THE COMMISSION OF INQUIRY
BERMUDA

IN THE MATTER OF AN APPLICATION TO NOT REQUIRE DR EWART BROWN TO COMPLY WITH THE SUBPOENA

IN THE MATTER OF THE RULES TO THE COMMISSION OF INQUIRY

THE COMMISSION OF INQUIRY

AND

THE HON. DR EWART BROWN

The application

1. This is an application for Dr Ewart Brown to be excused from compliance with the subpoena issued against him on the 31st August 2016, on the grounds that it would be unreasonable in all the circumstances for him to be compelled to give evidence. The application centres around his constitutional, statutory and common law right which guarantees him privilege against self-incrimination (the privilege).

2. It is our submission that the application can properly be dealt with by the chairman under the COI own rules and that in those circumstances it is not necessary for this application to be made orally on the 30th November (or some such other date that the COI deterrmines). If it is thought necessary Dr Brown can provide an affi davit to support the application that it is made on his instructions and with his assent.

The COI Rules

3. The COI created its own rules as to procedure. Rule 8 (4)(b) states:

> Ss(4) A claim by a person that…it is unreasonable in all the circumstances to require him to comply with such a subpoena, shall be

submitted in writing to the commission panel and will be determined by the chairman who may revoke or vary the subpoena on that ground.

ss(5) In deciding whether to revoke or vary a subpoena on the ground mentioned in paragraph (4) the chairman will consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.

ss(6) Claims under paragraph (4) should be submitted in writing to the commission panel as soon as possible and in any event prior to any return date of the subpoena.

4. We note that the Chairman can determine this application himself. We encourage the Chairman to consider this application in the first instance and if able to grant the application no more need be said subject to Dr Brown confirming (in writing if necessary) his claim to the privilege. If, however the Chairman was not minded to grant the application per se we submit that the full panel hear oral argument on the issue.

History

5. An application was made by the author to have the Subpoena set aside on the grounds of timing and prejudice on the 29th September 2016. That application was rejected although the COI allowed more time for the preparation of a statement to 28th November 2016 (subsequently varied to 30th November 2016).

6. During the course of argument it was made clear by me that if the point should arrive when we sought to invoke the privilege we would do so immediately rather than waiting until the return date. We do that herein.

7. Of immediate concern to us was the well-publicised extant police enquiry into Dr Brown's activities whilst he was the premier. This is known to be an enquiry that was instigated on the back of a subsequently convicted defendant (Bolden) in a fraud trial some five plus years ago making a variety

of accusations from the witness box. The Police Commissioner has accepted that millions of dollars have been expended on the enquiry even though Dr Brown has never been arrested, interviewed or asked to produce a single document.

8. These concerns were expressed in my letter of the 16th September 2016 in the following terms:

> *We know, and your investigators should know, that Dr Ewart Brown has been under investigation by the Bermuda Police Service for five years. There can be no doubt that vast amounts of material have been garnered by the more than $2.2 million investigation, yet the COI seems not to have obtained any of that material or has, in our view, unfairly stayed deliberately silent on the issue.*

28th September 2016

9. On the 28th September 2016 the chairman of the COI made clear that they had made a request of the police as to the investigation they were conducting in the following terms:

> *I should add that we have not had access to any police files of any matters, which are or have been, under active police investigation, although we have been made aware that some of the contracts into which we are inquiring are, or have been, the subject of those investigations.*

29th September 2016

10. During the course of argument on 29th September the Chair stated:

> *"We have approached the police …and asked them to tell us what matters – or rather we have asked them certain matters around the investigation and the answer is "yes". We have not gone further …we have not …taken any steps to compel them…"*

11. I was asked if the COI should seek compulsion of the police investigation files and I emphatically replied "yes". There was then an exchange about whether my client wished to give his permission for such action to be taken and I made it clear that we did not regard it as being something that the COI needed his permission for.

12. I also asked the Chairman for such information as they were in possession of ie what contracts the police were or had been investigating. The Chairman was not prepared to give me that information. I argued that it was relevant to know at least which projects/contracts the police were investigating so that I could at least be best placed to advise my client about invoking his privilege failing which it was the COI's obligation to safeguard his interests as they were better placed to do so than me. The Chairman seemed to accept that proposition.

11th October 2016

13. On the 11th October, I made an application of a similar kind on behalf of a witness called Allan DeSilva which was in part prompted by the discovery of an investigation into the activities of a Mr Lemoigne. He is a French national employed as the contract manager for the works to be carried out on the Port Royal Golf Course. He had been contacted by a solicitor from the UK to provide evidence into the contract. It became clear from the reaction of the COI that this had not been at their instigation and specifically through the chair disavowed any responsibility or knowledge of such an enquiry.

14. In relation to DeSilva this was fundamental in that it was specifically and only in relation to the Port Royal Golf Course Project that the COI were interested viz DeSilva. It followed that there was and is a continuing police enquiry running parallel with the COI's work that relates to the Port Royal Golf Course. In those circumstances the COI had little hesitation in allowing the application by him to invoke his privilege and he was not required to give evidence, neither was he required to formally claim the privilege from the witness box.

15. This is relevant to the instant application because it is one of the projects specifically identified in the COI's letter of the 25th July 2016 to Dr Brown which is of interest to the COI. It is a reasonable inference that this is one of the projects that the police are continuing to investigate, possibly as to Allan DeSilva, but clearly must include Dr Brown.

16. During the course of argument, the chair made a number of further observations on the state of their knowledge about the parallel police investigation and said:

> *"…we asked about certain **specific projects** and were told "yes, they are or have been subject to police investigation", we didn't go further than that",* [my emphasis].

17. What is clear is that the COI are seized of at least the information as to which projects/contracts are or have been the subject of investigation, they will not tell us which projects/contracts they are and they will not subpoena the COP to reveal anything further.

18. Against that background we are left with no choice but to assume that the police have and will continue to investigate all six of the projects (now seven) that the COI are interested in, viz Brown. That is the only safe course for us to adopt.

The Commission of Inquiry's Interest

19. By letter of 25th July 2016 the COI set out the six areas of interest that they believed Dr Brown could assist with. They asked for a witness statement or affi davit dealing with the six separate areas of interest and supplying both a large dossier of materials (approximately 720 pages) and specific questions (very widely drawn) in relation to reach topic which I do not repeat herein.

20. In the chairman's opening statement on 28th October 2016 he made it clear what the COI's remit was predicated on the Auditor General's report for the

financial years ending 31st March 2010, 2011 and 2012. He said that he regarded the COI's work to extend beyond those years as both earlier and later projects were pertinent to their investigation and ultimate findings. Significantly, they COI would concentrate on the tendering process and the Chairman said:

> *"…we decided to concentrate on one aspect, in particular, that is, the issue of tendering. Were contracts put out to tender, as required by Financial Instructions? If not, was the exception permitted by the Financial Instructions or other rules? If Cabinet approval was required, was it obtained? If not, why not?"*

21. This "limiting" of the scope of the Inquiry nonetheless focusses attention on those who were responsible for promoting the particular project in its passage through the machinery of government, as well as those who were ultimately responsible for its award whether directly or as a result of the doctrine of Ministerial Responsibility. Given Dr Brown's role this is fundamental.

22. Dr Brown was a member of Parliament from 1993 to 2010 representing the Warwick constituency. In 1998 the PLP having won the election over the UBP he was appointed Minister of Transport by the then Premier Jennifer Smith. In October 2006 Dr Brown became the Premier of Bermuda and the Minister for Tourism and Transport. He resigned from politics in October 2010.

23. It is clear from both the projects/topics of interest to the COI and Dr Brown's role in the years preceding the Auditor General's Report that he is an important figure in the Inquiry. In particular the COI are interested in the following:

    i. Delegation of Accounting Responsibility to the Ministry of Tourism and Transport. Seeking the rationale for such transfer and legislative compliance.
    ii. Bermuda Emissions Control Ltd. The selection process in 2001 and appointment of Correia Construction without tendering in

2006. The appearance of bias between Dr Brown and Donal Smith (of BECL) said to be a blood relation.

iii. Heritage Wharf 2007/8. Dealt with by the MoTT rather than W&E and the use of Correia Construction without an open tender or approval by cabinet. Seeking the rationale for such transfer and legislative compliance.

iv. Port Royal Golf Course 2007/8. Ultimately dealt with by the Trustees of the PRGC rather than W&E or the MoTT although said to be ultimately responsible to Dr Brown. Island Construction owned and run by the DeSilvas did not tender and their contract was not approved in cabinet. Seeking the rationale for such delegation and legislative compliance.

v. Global Hue 2006. Concerns expressed about the invoicing procedures by the company and whether it was providing value for money yet a further contract was signed with the company in 2009. A series of detailed answers are sought to the questions posed.

vi. Ambling 2008. Queries as to the contract date and the circumstances giving rise to it are in issue. Further detailed answers to matters relating to the tendering process and contracting with the Department of Tourism rather than W&E.

24. There is now a further letter from the COI dated 7th November 2016 in which they ask for the further evidence of Dr Brown in relation to the company LLC Bermuda Ltd run by Messrs Matvey and McLeod. It should be noted that there is no accompanying Subpoena in relation to this new request although I do not believe that will affect the nature of this application. There is however an accompanying 220 pages of material in support.

25. The COI seek evidence in relation to LLC Bermuda Ltd, which was concerned with the building of the Police Station and Courthouse, and in particular the relationship of the “New Principals” (Vincent Hollinsid and Winters Burgess) with Dr Brown and his state of knowledge about their involvement and to what extent that was disseminated to other ministers.

26. The clear rationale behind these questions make it obvious that the COI are concerned with bias and the potential for corruption. They are interested in the relationships between the contractees and those granting the contract; whether there was a deliberate by-passing of the tendering process and/or the cabinet approval for substantial projects. We anticipate that these are the very matters in which the police are interested and which forms the cornerstone of their five-year investigation.

27. The COI's mandate specifically requires them to consider, upon establishing the facts, whether to report any potential wrongdoing to, inter alia, the police and/or the DPP. Whilst this obligation places a considerable additional burden upon the COI it also enhances the risk that Dr Brown faces.

The Claimed Privilege

28. The privilege is a constitutional, statutory and common law right recognised in the Evidence Act 1905.

> S.14 No person offered as a witness shall be excluded by reason of interest or crime from giving evidence before any … person having, by law or consent of parties, authority to hear, receive and examine evidence, but any such witness shall, subject to this Act, be competent and compellable to give evidence: Provided that—
> (e) nothing herein contained shall, save as is hereinafter expressly excepted, render any person compellable to answer any question tending to criminate himself.

29. The definition of the privilege has changed somewhat as its effect has been eroded but in the UK the 1968 Civil Evidence Act s.1 offers a clear if somewhat narrow definition:

> The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any

document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty.

30. Cross & Tapper on Evidence 12th Edition puts it thus:

> "The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination…"

31. It has been described as an over-arching principle (R V White [1999] 2SCR 417).

32. The application of the privilege has already been accepted by the COI and previously fore-shadowed in correspondence between me and the COI. Although previously described as "the possibility of prosecution" by counsel for the COI and readily adopted by the Chair we respectfully suggest the preferred definition is as set out in the UK Civil Evidence Act ie that which "would tend to expose that person to proceedings for an offence" which it is submitted is a lower threshold than the "possibility of prosecution".

33. It is important to appreciate that the privilege applies to the whole of the questioning rather than any individual question. Thus "you cannot only not compel a witness to answer that which will criminate him, but that which tends to criminate him…" per LCJ Tenterden in R V Slaney [1832] 5 C&P 213 because a series of questions may well produce the same result.

34. It also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not. see Den Norske Bank V Antonatos 1999 QB 271 and R V Leicester Magistrates Court and Others [2016] 1 CAR 5.

35. It is our submission that the whole of the questioning as set out in the July letter (and November letter) will tend to expose Dr Brown to proceedings for an offence and therefore fall foul of the privilege which he invokes. This is compounded by virtue of the fact that he is unique of all the witnesses the COI has sought to obtain evidence from, in that, he is the only person that it is known to be under investigation by the police for apparently some, or all, of the same matters being inquired into by the COI and at the same time.

36. In a New Zealand case where an application was made by a number of applicants to prohibit the COI from continuing its work until after the trial of the applicants had concluded, the court held that in applying the test of "substantial risk of serious injustice" there was a real risk of prejudice to the applicants and as such the COI would only be allowed to go ahead if the applicants were not called to give evidence, they would not be required to reveal any defence to the criminal charges they faced and the COI would sit in private on matters which could prejudice their right to a fair trial.

See: Thompson V COI into Administration of the District Court at Wellington [1983] NZLR 98 HC and cf Fitzgerald V COI into Marginal Lands Boards [1980] 2 NZLR 368 HC

37. Clearly the case is distinguishable as we do not have any charges as yet and the test being applied relies on the dangers envisaged as a result of the publication of the report and the attendant publicity surrounding the COI. But it is well known that Dr Brown faces a criminal investigation and continues to do so. After five years of investigation he asked for it to come to an end. That request has been completely ignored by the COP. He remains under investigation.

38. We have not made any application for your COI to be suspended whilst the police investigation continues, indeed we have specifically made clear we make no such application. Instead we have focussed our attention on the requirement to give evidence. First being prejudiced by not having sufficient time to consider the evidence sought and now in the light of all that is known and unknown to seek to rely on his privilege.

39. Bermuda is a very small jurisdiction and nothing happens on these Islands without it becoming public knowledge. Any adverse conclusion of your COI is likely to prejudice Dr Brown. Any evidence he gives is capable of prejudicing any subsequent proceedings.

40. That Dr Brown may face trial is not a fanciful remote possibility; there is a declared and extant police enquiry into his affairs that dates back five years creating an appreciable risk of criminalmproceedings. Special investigating officers have been engaged and continue to interview potential witnesses known to Dr Brown. Here there is a real danger that Dr Brown's defence to any future allegation at any trial may be revealed before trial; there is the risk of unfavourable inferences being drawn from any refusal by him to answer specific questions in the witness box; that evidence probative of guilt may be given to the COI which would not be otherwise admissible in a court of law from which conclusions may be drawn.

The Public Interest

41. We are mindful of the requirement under your own rules for you to "consider the public interest in the information in question being obtained by the inquiry having regard to the likely importance of the information". There can be no doubt that the evidence Dr Brown could give will be regarded as important but we submit that once the privilege is invoked and accepted as being properly invoked then that simply must trump the public interest regardless of how important the evidence is. If the test is satisfied it matters not what the motive for invoking the privilege is. Privilege prevents the production of evidence; it is not concerned relevance or admissibility no matter how crucial. The COI will want to concern itself with the threshold being reached not with what prompts it.

Conclusion

42. We submit that the simple question is this "do we the COI accept that requiring Dr Brown to answer questions on the identified topics would tend to expose him to criminal proceedings?" If the answer is "yes" then that would

be the end of the matter and he will not give evidence. If the answer is “no” then the subpoena remains extant and he is required to answer it.

43. It is submitted that the evidence here is such that the claim to privilege is well founded and as such must be allowed.

44. We would only add that we would seek to avail ourselves of the same procedure that was afforded to Allan DeSilva in that Dr Brown either confirm in writing (by way of affi davit) his desire to seek to rely on his privilege if the matter is to be determined by the Chairman alone in accordance with the published rules or if it is to be determined by the whole panel then subject to the acceptance of the privilege he be allowed to claim it through me in his presence rather than the recognised “charade” of submitting to the witness box.

Jerome Lynch QC

13th November 2016