they gave freely.

7 Q. So, once again, you were content to rely on the
8 professionalism of those summoned--

9 A. Certainly Commissioner.

10 Q. --that they would give evidence freely, supply any
11 documents that they were asked to and cooperate fully with the
12 Public Accounts Committee?

13 A. Certainly, Commissioner. Certainly.

14 MR RAWAT: Commissioner, I think I've reached the end
15 of my questions. Can I conclude by thanking Honourable
16 Vanterpool for making himself available today and also for the
17 way that he has given his evidence to the Commission today.

18 THE WITNESS: Thank you, Commissioner.

19 COMMISSIONER HICKINBOTTOM: Can I echo that. Thank
20 you, Honourable Vanterpool, for coming and giving the evidence
21 in the clear way that you have.

22 As I said at the outset, if there is anything arising
23 out of the Cabinet Papers that you now have, if you can let us
24 have anything on those by the end of the week, that would be
25 appreciated. And we will now deal with the law witness with

1 Mr Denniston Fraser.

2 THE WITNESS: Thank you.

3 COMMISSIONER HICKINBOTTOM: You can go or stay as you
4 want.

5 THE WITNESS: I will leave your good legal people to
6 have your--thank you very much, sir, Commissioner.

7 (Witness steps down.)

8 COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat. Do you
9 want to open this?

10 MR RAWAT: Certainly, Commissioner.

11 One of the issues on which or the issue on which you
12 asked for assistance from the legal representatives of
13 Honourable Vanterpool was the question of the operation of The
14 Ports Authority Act.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 MR RAWAT: You'll recall, Commissioner, that on the
17 last occasion that Honourable Vanterpool came to give evidence,
18 he relied on the Act, and he sought to address you during the
19 course of his evidence as to the ambit of the Act and the extent
20 to which it allowed him to operate as a Minister.

21 As you have explained today to him, that is not a
22 matter for him but a matter for legal submission, and if I could
23 perhaps just introduce I think the issues that may arise.

24 COMMISSIONER HICKINBOTTOM: Yes.

25 MR RAWAT: You will find the--the Act at page 496 in

1 the second volume on our Law on Constitution. Not that volume,
2 Commissioner. One of the bundles that is now sitting on the
3 floor.

4 COMMISSIONER HICKINBOTTOM: I'm sorry, Volume 2?

5 MR RAWAT: Volume 2. Page 496 is the first page of
6 the Authority Act 1990 as amended.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 MR RAWAT: It was amended in 2017 and the amending
9 statute is in the bundle at 568, but the amendments are
10 not--don't change substantially the issues with which we have
11 discussed. What they simply do is where the words "Legislative
12 Council" appears that, becomes House of Assembly, but governing
13 counsel becomes Cabinet.

14 COMMISSIONER HICKINBOTTOM: Yes.

15 MR RAWAT: But to just set out some of the key
16 provisions that may arise today, section 4, which you will find
17 at your page 507, sets out the functions of the Authority. And
18 perhaps if I just draw your attention to section 3,
19 Commissioner, that section 3 establishes an authority to be
20 known as the British Virgin Islands Port Authority, which is a
21 Body corporate which can sue and be sued in that name and
22 perform such acts as Body corporates perform.

23 Section 4 sets out the functions which include at 4(a)
24 to provide, operate, and maintain all port and harbour services
25 and facilities in the Territory as the Minister considers

1 necessary, and at (b) to take such actions as the Authority
2 considers necessary in relation to the exercise of any of its
3 functions mentioned in paragraph (a).

4 Then at (f), 4(f), which is something I think my
5 learned friend Mr Fraser may take you to, and that is to perform
6 such acts as the Minister determines and report to the Minister
7 at such times he requires respecting the matters to which this
8 Act relates.

9 COMMISSIONER HICKINBOTTOM: And 4(e) as well.

10 MR RAWAT: Yes, to develop and manage all lands
11 including lands on or under the seabed leased to or vested in
12 the Authority.

13 COMMISSIONER HICKINBOTTOM: Yes.

14 MR RAWAT: The Act gives the Authority certain powers,
15 I don't need to set out the detail of those, but you will find
16 that there is section 5 says, without prejudice to section 4, in
17 the exercise of its function under this Act, the Authority may,
18 and then it sets out there as powers that the Authority can
19 exercise.

20 It also has--and we don't need to go to the detail of
21 the specific provisions, but at section 6, the Authority have
22 powers of entry on land or building. Section 7 gives the
23 Authority to own funds.

24 Section 8 allows the Authority to borrow, which under
25 section 9 such borrowings can be guaranteed by Government.

1 At section 10 gives the Authority power to borrow from
2 Government.

3 And section 12, which is at page 515, allows the
4 Authority, with the concurrence of the Minister responsible for
5 finance, so not necessarily the Minister under which the
6 Authority sits, but rather the Minister for Finance to invest
7 funds that are to the credit of the fund.

8 Also just briefly mentions section 20, which is at
9 518, where we have the Authority, with the approval of Cabinet,
10 being able to appoint a Managing Director and a Deputy Managing
11 Director. And at section 21, which is at 519, having the power
12 to appoint on such terms and conditions is the Authority may
13 determine such other officers and employees as are necessary and
14 proper for the Administration, management, and performance by
15 the authority of its functions under this Act.

16 I've left out perhaps the second key provision that
17 Mr Fraser may wish to draw you to, and that is at 19(1), which
18 is that the Minister may give the Authority general directions
19 in writing as to the performance of its powers under this Act on
20 matters which appear to him to affect the public interest and
21 the Authority shall give effect to such directions.

22 So, perhaps, as I understand Mr Fraser's written
23 submission, there are two key provisions that would justify, for
24 example, Honourable Vanterpool being able to give very clear and
25 specific directions to the Port Authority and where, even if one

1 takes it as an extreme that taking the lead and presenting the
2 Port Authority with a decision that is then required to make
3 would be justified in law, and firstly it's 4(g), which we've
4 looked at.

5 But in my submission, the difficulty with that--sorry,
6 it's 4(f), I apologize. The difficulty with requiring or a
7 Minister being able to dictate that the Port Authority can
8 perform such act as the--acts as the Minister determines, is
9 that that cannot be interpreted and cannot be used by a Minister
10 in such a way as to prevent the Authority from fulfilling its
11 other functions under the Act, and nor can it be used to compel
12 the Authority to do an act that is outside its prescribed
13 functions.

14 As to section 19 which was the section that Honourable
15 Vanterpool drew your attention to, on the last occasion, but
16 also in his written response and no doubt from which you will
17 want to hear from Mr Fraser on, firstly, the Minister is limited
18 to giving general directions. There is no definition in the
19 interpretation section, which is section 2 of the Act, which is
20 what is meant by "general direction". And in my submission,
21 perhaps it can best be understood by looking at the factual
22 circumstances and ask him whether it could, on sensible
23 analysis, fall within the term.

24 For example, in my submission, directing a Board to
25 sign a Resolution could not be described as a general direction.

1 It would fall more readily being a specific direction. And, in
2 fact, during the course of his oral evidence today, Honourable
3 Vanterpool did refer to specific directions.

4 The second is that the directions must be in writing.

5 But the third is that, any general directions given
6 must go to the performance of the Authority's powers under this
7 Act which appear to the Minister to affect the public interest.
8 So what the Minister cannot do, unless it can be justified under
9 section 4(f) is give general directions in writing or even
10 specific directions in writing as to the functions of the
11 Authority. The phrase "performance of its powers under this
12 Act" take us to the specific provisions which refer to the
13 powers of the Authority, in particular section 5, which is
14 headed in the marginal "Powers of the Authority".

15 And the added qualification to any direction given as
16 to the performance of powers, is that the Minister must, on a
17 reasonable analysis, come to the view that such direction is
18 needed because, to do otherwise--because it appears to affect
19 the public interest. So, there are, I think, a number of
20 hurdles to section 19: Firstly, it must be a general direction,
21 second, it must be in writing; secondly, it can only be directed
22 to performance of powers under the Act, which is set out in
23 other sections; and thirdly, it must be on a matter which the
24 Minister has concluded affects the public interest.

25 That's all I propose to say by way of opening the

1 position, and I shall cede the microphone to Mr Fraser.

2 COMMISSIONER HICKINBOTTOM: Yeah, thank you.

3 Yes, Mr Fraser. What do you say? Your submissions
4 are understandably focused really on section 19(1), although you
5 refer to other provisions as well.

6 MR FRASER: Right. Section 19(1) was the important
7 section we thought. We just wanted to clarify in writing
8 exactly what that meant.

9 And it is clear you've mentioned section 4 of the Act,
10 and we understand and recognize that the Authority has certain
11 functions, and we do not expect the Minister to usurp the
12 functions of the Authority just by giving section (f) of--of
13 section (f) of section 4, so we totally understand that. But
14 section 19 which we focused on--and I know the contention is
15 whether or not in writing whether or not this is something that
16 the Minister should have done. Well, I contend that the
17 in-writing portion of this is not--does not necessarily mean an
18 instrument signed by the Minister under the Minister's hand in
19 writing. This could have easily come by a letter by the
20 Permanent Secretary, those advising the Minister, to any person.
21 It may have been certain discussions that the Minister would
22 have had with the Permanent Secretary or any particular
23 consultant which, to those instructions, the PS or the
24 Consultant would have then deduced that in writing to the Board
25 or to the authority itself but it doesn't necessarily mean an

1 instrument under the Minister's hand, under the Minister's
2 signature.

3 COMMISSIONER HICKINBOTTOM: I understand that, but
4 there is no evidence of any of that.

5 MR FRASER: Exactly.

6 So, what I'm saying is these additional--any
7 additional evidence that would show that the Minister did give
8 directive to the Board or to the Authority would be considered
9 or should be considered in writing as well.

10 COMMISSIONER HICKINBOTTOM: But if that's right, there
11 is no evidence of the Permanent Secretary giving instructions in
12 writing nor indeed the Consultant.

13 MR FRASER: Well, certainly, additionally, we did have
14 Minutes that were given--or noted, I should say--the Minutes of
15 any Board Meeting. Once that's communicated in the Board
16 Meeting, the Board Ministers' prerogative or the Minister's or
17 the Government's view on a particular matter, if that was
18 discussed in a Board Meeting or if the PS had noted that in a
19 Board Meeting or if the Minister came to a Board Meeting and he
20 explained that to the Board, the Minister of the Board would
21 suffice as evidence in writing.

22 And, of course, as we've noticed throughout the Act,
23 the Minister has been given various prerogatives as I mentioned
24 in section 7, I think it was, 7(5), but we want--and that's just
25 to show the totality of the Act where the Minister is not

1 hands-off, basically. The Minister is hands-on in terms of
2 giving certain directions to the Board but we focus, of course,
3 primarily on section 19, section 19, where it gives--where it
4 speaks about the Minister having that responsibility.

5 COMMISSIONER HICKINBOTTOM: Yes, but he may give the
6 Authority general directions as to the performance of its
7 powers. Well, as Mr Rawat said, we're really concerned with,
8 not the powers, but the functions of the Authority as given to
9 the Authority by the Legislature, and that includes, for
10 example, the functions of the Authority shall be to provide all
11 port and harbour services and facilities in the Territory, so
12 that's a function, and he can't interfere with that.

13 The power, which perhaps is particularly or one of the
14 powers which is particularly relevant is the power at 5(h),
15 that's to enter into any agreement with any person for the
16 construction, other things as well, but the construction of any
17 property, real or personal, but that is, in the opinion of the
18 Authority, is necessary or desirable for the purpose of
19 discharging any of its functions, so even that power is
20 constrained or defined by in the opinion of the Authority, so
21 that's not something which the--it seems to me, the Minister
22 couldn't arguably override by section 19 because he can't
23 override--he can't tell the Authority what its opinion is.

24 This part of the functioning of the Authority seems to
25 me to be inherently embedded in the Port Authority Board.

1 MR FRASER: And while we agree that that is so, the
2 Ports Authority Board has that inherent authority. It doesn't
3 give the fact, again, back to section 19 about the general scope
4 and the general directions, as it says, as to the performance of
5 its powers under this Act. And especially where it talks about,
6 which appear to him to affect the public interest, and the
7 authority shall give effect to such directions.

8 So, again, having the overarching authority to give
9 these general directions, we're not expecting the Minister to go
10 and direct or instruct the Board or the Authority to sign
11 particular agreement or resolution and so forth, but we expect
12 him to at least give that the overarching direction, which I
13 think he clearly pointed out today as to where the Government of
14 the day would have wanted to take a particular--

15 COMMISSIONER HICKINBOTTOM: The policy direction,
16 that's clearly a matter for Government, but it's whether
17 implementation of that policy by going out, as Honourable Mark
18 Vanterpool said he did, and identify the contractors, without
19 any proper procurement process, to negotiate with them as to
20 precisely what's required, and then to present the Board with a
21 proposal, and eventually to require the Board to sign Heads of
22 Agreement.

23 Do you say that all of those fall under section 19?

24 MR FRASER: I would say that it is unfortunate, and we
25 did request from yourselves--or we did request to Cabinet to

1 have a copy of maybe Minutes, Decisions, notes.

2 COMMISSIONER HICKINBOTTOM: And we and you will have
3 those this week.

4 MR FRASER: Thank you.

5 And I did read an e-mail that came in early this
6 morning that said that they will be placed in the Dropbox.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 MR FRASER: One of the things coming out of the
9 meeting this morning is, and which I will let you know that we
10 probably would seek to pursue, are the Minutes from the Ports
11 Authority Board. Those Minutes during the period November 2011
12 up to maybe the entire 2012. I think that would add additional
13 information and give additional evidence as to exactly what
14 transpired in that process. We do have not that evidence before
15 us.

16 COMMISSIONER HICKINBOTTOM: No, what we've got is
17 we've got the PAC Report, which did have that evidence, and also
18 took evidence from the individuals involved, and they said, I
19 think to a man and a woman, that they were cut out of the
20 process.

21 MR FRASER: Commissioner, you said you had two types
22 of evidence, one from the Reports and one from the--

23 COMMISSIONER HICKINBOTTOM: The PAC Report, and the
24 evidence given to the PAC.

25 MR FRASER: Right. And that's fine.

1 But I think it's very important that we see the actual
2 Minutes of the Board itself.

3 COMMISSIONER HICKINBOTTOM: And I don't think we've
4 got those.

5 MR RAWAT: We don't, Commissioner, but may--I'm sorry
6 to intervene, but can I just respond on that whilst I still have
7 it?

8 COMMISSIONER HICKINBOTTOM: Yes.

9 MR RAWAT: What we have is the two Reports issued by
10 the Public Accounts Committee, including their final one, and to
11 both are--there are Minutes of what's described as meetings but
12 it's actually appearances of witnesses before the Committee,
13 which include a significance number of former and current
14 Members of the Board that Mr Skelton-Cline appeared, as did the
15 former Managing Director of the Port Authority, a former and
16 current Chairman, and members of the Ports Authority.

17 And so, when one looks at the evidence, you have
18 directly from those involved evidence that covers the entire
19 period of the Ports Authority Project. But in my submission,
20 what that adds in terms of detail and which may perhaps may not
21 be found in a Minute or a signed resolution, was the
22 circumstances in which people say they came to sign. And what
23 the evidence brings up--brings up is firstly that from different
24 Members that they were not involved in the decision-making
25 process. They were simply used to ratify decisions because they

1 had to do that because, in effect, they were signing the checks.

2 Secondly, that there are at least two instances--I
3 think the evidence of Mr Adams and possibly the evidence of
4 Mr O'Neal, where they speak of having to go along with the plan
5 because it was Government's plan. And that's what founds the
6 basis for the conclusion that is set out in the Auditor
7 General's Report but also by the Public Accounts Committee that
8 the Ports Authority Board were essentially sidelined. Matters
9 only came to them when there was a time to effectively sign on
10 the dotted line.

11 And I think the issue or one of the issues for you,
12 Commissioner, is, well, how did we get to that point? And a
13 Minute of a meeting or a resolution that is signed may not
14 necessarily illuminate it.

15 COMMISSIONER HICKINBOTTOM: There is some force in
16 that, I think. And also, the submission that we go and look at
17 the Port Authority Board Minutes, as it were, cuts against the
18 evidence of Honourable Vanterpool in this way. All of these
19 things--all of these things--he thought he had power to do under
20 section 19 so that if the Board were not cut out, it wasn't
21 because of the Minister's belief in his own powers. It would
22 have been entirely gratuitous. He thought he had the power to
23 cut the Board out of all of these things because he thought he
24 could use section 19 to give them directions as to all of these
25 functions.

1 MR FRASER: I'm not sure if that's what I gathered
2 from the Minister this morning in terms of he has the power to
3 cut them out, but to give the general directions as stated, but
4 the statement earlier about the--or just acting basically "as a
5 rubber-stamp" for the Minister, I find that I, myself, have sat
6 on Boards before and I don't ever recall a Minister, and that
7 was under--it doesn't matter really which Government--for a
8 Minister to just give an instruction to the Board and then the
9 Board would just go and carry out that, for example, as we were
10 mentioning here about signing the Agreements. Of course, this
11 is something that a Board would have to look over and consider
12 and decide whether this is, in fact, something that we ought to
13 sign.

14 COMMISSIONER HICKINBOTTOM: Because otherwise it would
15 be improper and unlawful because they're an independent body.

16 MR FRASER: Exactly.

17 COMMISSIONER HICKINBOTTOM: The Minister--The
18 Honourable Mark Vanterpool in his written evidence, said, we,
19 that is he and Mr Skelton-Cline, immediately began to gather
20 information and invite proposals for a suitable period for the
21 landside development. However, his intention was to develop the
22 scope of the Project, receive proposals, establish a Heads of
23 Understanding, and then present the Project as proposed to the
24 Port Authority and the public for consultations and suggestions.

25 MR FRASER: So, there is a time period there, I think,

1 in the beginning where the Minister mentioned of the--basically
2 gathering the thoughts of the Ministry and going forward,
3 looking at the general--he mentioned the--not Constitution but
4 the mandate basically of the Party at the time what was going to
5 happen, so I think the details as to when the general direction
6 was formally made to the authority may be worth looking at, but
7 I think generally the Minister, in his quest to steer the Board
8 in one direction or not is something that was done formally in
9 writing, maybe not in the time frame that needs to be, but I
10 think generally the Minister did, through the Minutes, as he
11 mentioned, the discussions with the relevant personnel did
12 comply with the Act in terms of his general directions.

13 COMMISSIONER HICKINBOTTOM: But the policy he was
14 pursuing was the policy to have a bigger pier with landside
15 development. That was a policy. That was the policy in the
16 manifesto, and the policy he pursued. But the implementation of
17 the policy, which on the face of it under the Act, is a matter
18 for the Ports Authority, was something that he took over, didn't
19 he? Because from the passage I read out, it was his--his
20 intention to get to a Heads of Understanding on a project with
21 some detailed proposals that could then be put to the public for
22 consultation. Isn't that--isn't that the job of the Ports
23 Authority?

24 MR FRASER: Could you just refer me to the criticism?

25 COMMISSIONER HICKINBOTTOM: Top of page 3 of The

1 Honourable Mark Vanterpool's response that I was referring to.
2 But it was reflected in his evidence today, he wanted to get a
3 complete proposal, done and dusted, with a particular
4 contractor, and put it in front of the public for some form of
5 consultation.

6 Well, isn't that the Port Authority's function under
7 the Act?

8 MR FRASER: I honestly think that gathering the
9 information, as it states, to look at the scope of the Project,
10 changing the scope of the project--I mean, that, I think, is
11 paramount that the Project went from a small project, let's say,
12 to a much bigger project. That is definitely not something that
13 the Authority itself would do that. It's something that's the
14 general direction that the Minister would have.

15 COMMISSIONER HICKINBOTTOM: That may be right, but you
16 have to read the words in between, and that is invite proposals
17 for suitable period of expansion and the landside development,
18 receive proposals, establish a Heads of Understanding with a
19 particular contractor, then present the Project as proposed to
20 the Ports Authority and the public for consultation and
21 suggestion.

22 Looking at that as a whole, the question is: Is that
23 under the Act, not clearly a matter of the Ports Authority?
24 Because it strikes me that given the Ports Authority is an
25 autonomous body, what was it there to do in respect of this

1 development?

2 MR FRASER: To take a project like this forward, I
3 think, receiving proposals which talk about the scope of the
4 Project, receiving the proposals, establishing a Heads of
5 Understanding, which I know later on the Premier at that time
6 and the Minister had signed, that that again establishing it,
7 that Heads of Understanding could have been signed even by the
8 Ports Authority itself, but I think what is said here is it's
9 clear that he--his intention was to develop the scope, receive
10 proposals, establish the Heads of Understanding, I think, again,
11 that's not taking us--that is not taking us to any particular
12 minute, as I might say, manipulating the Project or general
13 interfering in the Board's matter. These again are general
14 stuff that must be done. The proposals must be received before,
15 you know, anything else could be done, the Heads of
16 Understanding could be signed, there must be review of the scope
17 of the Project.

18 I honestly can't see any micromanagement in this here
19 but rather general policy directions given. That needs to be
20 done prior to establishing this Project.

21 COMMISSIONER HICKINBOTTOM: Thank you, Mr Fraser.

22 Anything else on that?

23 MR FRASER: No.

24 COMMISSIONER HICKINBOTTOM: Thank you very much.

25 Mr Rawat, anything else?

1 MR RAWAT: Nothing to add from me, Commissioner.

2 COMMISSIONER HICKINBOTTOM: I will obviously have to
3 consider those.

4 And the question is not really so much is the
5 construction that Honourable Mark Vanterpool took of the
6 provisions in the Act without taking any legal advice, not
7 whether they're definitely correct but whether they, frankly,
8 could possibly be correct, given the scheme of the Ports
9 Authority Act. But I will certainly take those submissions as
10 helpful submissions into account. Thank you very much,
11 Mr Fraser.

12 MR FRASER: Thank you.

13 COMMISSIONER HICKINBOTTOM: Anything else, Mr Rawat?

14 MR RAWAT: No. Our next witness is due at 2:00.

15 COMMISSIONER HICKINBOTTOM: Good. Thank you very
16 much.

17 (Recess.)

18 Session 2

19 COMMISSIONER HICKINBOTTOM: Mr Rawat, I think we're
20 ready to carry on.

21 MR RAWAT: Commissioner, I will start again.

22 Our next witness and our witness this afternoon is
23 Dr Daniel Orlando Smith.

24 Before I commence questions for Dr Smith, can I just
25 introduce the representation that we have this afternoon on

1 behalf of the Attorney General and the elected Ministers, the
2 Solicitor General attending remotely, that's Ms Jo-Ann
3 Williams-Roberts, and then Mr Richard Rowe attends on behalf of
4 a number of Members of the House of Assembly, and that is again
5 remotely.

6 Dr Smith has legal representation, and that is
7 Mr Dennis QC of O'Neal and Webster.

8 Unfortunately, Mr Dennis who is attending remotely
9 from Jamaica appears to have lost his connection. Hopefully
10 that will be restored. But Dr Smith has indicated that he's
11 content to continue in the absence of his legal representative.

12 COMMISSIONER HICKINBOTTOM: If Mr Dennis comes back to
13 us shortly.

14 THE WITNESS: I hope so. Thank you, sir.

15 BY MR RAWAT:

16 Q. Dr Smith, can I begin by thanking you for returning to
17 give further evidence to the Commissioner. You made an
18 affirmation on the 13th of June, which was the first time that
19 you gave oral evidence to the Commission. You're still bound by
20 that affirmation, so there is no need to take it again.

21 A. Okay.

22 Q. There are some bundles to your left, which contain
23 documents relevant to the issues that we will be going through
24 today, so I will take you to them as we need to. You also have
25 some loose-leaf documentation there on which you can--we will,

1 again, need to look at.

2 Could I ask you, please, Dr Smith, if you could just
3 keep your voice up.

4 A. I will.

5 Q. So that we can make sure that your answers are
6 accurately and clearly recorded.

7 A. Can you hear me now?

8 Q. The microphone, unfortunately, doesn't amplify.

9 A. Okay.

10 Q. And so, if perhaps I think probably the tip is to
11 speak even more loudly than usual.

12 The other thing we both need to guard against is
13 speaking across each other. That can happen, and if it does, I
14 will stop and allow you to finish your answer.

15 A. Thank you.

16 Q. You have been asked to return this afternoon just to
17 deal with two matters. First is what we have been discussing or
18 describing as the BVI Airways Project, and the second is the
19 Port Development Project, both of which took place during the
20 time that you were Premier and Minister of Finance.

21 A. Correct.

22 Q. What I will do is, if I may, I will take those each in
23 turn and separately. So, if we could just deal, Dr Smith, with
24 BVI Airways first of all.

25 To give some context to what will follow, on the 10th

1 of September, the Commission sent you a Warning Letter, which is
2 historically described as a "Salmon Letter", and which set out
3 potential criticisms which arise from the evidence obtained by
4 the Commission in relation to the BVI Airways Project. The
5 criticisms or the potential criticisms arise in relation to you
6 as Premier and Minister of Finance.

7 I should explain that they do not constitute either
8 the provisional or concluded views of the Commissioner. The
9 purpose of such a letter is to ensure that you have proper
10 notice of potential criticisms so that you can respond to them.
11 And you have done so. You have provided a written response to
12 the Commissioner, which, if I may so, is particularly helpful
13 because it might be the first written response we've had that
14 uses numbered paragraphs, which always makes it easier to
15 navigate a document.

16 A. All right.

17 Q. You have annexed to that as your Appendix I, the
18 Witness Statement that you made for the purpose of an
19 arbitration in which the Government of the Virgin Islands was
20 involved against various--or the Operator Parties in the BVI
21 Airways Project.

22 Now, if I can explain, Dr Smith, whilst the
23 Commissioner will have read the Witness Statement, it's
24 accompanied by a significant number of exhibits, which have
25 reached the Commission but which we haven't had proper time yet

1 to go through carefully, so it may be, that if there are
2 additional questions the Commissioner wishes to be put to you
3 that we can do that in writing in due course.

4 But can I confirm firstly, if you go to the last page
5 of your written response, please, which is at your paragraph 28,
6 Dr Smith. Can you confirm that on that last page it's dated the
7 24th of September 2021, it carries your signature?

8 A. The signature is--

9 Q. It's sort of the last page before you reach the
10 appendix.

11 A. Yes, it does, yeah.

12 Q. Thank you.

13 And can you also confirm, please, that you are content
14 that your written response together with the exhibits should
15 form part of the evidence before the Commissioner?

16 A. Yes, I am.

17 Q. Thank you.

18 Given the detail that you have provided both in your
19 response and the detail that is contained in the appended
20 Witness Statement, which gives some additional background, what
21 I would like to do this afternoon, Dr Smith, is just to focus on
22 some additional matters.

23 A. Okay.

24 Q. So, I'm not proposing to read out the entire document
25 but I will try and summarise it as we go along. If I could,

1 therefore, turn to paragraph 5, please, of your written
2 response. The first potential criticism that arises, relates to
3 the manner in which the BVI Airways Project was implemented, and
4 what is said is that there was a complete bypassing of the
5 tendering process which meant--which was inconsistent with the
6 principles of good governance and meant that the Project is
7 likely to have achieved best value for money.

8 If I could summarise your response, which is set out
9 at Paragraphs 6 to 9, your position, if I have understood it
10 correctly, Dr Smith, is that this was not a project where the
11 Government of the Virgin Islands--which the Government of the
12 Virgin Islands had to put out to tender because it was neither
13 for purchase of goods nor of services. I hope that I have
14 summarized that fairly, but could you explain what your
15 understanding, please, was of what the arrangement was that the
16 Government of the Virgin Islands was entering into with BVI
17 Airways.

18 A. What we were doing, what the Government of the Virgin
19 Islands was doing is giving a subsidy to an airline to carry
20 passengers to the British Virgin Islands, a subsidy for this
21 process. It is a duty subsidy that most Caribbean countries get
22 into with various airlines. They give a subsidy in order to get
23 the airlines to bring the passengers to their destinations.

24 Q. In this case--and you have in your written response
25 and in the Witness Statement you made--we're drawing a

1 distinction between the 2014 Project and the 2015 Project, the
2 2014 Project being the one that you rejected.

3 A. Correct, yes.

4 Q. Focusing on the 2015 Project, was the Government of
5 the Virgin Islands offering a seat subsidy there?

6 A. What we decided at that time, after reviewing and sort
7 of leaving, setting aside the 2014 Project, we looked at the
8 project, had discussions, and agreed that we would put duty
9 subsidy up front, based on the same calculations, but put it up
10 front. And so whatever it would have been costing us in the
11 region of maybe 15, the subsidy would just cost us around
12 10 million--sorry, where the cost was over \$10 million, if
13 you're doing a seat subsidy, the way we approached it, it would
14 cost us the \$7 million, that was our maximum exposure.

15 Q. I see.

16 So, by rather than having a seat subsidy that
17 persisted during the lifetime of the Project by handing over 7
18 millions at the beginning, the calculation was that the cost at
19 the end would be less to the Government of the Virgin Islands?

20 A. Substantially less, yes.

21 COMMISSIONER HICKINBOTTOM: But it wasn't in the--a
22 subsidy normally is you fly a plane, and we will give you a
23 subsidy of so much per plane or so much per seat or so much for
24 unit of time. But this wasn't a subsidy in that sense, was it?

25 THE WITNESS: It was in a way because it was based on

1 the original estimate from the 2014 Project, which carried a
2 certain percentage per seat, but we decided that that was too
3 high, so we needed to reduce it by giving the subsidy up front.
4 We were able to have the discussion to reduce it to \$7 million.

5 COMMISSIONER HICKINBOTTOM: I understand that the
6 maximum exposure under the Framework Agreement may have been 7
7 million as opposed to 10 million or something.

8 THE WITNESS: That's correct.

9 COMMISSIONER HICKINBOTTOM: Or greater figure--I
10 understand that--but the form of it, on its face, was not a
11 subsidy. It wasn't a gift to run the airline. It was, we will
12 come on to perhaps the precise legal nature of it, but it was an
13 agreement. There were provisions in there whereby you could be
14 paid back the \$7 million.

15 THE WITNESS: The agreement was that we will provide
16 this, I'll call it a subsidy at that point in time, towards
17 getting this service to the British Virgin Islands. There were
18 several discussions in it where if, you know, it were
19 successful, then the Government would paid back some moneys, but
20 the whole idea was to give the subsidy in order to get the
21 flights to the British Virgin Islands.

22 COMMISSIONER HICKINBOTTOM: I understand that that was
23 the intent of the £7 million up front, but the Framework
24 Agreement was an agreement that BVI Airways launch and operate
25 the commercial air service.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: From originally, I this,
3 from the 31st of October 2016. So, I mean, it was more
4 complicated than this, but they would have provided an air
5 service on particular terms, one of which was that the BVI
6 Government paid sums up front.

7 But I just don't see how that equates to a subsidy
8 because there is nothing to subsidise. The contract was to
9 provide an air service. Without the air service, there was
10 nothing to subsidise.

11 THE WITNESS: Yes, but this was in anticipation of a
12 service. If we had gone into the 2014 arrangement, for example,
13 where we had made an arrangement to subsidise on a seat basis
14 before the airline started, we would have been in the same
15 position before it started. Here, we made a decision to provide
16 a subsidy up front for the programme before it started.

17 COMMISSIONER HICKINBOTTOM: Yes, but the form of the
18 agreement was not, "Here is \$7 million, put that towards running
19 an airline." It was a more complicated agreement than that. I
20 mean, for example, although this didn't form part of the
21 Framework Agreement, we may come on to it, it was an earlier
22 provision which was not included in the agreement, for both
23 Parties to provide some of the capital needed to start the
24 airline.

25 THE WITNESS: There was in the discussion before,

1 there was an assurance that one of the persons who were involved
2 in the BVI Airlines would put up to \$6 million towards the
3 Project; right? But our understanding is that we are going to
4 provide \$7 million, and they're going to provide a service that
5 \$7 million would be our subsidy towards them. And they would
6 have to provide the service at whatever cost it was to them.

7 COMMISSIONER HICKINBOTTOM: Good point. So, this
8 \$7 million was towards provision of a service of an airline?

9 THE WITNESS: Towards the provision of a service,
10 yeah.

11 COMMISSIONER HICKINBOTTOM: Okay. Thank you very
12 much.

13 BY MR RAWAT:

14 Q. Did you take legal advice at the time, Dr Smith, as to
15 whether the Government was required to put the matter out to
16 tender?

17 A. At this point in time, we discussed that, the
18 Financial Secretary and myself, we saw it as a subsidy and did
19 not fall under the--it did not fall under the Guidelines for
20 being put out to bid; that is, the Protocols or even the
21 Financial Regulations, and I have spoken about that in this
22 paragraph as well.

23 Q. So, that was a view that you and the Financial
24 Secretary came to?

25 A. Yes, we agreed on that, um-hmm.

1 Q. Thank you.

2 The other point we need to make before we move on to
3 the next potential criticism is that you make the point
4 that--and this is at your paragraph 9, Dr Smith--it was in the
5 public interest to proceed with the Project as quickly as
6 possible in order to alleviate the difficulty and cost of travel
7 to the BVI and to make the destination more competitive.

8 Now, as I understand it, you had an affiliate of
9 American Airlines, which is American Eagle, flying in, but that
10 service then stopped in 2013.

11 A. I don't remember the exact date, but it stopped.

12 We can go back before that.

13 Q. We don't need to go back in detail.

14 A. Okay.

15 Q. But I can perhaps flag it up for the Commissioner's
16 note because it's at paragraphs 8 and 9 of your Witness
17 Statement which is at page 3 of that, but you say there that,
18 since at least 2011, the Government had identified that the
19 direct air service between the BVI and the United States would
20 greatly improve the prosperity of the BVI.

21 A. Again, as you know, sir, the economy of the British
22 Virgin Islands depends on two things: Financial Services and
23 tourism. Tourism is a major part of the economy and was long
24 before Financial Services. And that is where a lot of people
25 are employed to the point of owning properties and the working

1 in properties. And so, it was important for us to maintain
2 that. If we could not get direct service into the BVI, we would
3 never be able to grow that service efficiently. And this is why
4 we are so eager, so to speak, to get this service, both from the
5 tourism point of view and also from the Financial Services point
6 of view, because when this facility was built, it was expected
7 that there would be people coming from various countries for
8 arbitration here, and having this (unclear) service, the country
9 would greatly--what I'm getting at to be able to do their
10 business and get back to their homes.

11 COMMISSIONER HICKINBOTTOM: We've heard evidence,
12 Dr Smith, that the plan was to extend the runway at the airport
13 to enable direct flights to come in from places further away
14 than Miami because The Outer Banks could be bigger. That was
15 the plan. And this Project was intended to be a temporary
16 measure--I think three and five years have been
17 mentioned--whereby flights would come in regularly from the
18 Miami hub, which would mitigate the lack of direct flights from
19 elsewhere.

20 THE WITNESS: That's correct.

21 COMMISSIONER HICKINBOTTOM: Over a relatively short
22 period of time, but three, four, five years. That was the plan.

23 THE WITNESS: Yeah, because we saw it as necessary and
24 urgent to continue to grow the economy.

25 COMMISSIONER HICKINBOTTOM: Yes.

1 THE WITNESS: Because as I explained, tourism is the
2 basis of the economy of the BVI.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 BY MR RAWAT:

5 Q. If we move on, I'm at paragraph 10 in your written
6 response, please, Dr Smith. The second criticism that's raised
7 is that there was no invitation for competitive submissions nor
8 any examination of alternative solutions such as improving the
9 ferry service, and your response can be broken down into two:
10 First, you acknowledged that yes, there was no invitation for
11 competitive submissions. But you point to the fact that Cabinet
12 considered that the proposal--and that's of the air link from
13 BVI to Miami--was the best solution to the immediate problem,
14 and you discussed some of that detail with the Commissioner just
15 now.

16 You then go on to say that there was--other proposals
17 had been considered, firstly, the possibility of a direct flight
18 to BVI and then to Dominica, and then from Dominica back to BVI
19 and onwards to Miami.

20 When was that being considered?

21 A. That was--would have been perhaps a year or two
22 years--two years before. We looked at that, but we did not,
23 when we examined it, we did not think that the owners of the
24 service had the necessary capital backing to be able to do that.

25 Q. So, that must have been very shortly after you

1 returned to office in 2011?

2 A. I can't give you the exact time, but after that, yes.

3 Q. And by that time was American Eagle still flying into
4 BVI, or had it stopped?

5 A. I cannot remember the exact time when American Eagle
6 stopped flying. But when it stopped flying it was, you know,
7 increased the problem that we were having and getting the people
8 or passengers to the BVI.

9 And despite the fact that we did have ferry operations
10 going on between St Thomas and Tortola, we had many discussions
11 with the ferry operators to improve the service. We had many
12 discussions with the U.S. Authorities about improving the
13 service. But in the end it was not sufficient.

14 And we must remember also that St Thomas is also a
15 tourism destination, and we are in a way competing
16 jurisdictions.

17 COMMISSIONER HICKINBOTTOM: We've heard evidence,
18 Dr Smith, that--I mean, some research was done, and it was
19 really just a customer's choice as to what people coming here on
20 vacation would prefer, and I think the fact that by going
21 through USVI and getting onto a boat was not something which was
22 attractive to tourists.

23 THE WITNESS: Exactly. A few people were like that,
24 were adventurous, but--

25 COMMISSIONER HICKINBOTTOM: Yes.

1 THE WITNESS: --the majority of--

2 COMMISSIONER HICKINBOTTOM: --the majority of them
3 just wanted to get here--

4 THE WITNESS: Yes.

5 COMMISSIONER HICKINBOTTOM: --by some expedient means.
6 Yes.

7 BY MR RAWAT:

8 Q. What you also say, Dr Smith, is that there were talks
9 with American Airlines and Jet Blue who gave an indication of
10 interest, because that was dependent upon the runway being
11 expanded.

12 A. Exactly.

13 At that time, the planes which they now have American
14 Airlines, which can go to small airline. They did not have
15 those planes at that time. And so, that is why we could not
16 work with them until after we've had the airport expanded.

17 Q. But these discussions with American Airlines, Jet
18 Blue, the investigations as to the ferry option, did that
19 all--was that all going on before you settled on the BVI Airways
20 link?

21 A. Yes.

22 Q. If I take you to the third criticism which has two
23 elements to it, the first is that the Operator Parties failed to
24 learn from, and appeared entirely to ignore the experience of a
25 previous attempt to launch an air service between Miami and the

1 BVI, which was British Caribbean Airways in 1986. And the
2 second is that the Operator Parties--and that's those who were
3 behind BVI Airways--had little to no experience in establishing
4 or operating an air link because their backgrounds were in
5 lobbying, law, investment, real estate, and banking, and we say
6 that proper inquiries were not made into their experience and/or
7 that inexperience was not taken into account and decisions made
8 to proceed with the Project with them.

9 Now, in relation to British Caribbean Airways, we
10 heard evidence from the former Financial Secretary Neil Smith on
11 Friday about that, and your position, like his, is that the two
12 ventures are not comparable at all?

13 A. Not at all.

14 Q. Because there were specific reasons that British
15 Caribbean failed?

16 A. There were specific reasons which were not represented
17 in the Chief Auditor's Report.

18 Q. And those, as I understand it from the Financial
19 Secretary, was that the arrival of American Airlines on the
20 scene, and secondly, certain controversy surrounding British
21 Caribbean Airways in any event?

22 A. Certain controversies, yes. I don't think we need to
23 go into that.

24 Q. No, but Neil Smith set it out in his written response,
25 so the Commissioner has the detail.

1 COMMISSIONER HICKINBOTTOM: Yes.

2 BY MR RAWAT:

3 Q. But obviously the arrival of an American Airlines
4 flying directly in would also have put pressure on their
5 business?

6 A. Yeah.

7 I cannot recall the exact timing between American
8 Airlines and it was American Eagle coming from Puerto Rico, but
9 it was not--American Eagle is coming in and to have that other
10 plane coming in would have been useful because it would also
11 come in from Turks and Caicos and possibly expand it, but I
12 think mainly because of the other reason.

13 Q. I see.

14 But--it would appear that from the perspective of the
15 Government, Caribbean Airways, and what happened to Caribbean,
16 but that just simply wasn't relevant, in your view?

17 A. Please repeat?

18 Q. Was it your view that what happened to Caribbean
19 Airways was not relevant to any decision you took in relation to
20 BVI Airways?

21 A. Well, there was no indication that we could have from
22 the experience of Caribbean Airways that would inform us of how
23 to go forward.

24 Q. In relation to the second element of this potential
25 criticism, you make the point that you don't agree that the

1 Operator Parties lacked operational experience and that,
2 therefore, there was too high a risk to take in granting them
3 the requisite licenses, and you said that that's a comment made
4 by Mr Geluk, who has also given evidence to the Commissioner.
5 You say to the best of the Government's knowledge, the parties
6 were respected and successful businessmen, one had significant
7 aircraft experience, and you then point to the success, both in
8 the BVI, and you give the example of the now defunct Air BVI,
9 but also elsewhere in the Caribbean of successful airlines being
10 run by and owned by businessmen who don't have operational
11 experience?

12 A. That is correct, but I also made a point that
13 withdrawing British--BVI Airways, they'd have the experience.
14 There is one, Mr Willoughby, was an pilot, in the Air Force, he
15 was into commercial business.

16 And then the other two gentlemen were serious business
17 people who had successful or unsuccessful businesses in America.

18 So, combined with that his experience as a pilot,
19 their experience in business, they could easily hire the other
20 resources that they needed to be able to make the flights
21 successful.

22 Q. In terms of due diligence, was anybody in Government
23 tasked with doing due diligence on these individuals?

24 A. The Ministry of Finance, under the Financial
25 Secretary, they do the DG, and he gave evidence of that, as far

1 as I know.

2 Q. But you're Premier and Minister of Finance, I mean, is
3 that something that you get involved in at all?

4 A. No, the Ministry does it, the Financial Secretary is
5 my chief advisor on financially matters, and he would oversee
6 these matters.

7 Q. Now, obviously Lester Hyman is in a slightly different
8 position from the other three, but prior to the approach, the
9 first approach in relation to the BVI Airways Project, had you,
10 yourself, encountered Mr Bradley, Mr Willoughby, and Mr Weisman?

11 A. No.

12 Q. In terms of your conclusion that these three gentlemen
13 were successful businessmen who were well-respected, did
14 Mr Hyman's views influence you in any way?

15 A. Mr. Hyman was an Attorney with a major law firm in the
16 United States, who worked for us for over 30 years. He had an
17 engagement representing us in America in the various matters for
18 over 30 years.

19 He also--and for the time that he worked with us, we
20 were always satisfied with the service that he provided. He was
21 also very known in the United States. He worked at the firm
22 Swidler and Berlin, and he worked with several government
23 departments and agencies in the United States. For example,
24 attorney with the Securities and Exchange Commission, consulting
25 with the Federal agency, so he had vast experience. And because

1 of that, because of his experience with us, the 30 years that he
2 worked with us, he was a trusted person as far as we were
3 concerned.

4 Q. So, did he vouch for Mr Bradley, Mr Willoughby and
5 Mr Weisman to you?

6 A. Yes.

7 Q. We then move on in our fourth potential criticism, to
8 the joint engagement of technical experts, and what's said is
9 that agreeing to a joint engagement of technical experts to
10 examine feasibility of the Project instead of separately
11 commissioning a full study to examine the possible option to
12 address the airlift issues.

13 Now, the Feasibility Study that's being referred to is
14 the Sixel Study, which was done in July of 2014. So, the
15 essence of the potential criticism, Dr Smith, is, the decision
16 of to rather than have your own study, to essentially use an
17 expert proposed--or and independent body proposed by the
18 Operator Parties because that is what happened, isn't it? Did
19 they put Sixel forward to the Government?

20 A. They did.

21 Q. And how was the Feasibility Study paid for?

22 A. As I remember we were supposed to split the cost, but
23 I'm not sure exactly what happened in the end, how it happened.
24 I think you have to ask the Financial Secretary about that.

25 Q. Yes.

1 A. All right, he would have known the answer.

2 So, indeed, in the sense where if I'm going to start a
3 business, I should do--have to do a Feasibility Study to see if
4 it would work. And to these jobs were--we said to them we need
5 to see some study that say that this would work, would be
6 efficient, and the service you provided would work, and so we
7 agreed that there would be a Feasibility Study.

8 The other reason at that time, first to not expect
9 them to provide a study that would be efficient and tell us what
10 we need to know.

11 And as far as we understood that service, the study
12 showed that the service would be unsatisfactory, and this is
13 from the 2014 Report when it was reported, when my team at that
14 point looked at it--this was before--this was a team headed by
15 my Secretary at the Premier's Office, Mr Penn, they looked at
16 it, and they were satisfied about the study, but they were not
17 satisfied about their costs, and so that's why we ended up not
18 going with that project. And hence the review.

19 Q. And the point that you make in response to it is that
20 the potential criticism proceeds on a complete misunderstanding
21 because the Feasibility Study was done not for the 2015 Project,
22 which was what, went forward--

23 A. That's correct.

24 Q. --but for a 2014 Project.

25 A. Um-hmm.

1 Q. But that still leaves the question which is: Why go
2 for a joint report rather than your own report to look at the
3 feasibility of the Project?

4 A. They were preparing the service and we were looking
5 there and getting subsidises and everything to get the service.
6 If a reputable company was suggested, which it was, we saw no
7 reason why we should not engage them, and then each have their
8 comments on the study and agreed to it.

9 Q. I see. If we look at your paragraph 40 of your
10 Witness Statement to the Arbitration, that's got a page number,
11 and it's page number 15.

12 A. Yes.

13 Q. You explain there--and I just want to ask a little bit
14 about how the Sixel study was produced or what the Government
15 saw.

16 I think you set out at paragraph 40 that the Operator
17 Parties have identified Sixel as a Consulting Group is the
18 organisation to use. And they were supposed to provide an
19 independent analysis, which came to the Government in July 2014.

20 A. Yes.

21 Q. You say at 41 that the final draft of the Feasibility
22 Study was provided in September 2014.

23 Just so we're clear, were--in terms of the way Sixel
24 worked, did the Government see drafts on which it could comment
25 before the final version was issued?

1 A. At the moment I can't recall because I would not have
2 seen them myself, but as you read a little while ago, the draft
3 that was sent was reviewed by our team, the BVI team, comments
4 made.

5 Q. But in your Witness Statement to the Arbitration and
6 in the Arbitration itself, the Government's--the BVI's position
7 was that there was, if we put it, they raised a question mark of
8 how that final version was produced, but if we go to
9 paragraph 45 of your Witness Statement, you say there: "As I
10 have explained, my Government colleagues and I had always
11 understood that Sixel's Feasibility Study would be an
12 independent one produced by leading experts in the field. This
13 was of paramount importance to the Government as clearly we
14 would be relying on Sixel's Feasibility Study when deciding
15 whether to proceed with and invest what turned out to be
16 substantial sums in the 2015 Project".

17 So, you seem to be saying there that, actually,
18 Sixel--the Sixel study was still relevant to the decisions to
19 participate in the 2015 Project, even though you say in the
20 criticism it had been prepared for the 2014 Project.

21 A. This is--this paragraph is after the fact; right? And
22 after we concluded the 2014 Project and after we'd started the
23 2015 Project, this criticism--because up until that point we
24 still were dealing with honourable gentlemen who were working
25 with us, and we worked with them to get the service that we

1 wanted.

2 This was before they came after all that.

3 Q. If you could--I think there is, I hope, the one of the
4 larger lever-arch files there, is the BVI Airways bundle.

5 A. Um-hmm.

6 Q. The two bigger ones. One of those should have "BVI
7 Airways" on it.

8 A. Yeah.

9 Q. If you could turn, please, page 680 in the bundle, or
10 681, please.

11 MR RAWAT: Commissioner, whilst Dr Smith's turning up
12 the page, can I just record that Mr Dennis QC has joined the
13 Hearing. I hope his technical difficulties have been resolved.

14 MR DENNIS: Thank you so much for that information,
15 counsel.

16 BY MR RAWAT:

17 Q. I'm taking you, Dr Smith, to the Arbitration Award,
18 and at these pages, the Arbitrator set out the substantive parts
19 of the Framework Agreement which is what the agreement which
20 governed the 2015 Project.

21 If you look at under the heading "PREAMBLE" and then
22 goes to the third paragraph which reads, "WHEREAS, the MOU,"
23 Memorandum of Understanding, "contemplates that, subject to a
24 satisfactory Feasibility Study, the Government and Castleton
25 would enter into an agreement".

1 And the next paragraph reads: "WHEREAS, the Government
2 has reviewed the results of the Feasibility Study, is in
3 agreement with the conclusions set forth therein and has
4 determined that it is in the best interest of the Virgin Islands
5 to proceed with the Project and grant the right to develop and
6 consummate the Project upon the terms and subject to the
7 conditions herein set forth".

8 Can you help us here, with reference to the
9 Feasibility Study, is that a reference to the Sixel study?

10 A. Exact reference is to Sixel, yes.

11 Q. So, it still seems to be playing a part in the
12 Framework Agreement at least?

13 A. That's because we did not question the results of the
14 Sixel study until after. At this point, even though when we had
15 it done in 2014, we considered that the Project would have been
16 too expensive, based on all that. It still was relevant because
17 we bargained, so to speak, with them to reduce the cost of the
18 service to it.

19 COMMISSIONER HICKINBOTTOM: Yes.

20 THE WITNESS: But it's still relevant in that it would
21 have been satisfying where the service would work.

22 BY MR RAWAT:

23 Q. If we take that through to the fifth criticism, which
24 is paragraph 14 in the Warning Letter, Dr Smith.

25 A. Paragraph what, please?

1 Q. Paragraph 14, Dr Smith.

2 A. 14.

3 Q. That is failing to adopt the BDO advice, which called
4 for a more balanced financial arrangement. None of the
5 recommendations made in the BDO Report was adopted at all, and
6 you again point in response to BDO's Report was on the 2014
7 Project rather than the 2015 Project, which was the Project you
8 actually went forward with.

9 You say that you did--the Government did adopt aspects
10 of the advice from the BDO Report for purposes of the 2015
11 Project such as limiting the exposure of government for the new
12 project.

13 In terms of--can you, doing your best to assist the
14 Commissioner, it's right, isn't it, that the BDO Report was much
15 more pessimistic about the prospects than the Sixel had been?

16 A. They were more pessimistic than the 2014 Project, yes.

17 Q. Yes.

18 A. And this is why we shut the Project. But we thought
19 it was still pertinent with reviewing some of the conditions and
20 recommendations of the BDO's advice, is what we did. One of
21 them was to reduce the overall cost, and there are other
22 recommendations which are--which were implemented with the
23 Financial Secretary which I probably told you about.

24 Q. Now, where you say it reduced your exposures, under
25 the 2014 Agreement, you would have been giving 10 million?

1 A. That's correct, yeah.

2 Q. Whereas the threshold that the Government set itself
3 was 7 million?

4 A. 7 million, that's correct.

5 Q. But one of the points, as we understand it, that the
6 BDO Report made was that Government was required to bear the
7 costs, all the costs, and the risks whereas the Operator Parties
8 were guaranteed the returns, and the advice from BDO was that
9 the financial terms needed to be renegotiated more appropriately
10 proportion-risk and reward. In what way was that taken on
11 board?

12 A. I can tell you, the one way I know for sure is the we
13 reduced the overall cost for Government--

14 COMMISSIONER HICKINBOTTOM: I'm sorry, Dr Smith,
15 because I think I interrupted.

16 THE WITNESS: Okay.

17 COMMISSIONER HICKINBOTTOM: Carry on.

18 THE WITNESS: The first thing is that we reduce the
19 overall cost exposure to Government, reduce that to \$7 million.
20 The other aspects of that Report that were reviewed, but I would
21 not remember the detail of that because I was not involved in
22 those discussions.

23 COMMISSIONER HICKINBOTTOM: But that doesn't respond
24 to the point made by Mr Rawat. Mr Rawat's point was that--I
25 mean, the BDO did--the BDO Report did say these costs are high

1 and you reduced them--

2 THE WITNESS: Yes.

3 COMMISSIONER HICKINBOTTOM: --in 2015, but they made,
4 as I understand it, a discrete point, that all of the commercial
5 risk, whether it was 10 million or as it was 7 million, rested
6 upon the BVI Government, and none of the commercial risk lay on
7 the operators.

8 THE WITNESS: I understand that, but what we were
9 negotiating for was a service to the BVI and given a subsidy for
10 that service. As the negotiator to discuss it, that subsidy was
11 \$7 million. It did not--it was not an attempt to get money back
12 from the flight. We didn't--we did not own any part of BVI
13 Airways. We were just receiving a service from them.

14 We thought this service was important for the BVI's
15 economy, as I mentioned earlier. Tourism is a main factor or
16 driver to our economy, and we saw the need to do something to
17 support that.

18 COMMISSIONER HICKINBOTTOM: I understand that, but all
19 the commercial risks lay upon BVIG, not the operators, and
20 normally the commercial risk would be more evenly spread than
21 that because by spreading the commercial risks, the chances are
22 that the Project--the chances of the Project not being
23 successful are increased.

24 THE WITNESS: I understand that, but this is why we
25 set our maximum, and this is why we eventually went ahead with

1 the Project because they indicated we expected them too, because
2 if they are providing the service, they should provide the
3 service at whatever cost the service is, once we agree on a
4 price. But that was reinforced by the message that the
5 principals would inject at least \$6 million, so that reinforced
6 it.

7 But it did not, in our minds, remove the
8 responsibility of the Operator Parties to provide the service at
9 whatever the costs were because that was what we agreed to.

10 COMMISSIONER HICKINBOTTOM: In terms of the \$6 million
11 that the operators might have put in, there was no obligation
12 for them to put that in, so that \$6 million was not a commercial
13 risk to them. The commercial risk was in respect of your \$7
14 million because if, at the end of the preparation period,
15 everything just stopped, you would be \$7 million down, and they
16 wouldn't be anything down.

17 THE WITNESS: We understood that, but as far as we
18 were concerned, there was an arrangement for them to adjust the
19 flights that would bring us visitors to the BVI, and we would
20 subsidise it--right?--and so we expected them to do that.

21 And it's not--there was nothing at all say we are
22 going to put in 2 million or 6 million. They were going to
23 produce the service at whatever the cost of that service was.

24 COMMISSIONER HICKINBOTTOM: Yes, thank you.

25 BY MR RAWAT:

1 Q. So, the understanding of the Government, by the time
2 that the Framework Agreement was signed, was that you would
3 give--give \$7 million maximum, and they would then--and in
4 return for the \$7 million they would provide a service which
5 would be a direct flight from Miami into the BVI--

6 A. That's correct.

7 Q. --in tourists.

8 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
9 Mr Rawat.

10 I think to be accurate at the time of the Framework
11 Agreement--I mean, correct me if I'm wrong--the agreement was
12 \$5 million because after \$5 million there were going to be
13 planes in the air, another \$2 million to come. But \$2 million
14 under the Framework Agreement, as it originally was, that was to
15 be paid after the flights had started?

16 THE WITNESS: That is correct, yes.

17 BY MR RAWAT:

18 Q. If it turned out that the cost of that service overall
19 was, for the sake of argument, 9 million, it would be down to
20 the Operator Parties to find the additional funds.

21 A. That is correct, yes.

22 Q. Because, from the BVI Government's perspective, the
23 Operator Parties were going to get a fixed sum, and they had
24 contracted to provide a service in response--in return for that
25 fixed sum?

1 A. That's correct.

2 Q. You indicated, Dr Smith, that there was no expectation
3 that you would get the money back, but the expectation was that
4 there would be benefits in other ways.

5 A. That is correct.

6 Q. To the twin pillars of the BVI economy?

7 A. Correct.

8 Q. I think this was obviously envisaged as a short-term
9 measure whilst the runway was extended at the airport, but were
10 there any studies done to show what the economic benefit of the
11 short-term measure would be?

12 A. I don't recall any studies, but I--and I won't be able
13 to put my hands on studies of tourist arrivals because we had
14 that study done by the Tourist Board, but I can find--I can
15 request something like that to show what the tourism figures
16 were, are they increasing or decreasing, how they compared to
17 other countries directly from the United States.

18 Q. But you don't remember the Government commissioning a
19 study to say, "Okay, if BVI Airways institutes a flight--fly a
20 certain number of times into BVI a week, what would the benefit
21 be in terms of numbers of additional tourists and their economic
22 benefit and also in terms of the Financial Services sector?"

23 A. I don't recall a study like that, but we knew, based
24 on the arrival of passengers to BVI also the passengers to other
25 destinations with the airlift that there would be a difference.

1 We looked at St Thomas, for example; right?

2 And so, it was important for us to, you know, continue
3 to build the tourism sector. We had a population that was
4 going. We had challenges in our Financial Services sector, and
5 so we--it was--it was important to build up the tourist sector.

6 Q. Can I move on, then, Dr Smith, to the sixth--I think
7 it's the fifth--the sixth criticism, I think, which was the
8 position of Mr Hyman, and if I read it, it says: "Lester Hyman
9 was listed as a representative on the BVI Government's team in
10 the draft report for a meeting on 26 August 2015 in which the
11 parties solidified the terms for moving the Project forward.
12 This is in spite of his apparent alignment with the Operator
13 Parties. The Auditor General noted that in assuming dual rules
14 in the BVI Airways venture, Mr Hyman operated in conflicts of
15 interest as his obligations to the BVI Government appeared to be
16 superseded by his personal interest in the project. If the dual
17 role of Mr Hyman was not known, then it was suggests that proper
18 due diligence was not done".

19 You set out, and you've done it also in your Witness
20 Statement and earlier in your evidence, but that Mr Hyman had a
21 long-standing relationship dating back to 1987 with the BVI
22 Government.

23 A. Right.

24 Q. He had retired from a renowned US law firm of Swidler
25 and Berlin, Swidler spelled S-W-I-D-L-E-R, and Berlin. His

1 career had involved also working for various US agencies. And
2 that he had, in the BVI itself, been involved with the
3 community, for example, as a funding member of the Board of HL
4 Stoutt Community College.

5 You say that against that background there was no
6 reason to carry out additional due diligence on Mr Hyman in 2015
7 because it would have been inconceivable, given his background
8 and experience in his position, that you would not need to be
9 aware if there was a conflict of interest or a potential for
10 such conflict and therefore the need to act to avoid it.

11 You say at 16 that there was nothing in the history,
12 and given Mr Hyman's involvement and his involvement in the
13 Project would have alerted the Government and yourself to the
14 fact that--I will choose my words carefully--that he was--he had
15 interests in both camps. You say you directed the Commissioner
16 to your Witness Statement where you have given further details.

17 But does it come to this, Dr Smith, that you only knew
18 of the roles that Mr Hyman was playing once the Project had
19 collapsed?

20 A. That is true.

21 Q. And I think it's right, isn't it, that he was involved
22 in negotiating the Framework Agreement?

23 A. He was, yes.

24 Q. And when that was being negotiated--and as we
25 understand it from Mr Smith, the BVI negotiating team was

1 himself, Clive Smith, and Russell Harrigan?

2 A. That is correct, yes.

3 Q. But when negotiations were going on, who did you
4 consider Mr Hyman to be representing?

5 A. He was part of our team during that 1during that
6 meeting.

7 Q. Now, once Framework Agreement was in place, one of the
8 elements of it was that the BVI Government could have a
9 Government representative on the BVI Airways Board.

10 A. That's correct, yes.

11 Q. And that was Mr Geluk?

12 A. Mr Geluk, yes.

13 Q. Now, his evidence to the Commissioner was that he went
14 to a board meeting and was introduced to Mr Hyman at that
15 meeting as a Director of BVI Airways. Were you ever made aware
16 of that?

17 A. If that happened, he certainly did not inform me of
18 that, so I wasn't at the--if that was the case, I did not know
19 it.

20 Q. I mean, I think you know whether Mr Geluk, it doesn't
21 appear to be from the information we have, gave evidence in the
22 Arbitration proceedings?

23 A. I know that I hadn't been aware of it then.

24 Q. I don't think he was listed amongst those who provided
25 Witness Statement, so that would suggest that he wasn't that

1 involved with it.

2 A. I can't recall it, actually.

3 Q. Give me a moment, please, Dr Smith.

4 (Pause.)

5 A. Yes. On second thought, he did give evidence.

6 Q. All right. We will follow that up after this hearing.

7 Now, you do say in your Witness Statement that you
8 later learned--or I think at the time you were providing the
9 Witness Statement you learned--and this was the statement for
10 the Arbitration--that you learned that Mr Hyman had accepted a
11 directorship of BVI Airways and also of a company called
12 "Colchester", which had a share of BVI Airways; is that right?

13 A. Yes.

14 Q. Can I take you to page--

15 A. Just to--I learned after that whole process collapsed.

16 Q. Yes.

17 A. Okay.

18 Q. So, that information came to your knowledge--

19 A. Yes.

20 Q. --in the process of preparing for the Arbitration?

21 A. No. Some of it came to my knowledge in June of 2017,
22 when the Leader of the Opposition asked a question, and I had to
23 provide certain information for him.

24 COMMISSIONER HICKINBOTTOM: But before the collapse of
25 the Project, during the course of the Project, my understanding

1 from your--both your response to the COI and your Witness
 2 Statement is that you considered--you thought that Mr Hyman was
 3 acting on behalf of the BVI Government in all this?

4 THE WITNESS: Of course he did.

5 COMMISSIONER HICKINBOTTOM: And there came a point
 6 after the collapse of the Project when you understood that he
 7 wasn't, that he was--he had at least a foot in each camp?

8 THE WITNESS: That was after.

9 COMMISSIONER HICKINBOTTOM: Afterwards.

10 THE WITNESS: Yes.

11 COMMISSIONER HICKINBOTTOM: Afterwards. But as
 12 Mr Rawat said in the sense that he was a director of BVI
 13 Airways, that's perhaps more than one foot in that camp, but at
 14 least of the feet were not in BVIG's camp?

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 BY MR RAWAT:

18 Q. Could I ask you to turn up in that lever-arch file
 19 page 767, please Dr Smith.

20 A. This one?

21 Q. The one you have open.

22 A. 767?

23 Q. Yes, please.

24 A. Okay.

25 Q. It's part of the Arbitration Decision, and if you look

1 at paragraph 37.6, what the Arbitrator recalls is that,
2 actually, at the outset of Mr Hyman's involvement in what became
3 the AVRO Project--and that's what the Arbitrator called
4 it--Dr Smith and the BVI Government could only have thought that
5 Mr Hyman was with the airline, not the Government, or at most a
6 go-between. The Arbitrator then sets out a January 9th, 2014,
7 message to yourself, where in writing Mr Hyman refers to the new
8 airline that we proposed to you, and me include an attachment
9 which records--it refers to "our airline proposal for the BVI".

10 If you turn over to the next page, the Arbitrator--and
11 I won't set it out--then continues to set out--the operator
12 makes the point that it's not possible to read that letter and
13 conclude it's from a lawyer representing the BVI Government as
14 to the new airline. The Arbitrator then sets out--

15 A. Tell me which page?

16 Q. Yes. I'm at 768, please.

17 A. Okay.

18 Q. Just summarising paragraph 37.8. At 37.9, the
19 Arbitrator refers to the Memorandum of Understanding, so that's
20 at the 2014 Project stage.

21 And then says at the end, when asked about this
22 memorandum, the final version of which is referenced in the
23 Preamble to the Framework Agreement, Dr Smith testified as
24 follows, and then sets out some questions and answers put to you
25 at the Arbitration; which concludes with you confirming on

1 page 769 that Mr Hyman was the go-between, and the Arbitrator at
2 37.10 says that's consistent with Mr Hyman's own description of
3 his role.

4 And if you look at 37.11, what the Arbitrator then
5 makes the point that, during the course of the Project, Mr Hyman
6 quite visibly appears representing BVI Airways, not the BVI
7 Government, at least twice during the course of the Project,
8 once directly adverse to the BVI Government entity.

9 If you turn to page 770, at 37.12, the Arbitrator sets
10 out details of the dispute between BVI Airways and the BVI
11 Airports Authority, and explains that the BVI Airports Authority
12 is solely owned by the BVI Government, it's operated by
13 Government employees, including Clive Smith, who was on the
14 negotiating team. The operator concludes that paragraph with
15 this: "In that dispute between BVI Airways and the BVI Airports
16 Authority, Mr Hyman represented BVI Airways".

17 So, you have a conclusion by the Arbitrator that, at
18 worse, on the evidence that was available to you at the
19 time--and that takes us back to 2014--the conclusion only could
20 have been that Mr Hyman was representing the Operator Parties,
21 and at best--the best that can be said is he was a go-between
22 between the two parties.

23 A. Right. He was the person that was representing the
24 BVI Government to the Operator Parties. If you call that a
25 go-between, then that's a go-between, but he was the person that

1 was representing the Government of the BVI in discussions with
2 the operator bodies.

3 Q. If we take that last example where he is--

4 A. And this example, as you mentioned, I had no knowledge
5 that he was--

6 Q. In dispute about the Airports Authority?

7 A. No, I had no knowledge of that.

8 Q. That was never brought to your attention--

9 A. No.

10 Q. --at any time before the Framework Agreement was
11 signed or afterwards?

12 A. No.

13 And I listened to the evidence that Mr Smith gave the
14 other day, and I don't think he had any evidence either, and he
15 would be--he would be the one who would be relating this
16 information to me.

17 Q. But the--I mean, it seems a bit strange because you
18 had in your negotiating team a representative of the Airports
19 Authority.

20 A. Yes.

21 Q. And yet, information wasn't being shared across
22 Government. I mean, you were essentially negotiating to bring
23 an airline into the airport.

24 A. Um-hmm.

25 Q. The Authority gets into dispute with the airline.

1 Nobody appears to tell the Financial Secretary and, therefore,
2 the Premier and the Minister of Finance doesn't find out that
3 Lester Hyman, who, from your perspective, plays an important
4 role in this process, represented the other side.

5 A. Well, I'm not sure other side, but as I said before,
6 this was not discussion I knew about. And from what I
7 understood and not the discussion that my Financial Secretary
8 knew about, was one who basically advises me on those financial
9 matters.

10 MR RAWAT: Commissioner, I'm just moving on to another
11 topic. I wonder if we could have a short break for the
12 Stenographer.

13 COMMISSIONER HICKINBOTTOM: Yes. Dr Smith, you may
14 remember from last time, but we have a Stenographer. He just
15 needs a break every hour or so, so we will take a five-minute
16 break and come back to hear the rest of your evidence.

17 THE WITNESS: Thank you.

18 COMMISSIONER HICKINBOTTOM: Thank you.

19 (Recess.)

20 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

21 MR RAWAT: Thank you, Commissioner.

22 BY MR RAWAT:

23 Q. Dr Smith, if we turn to--we're on paragraph 17 of the
24 written response that you have provided. The seventh potential
25 criticism that's raised of you as Premier and Minister of

1 Finance is allowing the emotive and urgent pushing from the
2 Operator Parties to dictate Government's involvement in the
3 venture. Only a month after the Government rejected the
4 proposal, you entered into further correspondence with Mr Hyman
5 in circumstances in which you agreed in evidence communication
6 was emotive and that Mr Hyman was a friend.

7 Your response to that is to say that you have many
8 friends, including Mr Hyman, who you had known for 20 years, and
9 that that friendship did not in any way influence the decision
10 to enter into an agreement for services to be provided by BVI
11 Airways.

12 You deny that the emotive and urgent pushing of the
13 Operator Parties which is something that the Auditor General
14 raised in her report in terms of the tone of some of the
15 correspondence that was sent to you, but you denied that that
16 influenced the Government's decision at all. You made the point
17 that the BVI Government was proceeding on good faith and in
18 reliance, it seems--and tell me if I've misunderstood this--on
19 fact that Mr Hyman had been the BVI Government's US
20 representative for a significant period of time. Is that right?

21 A. Yes, the--

22 Q. Go on, please.

23 A. Mr Hyman, as I said before, I'd been working with the
24 BVI for quite a long time over 30 years, and we had no reason to
25 have a problem, and the work they did for us was always, always

1 good work, apart from the reputation he had in the States, so we
2 had no reason to believe that he'd not be working for us.

3 As a matter of fact, if you go to page 184 in the
4 document.

5 Q. Yes, in your written response.

6 A. Yes.

7 Q. Yes.

8 A. You notice it says (reading): By example, Lester
9 stated in an e-mail to me Bruce new from the beginning and knew
10 as now that I am involved in this Project solely in a capacity
11 as United States Legal Counsel for the BVI.

12 So, with all that, and the fact that we had a good
13 history record, you know in performing for BVI actually, we had
14 expected him to continue to perform well for us, and we did not
15 know of this duplicity until afterwards.

16 Q. I see.

17 What you also say just is that you point to the fact
18 that the 2014 Project was turned down, and that the--for the
19 2015 Project, you brought Government--the primary change the
20 Government sought and obtained was that its maximum commitment,
21 the 7 million, was the upper limit, and that was set before you
22 proceeded with the 2015 Project; is that right?

23 A. I mentioned that because be sure that no matter what
24 he said or how he said it, if we thought that the Project was
25 not good enough, it was not good enough. That's why he turned

1 it down. It doesn't matter that he was a good friend or
2 anything. We looked at the Project, reviewed it, and he said it
3 was not satisfactory and turned it down.

4 He came with a different project, and we looked at
5 it--or the new version, and we looked at it, and when we looked
6 at it and we agreed that we'd set a maximum at \$7 million and
7 the other thing that the Financial Secretary would be included
8 in that agreement, then we said okay, we will now, you know,
9 pursue it.

10 But it does not mean to just lose \$7 million and not
11 worry about it because we were, you know, putting this money in
12 for a service. When it did not materialise, that's when we got
13 to him and later on and he could--it would not materialise, but
14 realised. Then we engaged Mr Martin Kenny to look into the
15 matter for Government when I was still Chief Minister.

16 Q. But when you set off on this course, what your
17 evidence to the Commissioner is that, as you say, you were not
18 putting in the money to lose it. What you were putting the
19 money is is sea planes begin to land in the BVI.

20 A. Exactly, not to that, but of course, yes.

21 Q. And you again rely on your full statement for the
22 Arbitration, which gives further details of your interaction
23 with, in this case, Mr Hyman.

24 The next potential criticism that's raised is put this
25 way (reading): Failing to adopt or even properly consider the

1 amendments made by the Attorney General in the draft agreements
2 that would have afforded greater protection of the BVI
3 Government's interest in the venture. The Framework Agreement
4 signed on the 7th of December 2015 included a provision that BVI
5 Airways was to use its commercially reasonable efforts to launch
6 an operator commercial air service by 31st of October 2016. The
7 Attorney General sought to have that term removed from the
8 agreement as it did not favor the Government's interests. Given
9 Mr Hyman's conflict of interest and the Attorney General's role
10 as the public servant, take the advice of Mr Hyman over that of
11 the Attorney General was inconsistent with the principles of
12 good governance and was not in the public interest.

13 The first point you make in response, Dr Smith, is
14 that, at no time were you aware that Mr Hyman was in a position
15 of conflict.

16 A. That's correct, yes.

17 Q. You say and repeat that it only became apparent after
18 the collapse of the Project, and prior to that you said it had
19 been your sincere belief, based on his long-standing
20 professional relationship with the BVI, that he was acting in
21 the best interest of the BVI Government.

22 You, therefore, respected his advice as a hitherto
23 trusted legal advisor and representative of the Government, and
24 having considered both his and the Attorney General's advice,
25 you say, "I ultimately came to the understanding that the phrase

1 'commercially reasonable efforts' was a standard phrase used in
2 business which, at the time, did not seem to be a
3 'game-changer'".

4 Now, in reaching that view, and was it--was ultimately
5 your decision as Premier and Minister of Finance to accept that
6 the term "commercially reasonable efforts" should be included in
7 the Framework Agreement?

8 A. Let me explain. The personal who was the chief
9 negotiator here was my Financial Secretary, Mr Smith, and I know
10 he gave evidence that he was considered, other lawyers and we
11 asked them for their opinion of this phase, including Mr Hyman,
12 and they are all in--of the opinion that it was satisfactory.
13 And so, at least on that, we decided that we'd go along with
14 this programme--

15 Q. So, was it the--

16 A. --and have that phrase included in the agreement,
17 yeah.

18 Q. So, in terms of how you were advised, then, was the
19 work in terms of consulting legal advisors undertaken by the
20 Financial Secretary? Is that right?

21 A. Yes.

22 Q. And did the Financial Secretary then come to you and
23 said this is the legal advice we have, we need to make a
24 decision?

25 A. Yes. And we--yes.

1 Q. And do you recall whether Mr Smith told you that the
2 Operator Parties were insisting on having the term "commercially
3 reasonable efforts" put into the Framework Agreement?

4 A. I don't recall me having said that, but if they
5 were--they were actually insisting they wanted it in, and he
6 approached these law--legal folk to get an opinion, and they
7 gave him that opinion. He shared that opinion with me, and we
8 decided to go forward.

9 Q. And you put the term "game-changer" in quotes.

10 A. Mm-hmm.

11 Q. Is that because it was a word that others used to you?
12 This is in your warning response, in your response at 18.

13 A. Okay. No, it was--yeah it didn't seem that it would
14 change the outcome of what we are--what we're searching for.

15 Q. I see. Thank you.

16 The ninth potential criticism, Dr Smith, takes us back
17 to evidence you gave--or questions that were put to you by the
18 Commissioner earlier, which is about the financial commitment
19 that the Operator Parties indicated they would give, and it's
20 written as a failure to secure written commitment from the
21 Operator Parties of their financial input into the venture, and
22 to ensure that this obligation was incorporated into the terms
23 of the Framework Agreement.

24 And you say there, and you've mentioned it already,
25 that in several e-mails you had a commitment putting up to

1 \$6 million in the Project, and it was on the basis of commitment
2 that Mr Smith, the Financial Secretary, then traveled to
3 commence negotiations.

4 You accept that it wasn't included in the final
5 agreement but say that again the Government of the Virgin
6 Islands and yourself were acting in good faith and expected the
7 Operator Parties to do the same, and you, you know, you point to
8 what the Government's involvement in this project was. It's a
9 point you've made that--

10 A. Yeah.

11 Q. --Government's involvement was \$7 million. What they,
12 the Operator Parties, agreed to do was to provide a service at
13 any cost. So it was ultimately for them, as you've said to--if
14 there was a difference in cost, then they would have to find the
15 difference.

16 A. That is true.

17 And we fully expected them to do this, to provide the
18 service. In hindsight, it would have been good if they had
19 included the \$6 million in the agreement, but I'm not sure why
20 we didn't. I suppose it was because we were expecting a service
21 from them, and we believed that what they said that they would
22 do, that they would do; right?

23 Q. So, you proceeded on the basis that you have an
24 assurance--

25 A. Yes.

1 Q. --that an additional 6 million would come into the
2 Airways?

3 A. Of course, yes.

4 Q. And you said you don't know why that did not find its
5 way into the final Framework Agreement. But at any time did the
6 Operator Parties say that they would not be putting any money
7 in?

8 A. No, not to my knowledge.

9 Q. Was there any--do you recall any discussion within the
10 BVI team, the Government's team, about whether or not this
11 should go into the Framework Agreement?

12 A. No, I don't recall a discussion.

13 As I said, you know, the team was, you know, working
14 with Mr Hyman under those who prepared the document, and that's
15 was unfortunately not put in. It would have--if it had been put
16 in, it would have saved us--at least we would have been able to
17 claim some monies back, maybe, because then the process would
18 have gone on towards hopefully completing the flight; right?

19 But the essence of the agreement was that we put in
20 this 7 million maximum and that they would provide the flight.
21 We expect--we fully expected them to do this.

22 COMMISSIONER HICKINBOTTOM: But, Dr Smith, you say
23 that you expected them to put the 6 million in, and in your
24 written response you say the commitment of the operator party
25 was to provide this service at whatever cost it would be to

1 them.

2 THE WITNESS: Right.

3 COMMISSIONER HICKINBOTTOM: But under the agreement,
4 neither of those things was an obligation based on the Operator
5 Parties under the agreement. They were not committed to provide
6 the service at whatever cost. They were committed, as we've
7 just seen, simply to make commercially reasonable efforts, which
8 is a different kettle of fish.

9 And secondly, under the agreement, they weren't
10 committed to putting in \$6 million. All of the commercial
11 commitment was on one side of the balance, really.

12 THE WITNESS: Yes, but they--in several--on
13 several--many occasions they made this statement, this
14 commitment that they would be putting in this money.

15 COMMISSIONER HICKINBOTTOM: But it was not a legally
16 binding commitment.

17 THE WITNESS: Right. It was not in there, I agree.

18 But that was base--one of the bases on which we went
19 forward, knowing--expecting that once we had made progress that
20 we'd be delivering a service to the BVI; right? And we expected
21 that service, and that's why we went along, and that's why we
22 continued to work with them to provide that service.

23 COMMISSIONER HICKINBOTTOM: Yes, thank you.

24 BY MR RAWAT:

25 Q. One final point you make, Dr Smith, and I just want to

1 put it on the record, but it's your paragraph 20, but what you
2 make the point is then that there came a point in time when the
3 Operator Parties continued to demand more money from the BVI
4 Government, and you say, having received our financial
5 commitment in full, I refused to comply, and that led to the
6 rescission of the decision--of the agreement in 2017.

7 If we move on to criticism--the 10th potential
8 criticism, which was that effectively removing the performance
9 requirement from the agreement that required BVI Airways to
10 commence flight--these flights before receiving the final
11 2 million Government advance. So, as matters changed, as the
12 Commissioner pointed out, 5 million was going to be advanced,
13 and then there would be another 2 million once flights started.
14 I think your--you explain, and we've heard from this from
15 Mr Neil Smith--that--and indeed it's in the Auditor General--the
16 Government experienced difficulties securing a Letter of Credit.

17 A. That's correct.

18 Q. And ultimately that led to the decision to forward and
19 advance remaining sums so that BVI Airways had all the monies
20 before flights could commence, and, in fact, I think the
21 flight--the date by which flights would commence was put back in
22 time.

23 A. Okay, until--this is the way it happened. We were
24 having difficulties getting the--of credit, and it took some--it
25 caused some delays and eventually got the signature back, make

1 the deposit and the signature back. At that point we agreed to
2 put forward the monies up to the \$5 million. The \$2 million was
3 not included at that point to take forward. It was after we got
4 in a point where we had the company; there were airplanes; there
5 were flight arrangements; there were arrangements at the airport
6 here in Tortola; we had the okay and the go-ahead from ASSI,
7 which is the UK approval agency. They were in the process of
8 getting the agency approval from the FAA. At that point, after
9 putting in \$5 million and seeing the progress almost there, we
10 considered it and said, okay, let us do this, get it over the
11 hump, and then we should see the planes flying.

12 As a matter of fact, the airport officials in Miami
13 made a statement that they were ready to fly, but that was, you
14 know, withdrawn, retracted by BVI Airways personnel.

15 COMMISSIONER HICKINBOTTOM: But again, when the
16 \$2 million was paid over, all the risk was on the BVI
17 Government's side. I mean, as you say, you say in your written
18 response (reading): Advancing the money meant that planes
19 leased could now fly. Given where things stood at the time, the
20 Government and I had every reason to believe the airline was
21 actually about to commence operation.

22 THE WITNESS: That's correct.

23 COMMISSIONER HICKINBOTTOM: But there was nothing
24 sought in response to the 2 million, for example, a guarantee
25 that they would fly next Tuesday or next week or next month.

1 They were given the £2 million, and you really--in the hope they
2 would fly.

3 THE WITNESS: At that point, many of the conditions
4 for flight was in place--

5 COMMISSIONER HICKINBOTTOM: Yes.

6 THE WITNESS: --were in place; right?

7 Or just one--they were just waiting now on the
8 approval from the FAA, so we had every expectation that the
9 flights would begin.

10 COMMISSIONER HICKINBOTTOM: But it was a hope. It
11 wasn't a contractual commitment by the operators.

12 THE WITNESS: It was an expectation based on the
13 agreement that we had before that they would provide a service
14 once we'd made the first contribution of 7 million.

15 COMMISSIONER HICKINBOTTOM: Yes, yes, thank you.

16 BY MR RAWAT:

17 Q. And just in terms of the detail of how the 2 million
18 was paid over, we've heard from Mr Smith, but obviously it was
19 put into an Escrow Account. A decision was ultimately made to
20 pay it in advance of dates that had been agreed.

21 A. Right.

22 Q. Did you sanction, as Minister of Finance, the decision
23 to pay, make those payments in advance?

24 A. Yes, I did, and for the reasons I just explained,
25 yeah.

1 Q. Can you just explain, Dr Smith, why those weren't
2 decisions that needed to go back to Cabinet?

3 A. Because the laws, the finance laws, allowed for the
4 Premier and the Minister of Finance to make such commitments
5 when it was necessary.

6 Q. And in this case, it was the--

7 A. For the progress of the British Virgin Islands--
8 (Overlapping speakers.)

9 Q. To get it over the hump, so to speak.

10 A. Yes.

11 Q. Thank you.

12 The 11th criticism, the potential criticism raised is
13 the--relates to this, and it's something that we canvassed with
14 Mr Smith, but it's--you assigned the individual in charge of the
15 Government's finance--that's the Financial Secretary--to serve
16 as the primary facilitator for implementation, so resulting in
17 there being no higher financial authority to question or prevent
18 the individuals--that individual's decision to make early and
19 complete payments to BVI Airways, which was contrary to its
20 authorisation.

21 And you say--well, it then goes on, the fact that you
22 as Minister of Finance authorised this payment to be made early
23 without any guarantee of performance by the Operator Parties,
24 and indeed before authorisation for flights had been received,
25 is evidence of poor financial management and poor governance.

1 You, in response, said that, firstly, you were
2 Premier, Minister of Finance, but also Minister for Tourism, and
3 your priority was to find an effective solution to airlift to
4 the BVI. Following Cabinet's approval, you turned the
5 implementation of the Project over to the Financial Secretary,
6 who you saw as competent, experienced and who would be able to
7 take decisions quickly after conferring with you. What you say
8 is that it appeared to you that it was the right decision to
9 take, given where things stood at the time, and there's no basis
10 for any criticism, bad governance or poor financial management
11 because for the reasons why the early payment was made.

12 Now, I think, that's again the--what you saw, in your
13 view, as the need when you were getting to that sort of stage
14 where 5 million had been paid over to use the additional
15 2 million to try and effectively get the Project to the starting
16 line, I suppose.

17 A. Yes, I saw progress. I saw evidence of a plane
18 landing here in BVI. I saw evidence of the ability to fly, they
19 written the assurances from the British, yeah, regulators, and
20 also they're willing to--getting, you know, for, you know, quite
21 forward into getting the approval from the FAA regulators.

22 As a matter of fact, I wrote to both directly as in
23 support because I said we needed the service, and so I would,
24 you know, make a letter to them to encourage them to give
25 the--to work with the airline so they can get the approval to

1 fly.

2 All of this in order to get the approvals and get the
3 plane flying as quickly as possible. The longer we waited for
4 the approvals, the more difficult it'd become going forward.

5 Q. Another element of the potential criticism is the
6 position of Mr Smith. Mr Neil Smith found himself as the Public
7 Officer tasked with negotiating the BVI Airways Project,
8 liaising with the Operator Parties, and trying to ensure a
9 successful outcome to the Project, with his role as Financial
10 Secretary, on the other hand, as a custodian of the public
11 purse.

12 Did you, yourself, at the time appreciate that that
13 might raise a conflict of interest for Mr Smith?

14 A. I thought that he would be suitably placed, be able to
15 perform that role, knowing exactly what the regulations were,
16 and exactly where we wanted to go.

17 Q. But did you see a conflict?

18 A. No, I did not see a conflict at that time, no.

19 Q. Did anyone raise with you that there might be a
20 potential conflict?

21 A. Nobody raised that.

22 Q. Was it ever discussed in Cabinet at any point?

23 A. I don't recall a discussion in Cabinet on that matter,
24 but everybody knew. All the Members of Cabinet knew.

25 Q. That Mr Smith was--

1 A. Yes.

2 Q. --in that role.

3 A. Exactly. Yes.

4 Q. There is a 12th potential criticism which was that
5 there was no adequate financial oversight on the Project, and in
6 particular Financial Statements were not obtained, and the
7 operators' offer of disclosing the Financial Statements in the
8 US was not taken up.

9 Now, you again rely on the fact that matters had been
10 delegated to Mr Smith as Financial Secretary, and you rightly
11 say that he addressed this issue in his own examination before
12 the Commission. You accept that financial information should
13 have been made available to the BVI Government, and you say,
14 It's my understanding that Financial Statements were available,
15 albeit they were inadequate.

16 You say, though, We did, however, take, take up the
17 offer to review the records, and asked Mr. Mark Forte of the law
18 firm Conyers Dill & Pearman who had by then been instructed by
19 Government in the matter to do just that, and you explained that
20 you--those efforts are documented at paragraph 135 of your
21 Witness Statement to the Arbitration.

22 However, looking at that, and this is also in the
23 Auditor General's Report, Mr. Forte became involved or was
24 instructed in June 2017.

25 A. Correct.

1 Q. And so, that was after matters started to go in the
2 wrong direction.

3 A. But it was after matters started going in the wrong
4 direction when they invited the Financial Secretary to review
5 the records as well--it was after the last \$2 million was paid
6 out. And we thought, the first response to that is that I
7 should ask one of the people at the Board, that is Mr--what's
8 his name again?--Geluk, to write to the company to ask for these
9 records because, as the Director, he was supposed to be
10 receiving those records. He wrote to the company, but did not
11 get a response. That is when I instructed Mr. Forte to work
12 with me. And one of his--among the things he was also--he also
13 visited and we look--and looked at the records of the company,
14 which he said were far from adequate.

15 COMMISSIONER HICKINBOTTOM: But this was really after
16 the balloon had gone up.

17 THE WITNESS: That is correct.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: Yeah.

20 COMMISSIONER HICKINBOTTOM: And the criticism, really,
21 is that the records weren't looked at, even when we've heard
22 evidence there was an offer to the BVI Government to go to
23 Florida to see the records, but the records were not looked at.
24 One set of records were sent by the operators, and they were
25 patently inadequate, and you say even after things had gone

1 wrong Mr. Forte went to look, the accounts were inadequate then.
2 That's unfortunate; in terms of governance, not very good.

3 THE WITNESS: Not very good.

4 What I would say is that we were trying to--as you
5 understand, we were trying to get this service started, and
6 hence we did put forward the \$2 million at the
7 end--right?--fully expecting to get a service. When this did
8 not happen, then we said, okay, let us engage Mr. Forte to look
9 at the record but also to see if there was some way possible for
10 them to work with them to continue the operation and have
11 flights. That was his mission.

12 COMMISSIONER HICKINBOTTOM: But good governance might
13 have dictated that before things went badly wrong, efforts were
14 taken to look at where the 5 and then 7 million that the BVI
15 Government had given to the operators, what they'd done with it,
16 and that was not done.

17 THE WITNESS: The Financial Secretary did have some
18 records, but they were not as complete as they should have been.

19 COMMISSIONER HICKINBOTTOM: I think the evidence is
20 they were patently inadequate.

21 THE WITNESS: Right.

22 BY MR RAWAT:

23 Q. Mr Smith's evidence to the Commissioner was that
24 essentially what he did get--

25 A. Yeah.

1 Q. --was limited, it came late, and he did not consider
2 sufficient. But what he also said--and this is reflected in the
3 Board--was that there was an offer to him to come to Fort
4 Lauderdale to look at the records, and the Arbitrator recorded
5 that it was common ground that whilst the Project was still
6 active and alive that the bookkeeper was still on the payroll,
7 that Mr Smith was invited to inspect all of Colchester Aviation
8 and BVI Airways' financial books and records where they were
9 physically kept in Fort Lauderdale, Florida, and this was
10 what--we canvassed this with Neil Smith because what's recorded
11 is he was puzzled that the BVI Government would not permit him
12 to take up that invitation.

13 Can you just help with why he wasn't allowed to go to
14 Fort Lauderdale?

15 A. To my recollection, this happened after the payment of
16 the \$2 million; right? He, at that point, said, I need somebody
17 independent. So this is why I asked one of the Directors who
18 would by law receive--should receive the Statements, and after
19 that then they asked Mr. Forte to review it for me.

20 Q. But up until that point, the effect is that the BVI
21 Government had not been supplied, even though the Framework
22 Agreement, I think, provided for this, but that you had
23 been--not been provided with adequate Financial Statements--

24 A. That is correct.

25 Q. --with the result, therefore, that you couldn't

1 maintain adequate financial oversight.

2 A. The Ministry of Finance were receiving the statements,
3 and when I knew of that just before the \$2 million was--that's
4 when we had that discussion, and we agreed to withdraw the
5 \$2 million with the expectation they would be able to continue,
6 the Programme had the flights and had the records, correct.

7 Q. But that was--but, in effect, that financial
8 information that the indication of how 7--ultimately 7 million
9 was being spent, the BVI Government was only able to get hold of
10 it in June 2017, following Mr. Forte's instruction.

11 A. That is correct.

12 Q. If we go to the--

13 A. But I would like to say that--

14 Q. Of course?

15 A. --once we had discovered what is going on and having
16 realising that they had not met their commitment and finding out
17 reasons why and, you know, other faults in the arrangement, then
18 we engaged the firm Martin Kenny to look into it or recover the
19 money that was spent.

20 COMMISSIONER HICKINBOTTOM: I understand that,
21 Dr Smith.

22 THE WITNESS: Yeah.

23 COMMISSIONER HICKINBOTTOM: But if you had understood
24 that the Financial Statements were inadequate earlier, that may
25 have been a flag that things were not going as well as they

1 might.

2 THE WITNESS: I agree. If had understood earlier,
3 yes.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 BY MR RAWAT:

6 Q. Dr Smith, I'm going to take the last criticism
7 shortly, and I will summarise in--very shortly that effectively
8 it comes down to the BVI Government spent 7.2 million because
9 the 2 million is an extra 200,000 that was advanced to BVI
10 Airways, but without any public benefit.

11 Now, that's the number of the criticism. Some the
12 points that you make in response, and it is a detailed response
13 in your written response, was ones that you've made already,
14 including that the efforts that were made subsequent to the
15 collapse of the Project. But one point you make is that
16 expenditure of 7.2 million for service of direct flights between
17 the BVI and Miami was, in principle, money well spent. You
18 point to the fact that you had, by the end of it, there were
19 planes; there was, as you've said, staff had been engaged;
20 licenses had been received. And so, from the perspective of the
21 Government and yourself, there was a belief that BVI Airways was
22 ready to commence the service that you had bargained and paid
23 for.

24 What you say, I think, brought the agreement to an end
25 was that Operator Parties wanted more money from the Government,

1 and this was something that you were not willing to do.

2 A. Correct.

3 Q. You point to the fact that you had the Financial
4 Secretary's chief negotiator. You had Mr Geluk--JELUK
5 (phonetic)--on the Board of Directors of the BVI Airways, and
6 the Government had done all it could to ensure that best
7 practices were followed in its efforts to obtain direct flight
8 service into the Territory.

9 A. That's correct, yes.

10 (Overlapping speakers.)

11 Q. And so, bringing the--you say you acted in the public
12 interest.

13 A. I maintain that.

14 Q. Of course.

15 I mean, what's important, I think, for the record
16 because, of course, people will read the Transcript and may be
17 following these proceedings, is that you have given a detailed
18 written response, which the Commissioner will consider. But
19 if--and you also point to the fact that the Arbitrator, in terms
20 of its findings as to the way Government had acted, you say that
21 Government--the Arbitrator--the Arbitrator's findings support
22 that Government acted responsibly in bringing immediate end to a
23 situation--to the situation once you realised it had become
24 inimical to the public good. And as we are aware, there are
25 obviously ongoing proceedings in relation to the BVI Airways

1 Project.

2 But stepping from it now, you start off your response
3 by saying that, in principle, spending money in order to
4 establish a direct-line flight from Miami into the BVI, even for
5 a short period of time, you say is, in principle, a good idea.

6 What would you do different now, Dr Smith?

7 A. I think it was a good idea, and because this was
8 something that the--was necessary and would be useful to the
9 British Virgin Islands for its economic development, I put in
10 place measures that someone as the chief negotiator, Board of
11 Directors, "DCBO" (phonetic), which is an accounting firm in the
12 country, so we had--we put in place who could do the
13 responsibility to ensure that the Programme was going right.

14 However, I did--so, what would I do now? First of
15 all, as I--as you said--as I said earlier, it was--the
16 investment was a good idea, but a greater commitment in the form
17 of an--as opposed to saying "commercially reasonable" in an
18 interest by Mr Hyman, something more direct. I would ensure
19 that they had the liability, which would have--you know, which
20 is what the Attorney General is asking.

21 But as I explained earlier, Lester Hyman was a trusted
22 representative for us. The Financial Secretary considered
23 opinion from other lawyers, and then we agreed to go with that
24 provision. Unfortunately, we were at that point. But because
25 of all that and because of the duplicity involved, it was

1 necessary for us to engage Mr Martin Kenny to try to recover the
2 money that was spent.

3 Q. Thank you.

4 Can I move on to a second--the second project we have
5 to ask you about today, Dr Smith, and that's the Port
6 Development Project. You can put that larger lever-arch file
7 away, if you could, please.

8 Again, if I give some context, in relation to this
9 Project, Dr Smith, you were again sent a Warning Letter on 13th
10 of September, directed--again at raising potential criticisms
11 directed towards your role as Premier and Minister of Finance.
12 You have provided again a written response, but can you confirm
13 that you are content for that written response to form part of
14 the evidence before the Commissioner?

15 A. Yes.

16 Q. Thank you.

17 If I take you through the central criticisms that are
18 raised, the first relates to, we heard from Honourable
19 Vanterpool this morning, the second stage of the Project once
20 your administration had taken office, which was obviously
21 November 2011 through to July 2012, there was a situation where
22 the Ministry of Communication and Works under Honourable
23 Vanterpool was leading on the Project; that there came a point
24 in or around mid-2012 when the Ministry of Finance took over and
25 instigated a tender process.

1 A. Right.

2 Q. Can you help the Commissioner with why it was decided
3 necessary for the Ministry of Finance to become involved?

4 A. It was after the Programme had been started by The
5 Honourable Vanterpool that the Protocols were agreed to sign on
6 and agreed to by the British Virgin Islands Government, and it
7 was then decided or indicated that what was happening at that
8 point was not in line with the Protocols, and so we decided to
9 have the Ministry of Finance step in and start the process
10 again.

11 Q. Up until that point, how aware were you of what stage
12 the Ministry of Communications and Works had reached for the
13 Project?

14 A. The Minister for Communication and Works had gone to a
15 meeting in Miami to meet with the Cruise Association, and it was
16 impressed upon him that something needed to be done about the
17 pier and section repair in Road Harbour. Because if something
18 was not done, then the cruise ships would be forced to reduce
19 the numbers of passengers and trips to the BVI.

20 Tourism had assumed an important part of the economy
21 of the "chosen" (phonetic) product. We saw the urgency to get
22 on with having something done about improving the situation like
23 widening the dock, et cetera; right?

24 And so I am not sure how these were acquired
25 initially, but I know that at some point--at the point where the

1 Protocols were put in place, it was decided that we needed to
2 take a step back and move forward in a planned way.

3 Q. The Protocols were signed on the 23rd of April 2012.

4 A. Yes.

5 Q. So, obviously, the discussions and negotiations
6 leading up to the Protocols being signed would have paralleled
7 the work that The Honourable Vanterpool was doing in relation to
8 the Port Development Project.

9 Did anyone raise any concerns with you as to the
10 manner in which the project was being progressed?

11 A. No. We went initially before the Ministry of Finance.

12 Q. Yes.

13 A. Not based on--

14 REALTIME STENOGRAPHER: I'm sorry, can you bring the
15 microphone closer to you?

16 (Overlapping speaking.)

17 BY MR RAWAT:

18 Q. The reason I ask--and we can take you to it, if you
19 need it--is that Honourable Vanterpool was then Permanent
20 Secretary, told the Public Accounts Committee in 2014 that she
21 did have discussions with you raising concerns about the
22 procedures. Do you recall any such discussions?

23 A. I don't recall, actually.

24 Q. One of the other issues that relates to--and this
25 arises in relation to that first phase when Honourable

1 Vanterpool was leading on the Project, so to speak, was that the
2 extent to which the Port Authority were involved because there
3 is evidence to suggest that, in fact, despite being the
4 decision-making body, they were not involved in the process at
5 all, and it was all essentially being led by Honourable
6 Vanterpool and Claude Skelton-Cline as his advisor.

7 At the time that the Ministry of Finance became
8 involved, which was July 2012, was any consideration given at
9 that point to making the Port Authority the lead agency on the
10 Project?

11 A. The Honourable Vanterpool was leading the discussion
12 and the way forward and the elevation of the pier. He indicated
13 to the Ports Authority in his capacity as Minister of the Ports
14 that from a policy decision that he wanted to go in a different
15 direction to a policy decision.

16 Q. That was his indication given--how was that--who that
17 was communicated to?

18 A. To the Board.

19 Q. To the Board.

20 A. Yes.

21 Q. That was--so, he told the Board, "I want to take this
22 from a policy position to in a different direction".

23 A. Um-hmm.

24 Q. Did--was Cabinet involved in that at all?

25 A. Cabinet was involved to the point that the decision

1 and recommendation about the persons who should be selected were
2 brought to Cabinet. I do not recall the details of when it was
3 brought to Cabinet at what point because that was a long time
4 ago, but I noted it was to Cabinet, and Cabinet agreed for the
5 purpose of the program to go forward, the Governor was in
6 Cabinet, this question was would there be any loans, as far as I
7 recall; and then we continued that progress until the idea is
8 the Protocols coming into place, and we said, "Okay, we have to
9 step back now, be aware of where we're going and put forward in
10 the preparer way".

11 Q. I see.

12 So, whilst Honourable Vanterpool was leading the
13 Project, what was brought to Cabinet or sought from Cabinet was
14 approval of the Company that had been selected to take the
15 Project forward, but then what interrupted things was the need
16 to comply with the Protocol?

17 A. Yes, as I recall.

18 But the interest was also in communication with the
19 Ports Authority. As a matter of fact, the first thing he did
20 was to say we weren't going in a different direction, and then
21 there is another statement where he said to them, "Okay, my
22 policies if we're not going to continue with Disney, we are
23 going to go in the different direction".

24 What I found interesting was that, even as he was
25 saying that, the Board was, after he said that, you know,

1 progressing the Disney project; right? And--but he persevered,
2 brought to the Cabinet, and then he was directed to change
3 direction after the Protocols, and went out in proper bidding
4 process.

5 Q. So, it appears that it was the Protocols that brought
6 a halt to the selected company that had been selected under the
7 process put in place by Honourable Vanterpool taking matters
8 forward--

9 A. Right.

10 Q. --because Cabinet decided you had to do it under a
11 tender process; is that right?

12 A. Yes.

13 Q. And if we look at the--what's set out is that--and
14 this is the--in relation to the tender process, the first
15 element of the criticism is that the expedited tender process
16 led by the Ministry of Finance lacked transparency and fairness,
17 and what's said is the length of time allowed for the process
18 was inadequate. The provisions in the invitation for
19 Expressions of Interests mirrored the previously accepted
20 proposal from TPP, which created an unfair advantage.

21 So, TPP was--the process put in by Honourable
22 Vanterpool had been the successful bidder, so to speak, and then
23 obviously once a decision had changed--had been made to move to
24 a tender process had to resubmit a bid.

25 Now, in terms of your response, Dr Smith, you say,

1 first of all, you were unaware that the invitation for
2 Expressions of Interests mirrored the previously accepted
3 proposal. That was not something you were told?

4 A. No, I didn't. I was not aware of that, no.

5 Q. I wonder if you could just pull the microphone a
6 little closer to yourself.

7 A. I was not aware of that.

8 Q. Thank you.

9 But you don't consider that the process
10 was--was--lacked transparency and fairness overall; is that
11 right?

12 A. No, because the Financial Secretary engaged two very
13 significant firms, who were very experienced in matters of
14 contract law, et cetera, that was Baker & McKenzie and
15 PricewaterhouseCoopers, who actually advised him or were
16 advising him how to go about this, and they were--you know, they
17 gave him all the advice necessary, and he followed that advice
18 and went out to tender.

19 I think that the time period for Expression of
20 Interest was adequate. There was at least two weeks it was
21 adequate.

22 Q. I mean, to remind you, I think, Mr Smith has given
23 evidence twice about this--Neil Smith has--and he certainly,
24 when he gave evidence last week, there were two periods: The
25 first was the time allowed for Expressions of Interest, which

1 started off as two weeks but ultimately was from the 16th of
2 August to the 12th of September; which, I think, on his
3 evidence, he said was adequate having regard to, for example,
4 the kind of timeframes, the comparable timeframes, the
5 recommended timeframes?

6 A. Yes.

7 Q. But what he accepted was that when you take the time
8 to submit a fully or more formulated proposal with technical and
9 financial information of a tender bid, giving tenderers as was
10 given between the 12th of September 2021 and 11th of October,
11 which was just four weeks, was too short. Mr Smith's view was
12 that it should have been at least six to eight weeks.

13 Given that your then-Financial Secretary is expressing
14 that view now, does that make you less certain that the process
15 was transparent and fair?

16 A. No. When I read the Report of the Auditor General, if
17 you can take it back to that.

18 Q. Yes, of course. If you take the two smaller bundles,
19 it's one that is bundle--labeled "bundle 1" on the front.

20 A. Okay.

21 Q. I think the page you might be looking for is right at
22 the back, if you go to page 535, please, Dr Smith.

23 A. What is happening here is that this report by the
24 Auditor General has some conflicts, and I tell you why. The
25 Project that was envisioned at that point had three phases:

1 One, there was sent out Expressions of Interest, and there was a
2 tender bid process, but the bid process was--I can't find it,
3 but the bid process actually started off with a concept. The
4 persons who made the approaches were presented concept of what
5 the whole development would look like. The concept doesn't take
6 that long to produce.

7 After the concept would have happened, then they would
8 be invited to make presentations, and one would be selected to
9 continue to the development of the proposal for the
10 establishment of the facility.

11 But let me find--number 50 in the Report.

12 Q. 50 or 15?

13 A. Five-zero.

14 Q. Five-zero.

15 Are you looking at Roman numeral I, Dr Smith--

16 A. Yes.

17 Q. --where it says "submitted concept"?

18 A. Yes, financing.

19 So, that really indicated that at least the initial
20 step at that point was the concept design submitted.

21 The way it's stated in this document here, it is part
22 of the first process but it's not, actually; it's the second
23 process.

24 Q. I see.

25 So, in your view, therefore, Expressions of Interests

1 for two weeks and a concept process--concept design within
2 four--

3 A. Yes.

4 Q. --would be an acceptable time frame?

5 A. I think so. Yeah, that is true.

6 Q. Give me a moment, please.

7 REALTIME STENOGRAPHER: Dr Smith, can you pull the
8 microphone closer to you. This is the Stenographer. Thank you
9 very much.

10 (Pause.)

11 BY MR RAWAT:

12 Q. If we move on, then, just to the second criticism,
13 please, or the second element of it, and that is back to that
14 the team assessing the tenders included Claude Skelton-Cline,
15 who had by that time already established a relationship with TPP
16 and its principals in light of his involvement in the prior
17 process, and this created an obvious conflict of interest which
18 was not given or any proper consideration by the Ministry of
19 Finance.

20 Now, again to give it context, so Mr Skelton-Cline, as
21 we understand it, was appointed as a consultant to the Minister
22 of Communications and Works.

23 A. That's correct, yes.

24 Q. And he--he was, on evidence, very involved in the
25 Project.

1 What then happened was that when a tender process was
2 decided upon, you had on the evidence an Evaluation Committee
3 which looked at the proposals that were received, and that was
4 chaired by the Deputy Financial Secretary, Mr Gaskin, so
5 Mr Gaskin has limited recollection of events. He does remember
6 that he was Deputy Financial Secretary. But once it had gone
7 through that evaluation, he then went to a second committee
8 chaired by the Financial Secretary, and Mr Skelton-Cline was on
9 that Committee. And that Committee then looked at the more
10 detailed submission that came in from two entities, one of whom
11 was TPP.

12 Now, you point to the fact that on that what you call
13 the "Tenders Committee" you had Baker & McKenzie, you had PwC,
14 and you also had, I think, it's Dr Drexel Glasgow--

15 A. That's correct.

16 Q. --during the technical side of matters, and those were
17 independent persons who were involved with the process, and you
18 say Claude Skelton-Cline was there as the representative of the
19 Ministry of Communications and Works and so representing the
20 governments of the--and so representing the interests of the
21 Government of the Virgin Islands.

22 A. That's correct.

23 Q. And, therefore, you say his involvement in--prior
24 involvement which would have had--doesn't give rise to conflicts
25 of interest; is that right?

1 A. No, I didn't see that. No, I saw no conflict.

2 Q. Were you aware at the time, Dr Smith, that
3 Mr Skelton-Cline was involved in the Tenders Committee?

4 A. No, I was not aware at the time.

5 Q. So--

6 A. But being aware and seeing who were involved in the
7 process with these reputable firms actually advising--these were
8 the people who were advising the Financial Secretary of the
9 process; right? Never would have picked up any discrepancy that
10 I thought would have been, but they were quite satisfied.

11 And Mr Cline was their representative of the Ministry,
12 so if there was any information that was needed, he would be
13 able to provide it. But those three people are the ones to make
14 the selections, as far as I understand.

15 Q. Well, the evidence that Mr Gaskin gave to the Public
16 Accounts Committee at the time was that when Financial Secretary
17 was absent, Mr Skelton-Cline would actually chair the Tenders
18 Committee. That would not have been something that you were
19 aware of anyway?

20 A. No, I would not have.

21 Q. I think your evidence is you weren't actually even
22 aware that Mr Skelton-Cline was on that Committee. What you
23 rely on is the fact that there were others there--

24 A. Yeah.

25 Q. --who would be the safeguards?

1 Thank you.

2 The third point that's raised--and this is the point I
3 alluded to--is the Port Authority Board, as the decision-making
4 body, was excluded from the process, and that was throughout, so
5 even when The Honourable Vanterpool was leading on the Project
6 and then when the Ministry of Finance was involved, it was not
7 until later that the Project was handed back to the Port
8 Authority after the tender process had been terminated.

9 A. Yeah.

10 Q. Now, what's said is that, as Minister of Finance, you
11 had an obligation to safeguard the autonomy of the Board. As
12 Premier, you had an obligation to ensure that a Minister in your
13 Cabinet did not act in such a way as to compromise the autonomy
14 of the Board. And you set out--and I think you explained this
15 already, but the role that Honourable Vanterpool had
16 played--you've explained, for example, that he had met with the
17 FCCA in Miami, that he understood that there was a different
18 approach needed, and therefore he'd informed the Board of that
19 policy decision; and informed them of various other matters such
20 as the cancellation of the Disney Project, which was the
21 original project under your predecessor administration.

22 You then say that you don't understand the details of
23 what followed thereafter, but you understand it was a process
24 where there were three groups taking part and ended up with TPP
25 being selected as the successful bidder.

1 You mentioned, which you have done already, the fact
2 that although Honourable Vanterpool was taking the Project in a
3 different direction, as recorded by the Auditor General, plans
4 for the original project was submitted to Town and Country
5 Planning; you've noted that.

6 You then go on to explain, as you have done, the
7 reason why it had to start again was because the Protocols for
8 Effective Management came into play, and you note that this was
9 a process in which the Board of the BVI Ports Authority was
10 represented. Could you just assist the Commissioner, as far as
11 you can recall it, how was the Board represented?

12 A. I'm not sure whether it was the Chairman of the Board
13 or the Managing Director. I can't--I have no recall of that.

14 Q. Do you know whether either that Chairman or Managing
15 Director was on the Tenders Committee or--

16 A. I can't--I can't recall that.

17 But I know in this: That the Port Authority is not a
18 body unto itself. It still reports to the Government, the
19 Cabinet of the BVI. And so, if something is not going right,
20 therefore it's called the Central Tenders Board, was the
21 responsibility to review things and make sure they are
22 corrected, and then after that they would hand it back over to
23 the Ministry.

24 And this is eventually the process that was being
25 followed.

1 Q. By the Ministry of Finance?

2 A. Yes.

3 Q. So, the process that was being followed from July 2012
4 until the point when it had to be terminated was that the
5 Ministry of Finance would oversee the tender process?

6 A. Correct, yes.

7 Q. And then it would be handed to the Ports Authority to
8 deliver?

9 A. That is correct, yes. Well, through the Minister but
10 to the Ports Authority.

11 Q. Of course.

12 On those evidence, it would suggest that the Minister
13 may or it might be said that the Minister's job is policy
14 direction.

15 A. Yes.

16 Q. The Board would have responsibility for executing the
17 detail?

18 A. Um-hmm, I agree.

19 Q. Would you agree with that?

20 A. Yes.

21 Q. But taking that point, then, there is a distinction
22 between the two roles of Minister and Board?

23 A. Um-hmm.

24 Q. During your tenure as Premier and Minister of Finance,
25 how did--what steps did you take to safeguard the autonomy of

1 Boards?

2 A. Well, speaking about this, all Boards in general are
3 responsible for that, to my knowledge; right? Certainly. But
4 referring to this passage here, it was the responsibility of
5 Central Government to make sure things are done correctly, and
6 that's why after the Protocols and so, the Financial Secretary
7 got involved and brought the Central Tenders Board to review the
8 Programme and do the publishing for tenderers and all that. So,
9 once that had been corrected, that it would all be turned back
10 over to the Ministry which, indeed, it was, afterwards.

11 Q. But I think by "Ministry," you mean it would go to the
12 Ports Authority; is that right?

13 A. Yes, it did--yeah, to the Port Authority.

14 Q. But generally, did you give--did you give the
15 Ministers in your Cabinet any guidance as to how they should
16 approach Boards, Statutory Boards, so as to preserve the
17 autonomy of those Statutory Boards?

18 A. This was established procedure, that the Ministers
19 understood and worked in.

20 But before the Protocols came in, there was--and at
21 that point there was an urgency that Mr Vanterpool--the Minister
22 Vanterpool saw there was urgency having been to sea trade,
23 having been to the Cruise Association in Florida, there was
24 urgency because he was sure at that point that if something was
25 not done, visits by the cruise ships would decrease, the numbers

1 would decrease.

2 This was part of the industry that had--you know, the
3 country accepted and, you know, needed greater part of the
4 industry. And so, therefore, it was--it was necessary to do
5 something.

6 I know when he started off, he was very interested to
7 try to get it done because of the urgency. But then when we
8 realized that there should be a tender, different tender
9 process, he had no hesitation and say, "Okay, let's go ahead
10 with the process, let the Central Tenders Board do their job".

11 Q. But you said in terms of maintaining the autonomy of
12 the Board it was established procedure, but could you just tell
13 the Commissioner what was the established procedure under your
14 tenure as Premier and Minister of Finance?

15 A. Each Ministry--not each Ministry. Several Ministries
16 had statutory bodies attached to their Ministry; right? Each
17 statutory body had their own rules and regulations which the
18 Minister would know about, and the statutory body continued to
19 operate as a statutory body under the policy direction from the
20 Minister. I know this for a fact that BVI Electricity was one
21 of the major statutory bodies, and that continued to operate as
22 a statutory body. The Tourist Board continued to operate as a
23 statutory body, so all the Ministers knew how--when the approach
24 was the statutory body, and it was in the law; right?

25 So, while as I said before, each statutory body had a

1 different set of rules and Regulations. These were all
2 followed, as far as I can recall, except for this one.

3 Q. Certainly in terms of from the Ministers in your
4 Cabinet, what they would have known is that their role was
5 policy.

6 A. Yes.

7 Q. It wasn't operational.

8 A. Right.

9 Q. Thank you.

10 If we move on quickly, Dr Smith, just to the last
11 potential criticism that's raised, which is that--and it arises
12 in this way: As part of the tender process, tenderers were
13 required to show that--or strongly encouraged to have a local
14 partner, and ultimately I think it came to that you would have
15 to have a 20 percent involvement of the local partner. The
16 submission from Tortola Port Partners named the BVI Investment
17 Club as its local partner, and what the potential criticism says
18 is the involvement of the BVI Investment Club raised potential
19 issues of conflicts of interest of which the Ministry of Finance
20 should have been aware, and which would have been relevant to
21 consideration of the TPP proposal, and those arise in two ways:

22 The principle of PFK (BVI) Limited, a firm engaged
23 their business case for the initial TPP-Government partnership
24 was also present in a public figure for the BVI Investment Club,
25 and Declaration of Interests for election candidates is

1 published and Gazetted on 10th of October, 2011, showed more
2 than one elected Member with shareholding interest in subsidiary
3 companies owned by the BVI Investment Club.

4 Now, the PFK's involvement had been in relation to
5 when TPP was going round the first time under the umbrella of
6 Honourable Vanterpool's work, but your answer is short, which is
7 that, despite the Chairman of PFK having other interests, which
8 are many, he is the sole owner of that company which had no
9 involvement with BVI Investment Club; and, therefore you don't
10 think it's right to infer that company derived any benefit
11 because he was member of the Investment Club, nor does any other
12 member of the club benefited because his company was engaged.

13 You say that members of the BVI Investment Club do not
14 hold interest in all activities of the club. None, to your
15 knowledge, had interest in the Port Project. PFK (BVI) was just
16 doing their job and not as part of the BVI Investment Club.

17 I think it boils down to one question, though,
18 Dr Smith, and that is, you have a tenderer coming forward, and
19 this is TPP, who has already been through a selection process,
20 albeit one that was not a tender process and now going through
21 again and reached the Tenders Committee, they have partnered
22 with the Investment Club.

23 And isn't the question this: Did anyone at the time
24 consider, to your knowledge, whether that raised a potential
25 conflict of interest?

1 A. To my knowledge, there was no conflict of interest
2 because of the following: First of all, let me speak with PFK,
3 to start with; right?

4 The PFK--the Chairman of PFK, he's a businessman in
5 this Territory with many interests. BVI is a small place. The
6 number of people who could be involved in process like this is a
7 small number, and it would be wrong to penalize somebody for
8 other interests when he's been applied to do a job, a particular
9 job. He was doing this--he was doing this as PFK, not as part
10 of the investment club at all, and Investment Club was not
11 involved.

12 Further, as far as I know, even though the Company had
13 named the Tortola Investment Club as a partner, I cannot recall
14 that there was any document signed that was given that showed
15 that this was happening.

16 Q. But do you know if the Tenders Committee, in looking
17 at the and you called it a "concept design", but in looking at
18 what was being submitted by those seeking to be successful under
19 the tender process--

20 A. Um-hmm.

21 Q. --had in mind conflicts of interest?

22 A. Not--I don't see why they should, not to my knowledge,
23 because they're further--right? As I said, as far as I know,
24 there was nothing signed between those two companies.

25 And the other thing is that as far as I can recall, no

1 member of the Investment Club had any interest in the ports.
2 The member of the Investment Club is a club charged different
3 companies, members are companies they choose to be involved.
4 So, for example, some members are the telephone company, so
5 members were with the land development company. So, it's
6 difficult to say that any member would have been from that since
7 none of them were involved in that company.

8 Q. Thank you.

9 Can I conclude with one final topic. You may be aware
10 that the Commissioner has heard evidence in relation to the
11 perimeter wall that was built around Elmore Stoutt High School,
12 and that includes evidence from Myron Walwyn.

13 Now, your party returned to Government on the 7th of
14 November 2011. When would the election have been due after
15 that?

16 A. We have a four-year term, so it was November '11,
17 15--November '15, if I get that right.

18 Q. Now, as we understand it, you decided to call an
19 election on the 8th of June 2015; is that right?

20 A. Yes.

21 Q. When did you inform your Cabinet, of which Mr Walwyn
22 was a Member, that you would be calling an election?

23 A. I honestly cannot recall that, but I know that was
24 during that point, I recall an early election, but at this point
25 I regret I cannot recall. It was some time ago. I can't recall

1 when I said to them they would have an election at that time.

2 COMMISSIONER HICKINBOTTOM: Would it have been shortly
3 before you called--you called the election on the 8th of June.
4 Would it have been shortly before that?

5 THE WITNESS: It would have been shortly before.

6 BY MR RAWAT:

7 Q. Thank you.

8 MR RAWAT: Commissioner, I have concluded my
9 questions. Can I finish by thanking Dr Smith for returning to
10 give evidence and also apologize that we delayed the start of
11 his evidence, and it's a bit of a long session, but I conclude
12 finally by thanking him as well for the way in which he has
13 given his evidence this evening.

14 COMMISSIONER HICKINBOTTOM: Yes.

15 Can I echo my thanks, Dr Smith, both for your time and
16 the way in which you have given your evidence which has been
17 very helpful. Thank you very much.

18 THE WITNESS: You're welcome.

19 (Witness steps down.)

20 COMMISSIONER HICKINBOTTOM: Mr Rawat?

21 MR RAWAT: 10:00 tomorrow, Commissioner.

22 COMMISSIONER HICKINBOTTOM: Thank you.

23 (End at 5:09 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 dark ink, appearing to read "David A. Kasdan", is written over a horizontal line.

DAVID A. KASDAN