[2012] UKPC 17
Privy Council Appeal No 0116 of 2010

JUDGMENT

The Queen ex parte Mario Hoffmann (Appellant) *v* The Commissioner of Inquiry and the Governor of Turks & Caicos (Respondent)

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY LORD PHILLIPS ON

23 May 2012

Heard on 13-14 March 2012

Appellant	*Respondent*
Lord Pannick QC Javan Herberg QC Naina Patel	Phillip Havers QC Howard Stevens QC
(Instructed by Arnold & Porter)	(Instructed by Charles Russell LLP)

LORD PHILLIPS:

Introduction

1. On 31 May 2009 the first respondent, Sir Robin Auld ("the Commissioner") presented to the second respondent, Mr Gordon Wetherell, who had succeeded Mr Tauwhare as Governor of the Turks & Caicos Islands ("TCI"), his final report ("the Report") on corruption in relation to members of the House of Assembly, previously known as the Legislative Council, of TCI. Mr Tauwhare had appointed Sir Robin as the Commissioner and the Board will refer in this advice to "the Governor" whether speaking of Mr Tauwhare or Mr Wetherell. The entirety of the Report was made public. The Report opened with the following statement:

> "There is a high probability of systemic corruption in government and the legislature and among public officers in the Turks & Caicos Islands in recent years. It appears, in the main, to have consisted of bribery by overseas developers and other investors of Ministers and/or public officers, so as to secure Crown Land on favourable terms, coupled with government approval for its commercial development."

The Report identified some of the "overseas developers" referred to and included findings of fact in relation to their involvement that formed the basis of the Commissioner's conclusion that there was "a high probability of systemic corruption". Prominent among these developers was the appellant, Mr Hoffmann.

2. Mr Hoffmann was given notice by the Commissioner of the possibility that the Report would make adverse findings in relation to him and responded to that notice in writing. Before the Report was published he began proceedings for judicial review, seeking an order that it should not include any adverse reference to himself, or alternatively that any such reference should not be published by the Governor. There were two grounds for seeking this order. The first was that any such reference would fall outside the terms of reference of the Commissioner. The second was that the procedure adopted by the Commissioner in relation to Mr Hoffman was unfair. On 16 June 2009 Gordon Ward CJ entertained but rejected his application for judicial review.

3. Mr Hoffmann appealed to the Court of Appeal. On 17 March 2010 the court, Zacca P, Mottley and Ground JA, dismissed his appeal. He appeals to the Board with the permission of the Court of Appeal. He seeks declaratory relief to the effect that the findings in relation to himself were outside the Commissioner's terms of reference and that the procedure adopted in relation to him was unfair.

4. Mr Hoffmann's case was heard together with that of another developer, Dr Kinay, who was also the subject of adverse findings in the Report. The Chief Justice found that the procedure adopted in Dr Kinay's case had not been fair, but that finding was reversed on appeal.

5. Mr Hoffmann is a wealthy Slovakian businessman. He is, indirectly, the owner of over 90% of Postova Banka, a regulated Slovakian retail bank, and is the Chairman of its supervisory board of directors. Since 1997 he has been a frequent visitor to TCI, having built a house there and spending 2 to 3 months there every year. Since 2000 he has been pursuing a project to develop, through a company called DEVCO, an island of particular beauty called Salt Cay. To that end he has steadily acquired land on this island from the Government of TCI. Another Slovakian bank, J & T Banka, is a partner in this project. An important part of the project is the creation of a golf course. The following facts have not been in dispute in relation to the project. The TCI Government, under the leadership of its premier, the Hon Michael Misick, granted to DEVCO the land on which the golf course was to be built, on a 99 year lease at a "peppercorn" rent. In August 2006 Salt Cay Golf Club was incorporated as the company that would own and run the golf club. 50% of the shares in this company were held by Mr Hoffmann's Cyprus based holding company. The other 50% were given to a holding company of which Mr Chal Misick, a brother of the Premier, was the owner. In the following year, 2007, the Hon Michael Misick successfully applied to J & T Banka for a loan, made to himself and his wife, of US$ 6 million. Mr Chal Misick provided, and J & T Banka accepted, his 50% shareholding in Salt Cay Golf Club as security for this loan.

6. Findings made by the Commissioner in relation to the implications of these transactions form the principal subject matter of Mr Hoffmann's complaint. In particular objection is taken to the Commissioner's rejection of Mr Hoffmann's assertion that the land that was to be transformed into a golf course had no intrinsic value and the reasons given by Mr Hoffmann for taking Mr Chal Misick as a partner. More generally, Mr Hoffmann objects to the following expression of the Commissioner's conclusions in relation to these transactions:

> "I find that there is information of possibly corrupt and/or otherwise seriously dishonest involvement, including misfeasance in public office, of the Hon Michael Misick in relation to the Government's transactions with Mario Hoffmann of DEVCO for the development of Salt Cay: 1) In respect of his participation in that development with Chal Misick's knowing assistance and complicity in it, as described above; 2) in the potential abuse of his public office by accepting lavish and disproportionate hospitality from Mario Hoffmann, including the use of private aircraft, the provision of international flights and other hospitality in the course of developing business relations between DEVCO and the Government; and 3) in potential abuse of his public

> office by seeking and accepting a loan of $6 million from J&T Banka when that Bank, on its own account, was in negotiation with the Government over funding and participation in the development of Salt Cay.
>
> I therefore, recommend criminal investigation by the police or others of the possibility of corruption and/or other serious dishonesty, including misfeasance in public office, in relation to the Hon Michael Misick in respect of those matters."

The Board will turn straightaway to Mr Hoffmann's assertion that these findings, and the findings of fact that related to them, fell outside the Commissioner's terms of reference.

The scope of the terms of reference.

7. On 4 July 2008 the Foreign & Commonwealth Office ("FCO") wrote to the Governor referring to allegations, of which the Governor was aware, and other indications of possible corruption and serious dishonesty in relation to past and present elected members of the House of Assembly and instructing him to consider, in accordance with the TCI Commissions of Inquiry Ordinance 1986 ("the Ordinance"), whether to appoint a Commission to inquire into these matters. Two days later the Foreign Affairs Committee of the House of Commons published a report that contained a section headed "Allegations of corruption in the Turks and Caicos Islands". Areas of concern identified by this report included the sale of Crown land, contracts and development agreements and grants of "Belongership", that is residential status that carried with it the possibility of acquiring Crown land on advantageous terms.

8. The Ordinance provided, by section 2(1):

> "The Governor may appoint one or more Commissioners (hereinafter referred to as a Commission) to inquire into the conduct and management of any public body, the conduct of any public officer or into any matter whatsoever which is, in his opinion, of public importance."

9. On 10 July 2008 the Governor appointed the Commissioner with the following terms of reference:

"…to inquire into whether there is information that corruption or other serious dishonesty in relation to past and present elected members of the House of Assembly (previously known as the Legislative Council) may have taken place in recent years. It is to report to the Governor within sixteen weeks its preliminary findings and recommendations concerning:

a) instigating criminal investigations by the police or otherwise

b) any indications of systemic weaknesses in legislation, regulation and administration

c) any recommendation that the inquiry's terms of reference be extended

d) any other matters relating thereto.

In relation to (a), the Commission is directed to refer such information and/or evidence it may obtain to the TCI prosecuting authorities."

10. These terms of reference were challenged by two members of the House of Assembly on a number of grounds in *Robinson and Been v Auld and Attorney General* (CL 83/08) unreported dated 28 July 2008. They had limited success in as much as they succeeded in persuading the Chief Justice to order (c) above to be deleted on the ground that it fell outside the scope of the Ordinance.

11. Before the Chief Justice and the Court of Appeal counsel for Mr Hoffmann based their attack on the inclusion by the Commissioner of findings adverse to Mr Hoffmann on two grounds. The first was the more fundamental. In their skeleton argument for the hearing before the Chief Justice, Mr Sturman QC and Mr Herberg contended at para 23(3):

"In any event, the inquiry into whether there is information as to corruption or other serious dishonesty is only expressed to be '*in relation to past and present elected members of the House of Assembly (previously known as the Legislative Council)'*. The Commission is not empowered to investigate, or make findings relating to, whether there is evidence of corruption against other persons. At most, it might be

> relevant for the Commission to consider the role and actions of such other persons in relation to an investigation into past and present elected members (and as to whether to recommend further investigation), but the Commission is not authorised to report into such other persons."

12. This submission was repeated in the skeleton argument of Miss Carss-Frisk QC and Mr Herberg for the Court of Appeal. They submitted at para 45:

> "…it is accepted that it might be relevant for the Commission to consider the role and actions of such other persons in relation to an investigation into House of Assembly members (in the context of assessing whether to recommend further investigation). But it could only do so to the extent that it was necessary in relation to such an assessment. It could not independently assess, still less make (even provisional) findings of fact in respect of a third party."

13. These submissions were rejected by both courts. The Chief Justice held at para 66:

> "That cannot be correct. Corruption is an offence which almost invariably requires more than one person. Any meaningful investigation into corruption must involve an examination of the wider offence. The expression 'in relation to' used in the instrument allows, in fact demands, if it is to have any real meaning and effect, investigation of those who may have been bribed, those who may have bribed them and/or those who may have been parties to any such corrupt and/or otherwise serious dishonest behaviour, as the Commissioner stated in his Interim Report."

To like effect the Court of Appeal held at para 16:

> "We find that argument hard to follow. It does indeed take two to tango, and an assessment of whether there was information against a member of the House of Assembly will of necessity involve an assessment of the information against any person with whom he might have entered into a corrupt transaction. We would accept that it would be impermissible to launch into a wholly unrelated matter involving a third party, but do not think that the Commissioner has done that. It has also to be borne in mind that some of the transactions concerned were by their very nature complex, and involved numerous parties. In order to understand and evaluate them the Commissioner was obliged to look at the whole

> picture, and it would be both artificial and unconducive to the proper performance of his functions to tease out some strands only."

14. This argument was not pursued by Lord Pannick QC before the Board. On the contrary, in a complete *volte face* he repeatedly argued that Mr Hoffmann should have received precisely the same treatment as the members of the House of Assembly to whom the terms of reference expressly referred. This matter will have some relevance when the Board comes to consider the issue of fairness. So far as the scope of the terms of reference is concerned the effect of the *volte face* is that Mr Hoffmann's attack cannot be restricted to the passages of the Report that are adverse to Mr Hoffmann.

15. Findings adverse to Mr Hoffmann pale into insignificance compared to those made by the Commissioner in relation to those members of the House of Assembly whom he summoned to give evidence. In the first chapter of his report at 1.81 the Commissioner summarised his "provisional conclusions" by stating that on all the material and evidence before him there was "information in abundance pointing to a high probability of systemic corruption and/or other serious dishonesty". He went on to identify this. The second chapter of the Report was headed "Corruption". At 2.8 the Commissioner spoke of the "seemingly embedded disregard" by Ministers and other members of the legislature of the imperative to avoid conflicts of interest. At 2.14 he stated unequivocally that the disregard by the Cabinet of the Code on Principles in Public Life in promoting their private interests and those of their intimates "deserves more serious censure". At 2.20 he commented that the attitude of the Hon Michael Misick to his statutory obligations "would have *caused raised eyebrows in the foc'sle of a pirate sloop*". At 2.36 the Commission referred to a number of clearly evidenced payments, direct or indirect, to, in particular, the Hon Michael Misick, the Hon Floyd Hall, the Hon McAllister Hanchell and the Hon Jeffrey Hall, detailed in chapter 4. The findings adverse to Mr Hoffmann, while among the most significant of those in chapter 4, related to only one of a considerable number of transactions described in that chapter. If Lord Pannick is correct in submitting that the findings in relation to Mr Hoffmann were outside the terms of reference of the Commission, then it must follow that the Report was ultra vires almost from beginning to end.

16. The case advanced by Lord Pannick in support of his argument that the findings adverse to Mr Hoffmann were ultra vires was founded on the terms of reference laid down by the Governor. The Commission was to do no more than ascertain whether "corruption or other serious dishonesty *may* have taken place in recent years". Findings and recommendations were to be "*preliminary*" leading to a recommendation concerning "instigating criminal investigations". As Lord Pannick put it the inquiry "was intended to be an investigation preliminary to potential investigation by other authorities". He submitted that it was unusual to set up a public inquiry as a precursor to possible criminal prosecutions rather than as a substitute for

these and that the tentative nature of the terms of reference was designed to avoid findings that might prejudice a subsequent prosecution.

17. Lord Pannick supported his submission by reference to statements about his role made by the Commissioner himself. Thus on a preliminary visit to the TCI on 15 July 2008 the Commissioner said:

> "Although it is an 'Inquiry' within the meaning of that Ordinance, it should be plain from the wording of the Terms of Reference, that it is, for the moment, an inquiry into whether there is a need for a further and more searching investigation of what may have been going on in the government of this Territory. That could be by the Commission itself, the Police or some other public or regulatory body – such as the new Integrity Commission."

A Commission press statement on 23 December 2008 said:

> "The Commissioner is not a Court or Tribunal with power to *determine* any issue of fact in the Inquiry or to *direct* any particular outcome. In particular, it is not his job to make findings of guilt or in exoneration of those against whom allegations may have been widely and publicly made. The most he can do, should he conclude that there is information of *possible* venality, is to consider whether to recommend a further and more searching investigation, or investigations, by some other body. His second task, which but for the first, would certainly not call for a partly forensic exercise of this sort, is to report on any indications of systemic weakness in the law or its administration in the Territory."

18. In opening the oral hearings on 13 January 2009, the Commissioner returned to this theme:

> "I am concerned with the possibility, not with proof, of corruption. I have no power to determine issues of fact or to direct any particular outcome. It is not my job to make findings of guilt or to exonerate those against whom allegations have been made. The most I can do – if I have information of possible corruption or other dishonesty – is to recommend further and more searching investigations, say, by the police and/or some other public enforcement body with a view to criminal prosecution, recovery of the proceeds of crime if proved and/or consideration of other sanctions."

19. The effect of the terms of reference and of the legitimate expectation that would have been created by the Commissioner's statement was, according to Lord Pannick, as follows. It was not within the Commissioner's remit to make findings of any fact that was in issue, even if the findings were provisional. Nor was it within his remit to express any view on the likelihood of dishonesty or corruption. His role was no more than to identify any areas that merited further, and more detailed, investigation by the appropriate authority to see whether there was justification for criminal proceedings.

20. Lord Pannick identified the following instances as going beyond the Commissioner's remit to do no more than identify information that raised the possibility of corruption that ought to be investigated by others:

i) The opening statement in the Report that there was a "high probability of systemic corruption in government and the legislature", coupled with a cross reference to chapter 4 of the Report, which gave instances of relationships between members of the House of Assembly and developers, including Mr Hoffmann.

ii) The statement that the Commissioner was "unable to accept" Mr Hoffmann's explanation of why he appointed Mr Chal Misick as a partner in the Salt Cay project;

iii) The unqualified finding, contrary to Mr Hoffmann's written evidence, that Mr Chal Misick was not made a partner because Mr Hoffmann needed a Belonger as a partner.

iv) The finding that Mr Chal Misick had received an "unearned stake in a development company".

v) The rejection of Mr Hoffmann's written statement that the golf course had no significant value as "meaningless".

vi) The unqualified statement that the Hon Michael Misick had received "lavish and disproportionate hospitality" from the appellant.

vii) The description of the J & T Banka loan as "a convenient fiction".

21. Lord Pannick submitted that these were findings of fact that went far beyond the "tentative" standard in respect of giving "preliminary indications" that further

investigations should be carried out, which the Commissioner had himself accepted as a true description of his role under his terms of reference.

22. The case advanced by Lord Pannick was one that had been swept aside in fairly peremptory fashion by both the Chief Justice and the Court of Appeal. The Chief Justice was unaware of the contents of the Report, which was not yet in the public domain, but he said this of the suggestion that the Commissioner could not make findings of fact where these were in issue:

> "The Commission is required to inquire whether there is information that corruption may have taken place. It would be a failure by the Commission to carry out its duties properly if it was simply to accept all information as having the same weight. It must evaluate the information and submit its preliminary findings and recommendations as to whether there should be further investigations by some other body. Simply to name the people subject to further investigation without any further explanation would be of little value and would certainly not supply the Governor or the prosecuting authority with sufficient information on which to base the decisions they will have to make. Clearly it is necessary to evaluate the strength or weakness of the information and its likely relevance to the criminal offences for which further investigation is recommended. That is the preliminary finding that is to be supplied with any recommendation to instigate or not any further investigation. Similarly, one might ask how the Commission is to instigate further investigation if it cannot report the basis upon which it has made its preliminary finding that the information is sufficient to justify such a course of action."

23. The Court of Appeal accepted that the Commissioner had made some findings of fact in "the decisive language of concluded findings", but went on to say this:

> "However, it is hard to see how the Commissioner could have fulfilled his task without making some evaluation of the material before him. He had to find his way through a sea of gossip, rumour and misinformation and in order to do that effectively it was both necessary and permissible for him to weigh the evidence, rejecting some and accepting some. Nor was he bound to accept the explanations given by the witnesses, including Mr Hoffmann and Dr Kinay, and if he did not accept them, then he was obliged to explain why. We do not think that he went beyond that, but even if he did in some instances, the overall context as noted above would correct it. Nor was it necessary for him to render the report unreadable by obsessively inserting qualifications, or by peppering the text with reservations."

24. It seems to the Board that this area of contention arises out of confusion in relation to the requirement in the terms of reference that the Commission should make "preliminary findings" coupled with "recommendations concerning …instigating criminal investigations by the police or otherwise". That language has to be considered having regard to the fact that the original terms of reference also required the Commission to make "any recommendation that the inquiry's terms of reference be extended". When announcing the appointment of the Commission on 10 July 2008 Governor Tauwhare said that the Commission would submit a preliminary report, after which Governor Wetherell

> "will then consider how best to proceed in the light of the Commission's preliminary findings, including whether to extend or amend the Inquiry's terms of reference. It would not be sensible for me now to prejudge whether or how the Inquiry might be extended. These matters will need to be assessed in the light of the Commissioner's preliminary report. At the same time any information which might be relevant for a criminal investigation would be passed directly by the Commission to the Hon Attorney General who in turn could request the police to undertake investigations which could lead to criminal prosecutions. It is important to understand that it is not the role of the Commission itself to conduct a criminal investigation or prosecution. Any matters of a potentially criminal nature which come to light as a result of its work will need to be the subject of investigation by the police and, if appropriate, prosecutions brought by the Attorney General."

25. As the Board has explained at para 10 above, the possibility of the Commissioner recommending an extension to his terms of reference was challenged and excluded from his terms of reference. Nonetheless, the reference to "preliminary report" reflects the possibility that the Commission itself might be asked to make a further report. In the light of this it would have been particularly bizarre if the Commission's terms of reference had precluded it from making in its preliminary report findings of fact or expressing opinions as to the inferences to be drawn from the facts. Lord Pannick accepted that terms of reference that did no more than require a commission to report on whether there should be a further investigation were without precedent in his experience. Mr Havers QC, for the respondents, agreed with him.

26. The Board does not consider that the terms of reference restricted the function of the Commissioner in a manner that was without precedent. It reads the reference to a "preliminary" report as indicating that the report would not be final, but that any findings would be subject to further review, either by the Commission itself or by the prosecuting authorities or by some other body. The attack on the terms of reference to which the Board has referred at para 10 included a root and branch attack on the terms

of reference on the ground that they were "too wide and ill-defined to satisfy the requirement of clarity". This attack did not succeed. The Chief Justice held at para 28:

> " The public has a right to know that it will look at all matters which may have taken place and will not be restricted by terms which may effectively prevent full investigation of the allegations that have been made and of any relevant information which comes to light. The purpose of appointing the Commission of Inquiry is to try and ascertain whether there is substance in these allegations or whether they are unfounded. It is an inquiry not a trial. It is not to establish guilt but to uncover information. Any past or present elected member who is not involved should regard the Commission as an effective way of having the propriety of his or her conduct confirmed. If, however, there is information that there has been corruption or serious dishonesty in relation to any such members of the public is entitled to know that the Commission has the necessary power to uncover it , but the decision to bring any possible criminal charges is, and will remain, the responsibility of the prosecution authorities not of the Commission."

The Court of Appeal upheld his decision.

27. The Board agrees with the conclusions of the courts below. It has concluded that the terms of reference entitled the Commissioner to express conclusions of fact and to express opinions as to the implications of those facts, albeit that these would only be "preliminary" or "provisional". That is, they would have no effect in law and would be open to review in the event of any further proceedings. Many public inquiries take place in circumstances where subsequent criminal proceedings are possible and the Board is aware of none in which the terms of reference precluded findings of fact. To have restricted the powers of the Commissioner in the manner suggested by Lord Pannick would have robbed his Report of almost all utility. Certainly it would have rendered inappropriate the action that he took before he produced his final Report.

28. On 28 February 2009 the Commissioner presented an Interim Report to the Governor. This included the following paragraphs:

> "Over the six months of extensive written inquiries by the Commission before it began its oral proceedings in Providenciales in January and February 2009, I had found much information pointing to possible systemic corruption or of other serious dishonesty involving past and

present elected Members of the Legislature in recent years. I had also found indications of systemic weaknesses in legislation, regulation and administration and in related matters calling for attention by way of recommendation.

The oral proceedings – required in the main to secure full disclosure of interests from Ministers and other Members of the House of Assembly - have provided further information in abundance pointing, not just to a possibility, but to a high probability of such systemic venality. Coupled also with clear signs of political amorality and immaturity and of general administrative incompetence, they have, in my view, demonstrated a need for urgent suspension in whole or in part of the Constitution and for other legislative and administrative reforms. There are also strong indications, in the information before me, of the need for change in other related matters."

The Commissioner went on to recommend actions which included the suspension of the entire Constitution for an indefinite period. The Commissioner could not properly have justified such a recommendation without making an evaluation of the extent to which the information that he had received was indicative of systemic corruption. He stated, when he did so, that he was not ready at that point to formulate "provisional findings or recommendations for institution of criminal investigation in relation to any individual". No criticism has been made of the Interim Report.

29. Had the Commissioner's subsequent Report been as anodyne as Lord Pannick suggested that his terms of reference required, it could not have justified the drastic action recommended in the Interim Report. In the event the Commissioner set out in his subsequent Report, as explained in para 1.9,

"findings of information of possible corruption and/or other serious dishonesty involving individual Members of the House of Assembly – all Ministers at the material time and some third parties, with recommendations for criminal investigations."

30. At the beginning of chapter 4 the Commissioner explained the provisional nature of his findings in the following terms:

"In reporting upon what I have found, I have simply related what emerged from the evidence, and identified areas of conflict, contradiction and information pointing to possible corruption. Further investigation will be required in every case, but to do less than this, at

> this stage, would have been a dereliction of my duty under the Terms of Reference, and would have risked presenting a less than full picture.
>
> Any final assessment made, may or may not bear out my initial assessment on the material available. That assessment will be a task for those who come after me, and may or may not involve criminal proceedings. What should also be clear is that the process of inquiry, which this Commission has begun, is far from complete. The fact that an individual is not named or criticised should not be taken as any form of endorsement of their behaviour; the fact that particular misdeeds are not explored in detail here, does not mean they will not be given attention at a later stage."

The Board has concluded that the Commissioner correctly identified the task entrusted to him by the terms of reference and concludes that Mr Hoffmann's appeal against the Court of Appeal's findings to that effect should be dismissed.

Procedural fairness

31. Lord Pannick's case on procedural fairness is summarised by the following proposition in para 17 of his written case:

> "…persons liable to be criticised by a commission of inquiry should generally be given a fair opportunity to participate in the process: *Mahon v Air New Zealand* [1984] AC 803. Although the extent of that opportunity and how it may be given effect to will depend upon the particular circumstances, the basic principle is clear."

32. The Board endorses that principle. It observes, however, that reliance on it is at odds with Lord Pannick's case on the first issue, for his submission is that it was not within the Commissioner's terms of reference to make findings that were critical of Mr Hoffmann. In truth the second issue raised by this appeal arises only because Mr Hoffmann has failed on the first issue.

33. Lord Pannick's complaint about Mr Hoffmann's treatment by the Commissioner is, in a nutshell, that he was not treated in the same way as the members of the House of Assembly who were summoned to give evidence to the inquiry. They were given notice that they were potentially subject to criticism. They were given access to the relevant documents. They were called to give oral evidence and they were represented by lawyers throughout the oral hearings. These were procedures that the Commissioner had promised would be afforded to all whose

conduct was the subject of the inquiry. None of these safeguards against injustice were afforded to Mr Hoffmann.

34. In order to address these submissions it is necessary to consider the procedures announced and adopted by the Commissioner prior to his delivery of his Report to the Governor. These were carefully summarised by the Chief Justice in his judgment and the Board has annexed that summary to this advice.

The obligation of fairness

35. The submissions made by Lord Pannick in relation to the procedural requirements of fairness in a public inquiry were founded on common law. He relied on the "Salmon Principles" as set out in para 32 of the Report of the Royal Commission on Tribunals of Inquiry (1966), (Cmnd 3121):

> "1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
>
> 2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
>
> 3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
>
> (b) His legal expenses should normally be met out of public funds.
>
> 4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
>
> 5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
>
> 6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him."

36. At para 70 of his judgment the Chief Justice accepted that these principles were applicable in TCI. The Court of Appeal did not agree. It, referred, with approval, to a passage in *Wade & Forsyth Administrative Law* 10th ed (2009)pp 826-827 which challenged the inflexible application of the Salmon principles. The Court of Appeal preferred the following principles laid down by Lord Mustill in an oft-quoted speech in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 560:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

37. The Court of Appeal added this at para 31:

> "…the procedure of a Commission of Inquiry such as this one is primarily a question for the Commission itself. Various considerations will affect that in addition to fairness, including the requirement of effectiveness, speed, economy and practicality. There is no general rule that all persons likely to be adversely affected by the findings of a Commission of Inquiry are entitled to give oral evidence. It is sufficient if they are notified of matters of concern which affect them and given a chance to respond."

38. The Board is broadly in agreement with the approach of the Court of Appeal. The Salmon principles cannot be inflexibly applied and the requirements of fairness must be tailored in a manner that has regard to all the circumstances of the particular Inquiry. The Court of Appeal was, however, itself overly specific if it intended to suggest that it will always be sufficient to notify a person likely to be affected by the findings of a Commission of Inquiry of matters of concern to the Inquiry and to give that person the chance to respond in writting. Fairness will sometimes require that such a person be given the opportunity to give oral evidence, and it is necessary to decide whether Mr Hoffmann was such a person.

39. The position of Mr Hoffmann was governed not merely by the common law, but by the terms of the Ordinance. Section 7 of the Ordinance provides:

> "(1) Any person whose conduct is the subject of an inquiry, or who is implicated or concerned in the subject matter of the inquiry shall, subject to the provisions of section 4, be entitled to be represented by an Attorney at the inquiry.
>
> (2) For the purpose of subsection (1), a Commission shall determine whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry."

Perhaps because in the courts below it was Mr Hoffmann's case that he was not one of those whose conduct was to be investigated under the Commissioner's terms of reference, neither counsel before the Board focussed initially on this provision. When it was drawn to their attention, both agreed that it applied to Mr Hoffmann. The Board has considered whether they were right to do so.

40. In his interim report, and again at para 1.3 of his Report, the Commissioner said this:

> "Under the first Term of Reference, I am to consider whether there is information – in whatever form and giving it the weight I consider it deserves – of possible corruption *in relation to* , that is, involving, elected Members, past and present of the Legislature. If so, I am to consider whether to recommend criminal investigation by the police or other bodies. The potential targets of the Commission's Inquiry and any such criminal investigation are those who may have been bribed, those who may have bribed them and /or those who may have been parties to any such corrupt and/or otherwise seriously dishonest behaviour."

The Board considers that this statement is capable of giving a misleading impression both of the object of the Inquiry and of the manner in which the Commissioner addressed that object. The terms of reference required the Commissioner to inquire into possible "corruption or other serious dishonesty *in relation to past and present elected members of the House of Assembly*" (the Board's emphasis). When dealing with the attack made by Robinson and Beer on the terms of reference the Chief Justice remarked at para 21 that the Governor had identified "the limited group of people who were to be the subject of the inquiry". At para 24 he added:

> "…the inquiry is limited to the past and present members who have been elected to a total of fifteen seats at any one time. It does not extend to the appointed members or to any member of staff in the House. It is limited to information whether corruption or serious dishonesty has taken place in relation only to that specified group."

41. These observations were well founded. The suspected corruption that was the object of the inquiry was corruption in government. The principal targets of the inquiry were the members of the government who were suspected of corruption. The suspected corruption consisted, in part, in the soliciting and the acceptance of money and benefits from developers in exchange for benefits that were conferred on the developers. At para 6 of his Report the Commissioner summarised his findings as follows:

> "Pursuant to the Commission's first Term of Reference, I find that there is information of possible corruption and/or other serious dishonesty, including misfeasance in public office, in relation to five present elected Members of the House of Assembly, all of whom until recently were members of the Cabinet, namely, the Hons Michael Misick, Floyd Hall, McAllister Hanchell, Jeffrey Hall and Lillian Boyce. I have recommended criminal investigation by the police or others with a view to prosecutions, if so advised, in relation to such possible offences in respect of matters identified and described in Chapter 4, and summarised in Chapter 6, of this Report."

The five named members of the House of Assembly were primary targets of the inquiry.

42. At the beginning of chapter 4 of his Report, at 4.2, the Commissioner said:

> "This Chapter necessarily considers other persons beyond simply the elected officials involved. It would be wholly artificial to produce a Report that did otherwise. In so far as there is information indicating

> corruption, that corruption does not exist in a vacuum (eg if an official receives a possibly corrupt payment, it must have come from someone else and they must be identified in order to show why and how it may be is corrupt)(sic)."

The statement that persons other than officials had to be named in order to show why and how the conduct was corrupt is significant. It demonstrated that the Commissioner appreciated that persons other than officials were not the primary targets of his inquiry.

43. The Commissioner went on to state at para 4.3

> "Several parties have sought to argue before the Commission that to consider or even to name parties, apart from elected officials, takes the Commission outside its Terms of Reference. Related arguments were also raised that no comment should be made upon those who provided no evidence or who only gave written evidence before the Commission. I do not accept those arguments. I have endeavoured to ensure that, in every case, where I was minded to make an adverse finding leading to a recommendation of criminal investigation in respect of any person whose conduct is the subject of, or who is implicated or concerned in the subject matter of the Inquiry, that person should have an opportunity to comment ahead of the Report, by means of responses to *Salmon* letters. All have responded."

44. The Board was told that 19 Salmon letters were sent, some of them to developers other than Mr Hoffmann. The Board does not consider that every developer who was suspected of providing money or other benefits to Ministers fell to be considered as a "person whose conduct [was] the subject of, or… implicated or concerned in the subject matter of the inquiry" within section 7(1) of the Ordinance, or as "involved in" the inquiry, in the wording of the Salmon principles. To have involved all of them in the inquiry would have multiplied the length of time that the inquiry would have taken and defeated the its object, as deduced from the terms of reference. That object was to address a situation of emergency in the governance of TCI, as indicated by the very short timescale of the inquiry.

45. Mr Hoffmann cannot, however, fairly be treated on the same footing as the developers who played a less prominent part in the matters investigated by the Commissioner. Mr Hoffmann was no mere outsider. He had had a house in TCI since at least 2000, spent two or three months a year there and had been granted Belonger status. His relationship with the Hon Michael Misick, and with his brother Chal, received detailed consideration by the Commissioner. The dealings in relation to Salt

Cay formed the most significant and detailed portion of the Report. In the Board's view, these matters were enough to make Mr Hoffmann's conduct a subject of the inquiry within the meaning of section 7(1) of the Ordinance, or at the very least to make Mr Hoffman a person who was "implicated or concerned in the subject matters of the inquiry".

46. Mr Hoffmann had a powerful personal interest in the inquiry. Not only was his reputation at stake, but so was the substantial business venture in which he had invested heavily. In these circumstances, the Board has reached the conclusion that fairness required that Mr Hoffmann should be given a reasonable opportunity to deal with his involvement in the Salt Cay project and that this involved giving him a reasonable opportunity to give oral evidence to the Commissioner. The critical question is whether he was given those opportunities.

The relevant facts

47. On September 24 2008 the Commissioner wrote to the attorneys acting for the Hon Michael Misick seeking information and documentation in relation to the Salt Cay project. The letter sought confirmation from the Hon Michael Misick that DEVCO would not be permitted to commence work unless all the necessary permissions had been granted.

48. On January 6 2009 the Governor was instructed by the Secretary of State for Foreign and Commonwealth Affairs not to act in accordance with the advice of the TCI Cabinet in relation to any further steps in the development of Salt Cay. An official of the FCO subsequently made it plain that this instruction was issued when it became clear that the Commissioner was looking into the Salt Cay development and it was considered imprudent, pending the outcome of the inquiry, to allow any further steps to be taken in respect of the development which might prove to be irreversible.

49. On 8 January 2009 the lawyers acting for the Hon Michael Misick sent, electronically, a letter to Mr Hoffmann stating that the Salt Cay development was one of the matters being investigated by the Commission and asking five questions in relation to Mr Hoffmann's involvement in the loan of $6 million made by J & T Banca to the Hon Michael Misick. The letter ended:

> "If you feel able to do so we would like you to give a general statement as to the allegation that your development project is tainted by connection to the Premier and this is not the case (sic)."

50. Mr Hoffmann replied electronically on 12 January 2009, denying any involvement in the loan. The letter went on to express concern about

> "absolutely irresponsible rumours and some media reports that me personally or my project on Salt Cay is connected with any potential corruption or inconvenient acting. I'd like to present to you and whoever it may concern indisputable facts about my activities on TCI and Salt Cay Project."

51. Mr Hoffmann went on to set out a concise but detailed account of his dealings in relation to Salt Cay. This was to the effect that he had given fair value for any land or benefit acquired in relation to the project and had received no preferential treatment when compared to other developers on TCI. The letter ended by remarking that Mr Hoffmann had not been contacted by the Commission but would cooperate with any enquiry made of him by it.

52. This letter was read to the Commissioner in the course of the oral evidence of the Hon Michael Misick on 15 January 2009. On 19 January the Commissioner referred to this and remarked that in the light of the evidence given by the witness he considered that it would "be only just" that Mr Hoffmann should come to give evidence to the Commission. The Commissioner was informed that Mr Hoffmann was in Slovakia. On the following day, having obtained Mr Hoffmann's email address, the Commission sent a letter to him requesting Mr Hoffmann to attend to give evidence on oath in relation to the evidence of the Hon Michael Misick and the letter sent by Mr Hoffmann. Relevant extracts from the transcript of the oral hearings were included and Mr Hoffmann was asked to state the days on which he could attend prior to February in order to attempt to schedule a hearing to suit his convenience.

53. No reply had been received by 26 January, on which day the Commission sent a chaser to the lawyers acting for Mr Hoffmann in TCI. One of these, Mr Katan replied at once stating that they had just received instructions from their client to the effect that owing to pre-existing commitments it would be extremely difficult for him to attend within the timetable provided. Mr Katan complained that the tight timetable was unreasonable, asked for sight of the core documentation and said that Mr Hoffmann would be happy to provide evidence in response to written questions.

54. Two days later Mr Katan wrote suggesting that Mr Hoffmann should give evidence by written statement "in the first instance". Although there was some discussion of the possibility that Mr Hoffmann might give oral evidence when the Commissioner returned to London on termination of the hearings in TCI, Mr Hoffmann was told that this would not be possible and asked to submit evidence in writing by 20 February 2009. In a letter to his lawyers dated 10 February, Mr Milne,

counsel to the inquiry, explained the nature of the evidence that the inquiry hoped to receive. He stated:

> "We suspect that he, along with many other developers, found that the approach that had to be taken was that nothing happened if the wheels were not greased in government. That greasing in many cases appears to be that one is required to appoint a 'partner' who takes a large share of some aspect of the project; who contributes nothing of any appreciable value; who is entitled to a significant proportion of the eventual profits/capital, and who just happens to be a relative or close friend of the Premier. He may wish to comment upon this."

This comment supports the Board's conclusion that the Commission was not treating developers as primary targets.

55. Mr Hoffmann submitted to the Commission a very lengthy written statement, accompanied by submissions from leading counsel. He offered to submit to oral questions, an offer that was not taken up by the Commissioner. On 9 April 2009 the Commissioner sent Mr Hoffmann a Salmon letter, inviting his comments on the following provisional conclusions:

> "1. Mr Mario Hoffmann in granting a 50% stake in Salt Cay Golf Club Ltd to Mr T Chalmers Misick in December 2006 entered into a potentially corrupt deal, in that he knew that the purpose of granting the shares to Mr Misick was to provide a benefit directly or indirectly to the Premier who was negotiating on behalf of the government in relation to the Salt Cay development as a whole.
>
> 2. Mr Mario Hoffmann, in representing to the Commission that he had recruited Mr T Chalmers Misick as a 'Belonger partner' solely on the basis that Mr Misick provided particular skills and abilities, and not because he was the brother of the Premier, was seeking to mislead the Commission.
>
> 3. Mr Mario Hoffmann engaged in potentially corrupt practice in that he may have procured and/or facilitated the loan to the Premier from J&T Banka of $6 million secured upon the shares provided to Mr T Chalmers Misick by Hoffmann.
>
> 4. Mr Mario Hoffmann engaged in potentially corrupt practice by providing lavish hospitality to the Premier and other TCI ministers,

> including the provision of international travel and the use of his private jet, whilst engaged in business negotiations with the Government of the TCI."

56. Mr Hoffmann submitted a further statement, again supported by submissions from leading counsel, again to no avail. The Commissioner's Report included the adverse conclusions set out in the Salmon letter. The issue before the Board is not whether those conclusions could properly be based on the material before the Commission but whether the procedure adopted by the Commissioner in reaching those conclusions was fair.

The findings of the courts below

57. The relevant findings of the Chief Justice are at paras 93 to 99 of his judgment. He held that Mr Hoffmann was entitled to expect to be treated in the same way as "other witnesses and persons implicated". He found that there were significant departures both from the procedure announced by the Commissioner and from the requirements of natural justice and the Salmon principles in the early stages of the inquiry. He commented that it was difficult to see how the Commissioner could have failed to see the link with Mr Hoffmann as soon as the Salt Cay matter came to his attention. He should have advised him of his interest before the oral hearings began and enabled him to test the witnesses in cross-examination. The Chief Justice held, however, that the Commissioner could not be criticised, having regard to the urgency of the inquiry, for failing to continue to try to make arrangements for Mr Hoffmann to give oral evidence after the hearings in TCI came to an end. Looking at matters overall, the Chief Justice was satisfied that Mr Hoffmann had been given a fair hearing. Subsequent events repaired the earlier shortcomings.

58. The relevant findings of the Court of Appeal are at paras 54 to 64 of its judgment. The Court held that the Chief Justice had erred in finding that there had been breaches of natural justice and the Commissioner's own procedure in the initial stages. The published procedure envisaged that if the Commissioner pursued someone who might be implicated for information or documents he would tell that person the gist of the information against him. Nor did he promise an oral hearing to all such persons. It was in his discretion whether to take the evidence orally or in writing. Mr Hoffmann was not himself within the first or second stages of the proceedings contemplated in the press release of 23 December. They were members of the House of Assembly, civil servants or other government insiders. The latter included Mr Chal Misick, who was closely involved in many of the transactions and was a "key participant" in whatever was going on at Salt Cay. Nor was Mr Hoffmann a stage two person. These were in effect witnesses for the prosecution. Mr Hoffmann fell into the category of those adversely implicated by the evidence given at stage 1 or 2, who were promised an opportunity to give evidence at stage 3, either orally or in writing at the

Commissioner's discretion. Fairness did not require persons in Mr Hoffmann's position to be given the opportunity to give oral evidence.

59. The Court of Appeal further held that it was not apparent that the Commissioner or his staff were aware of the matters that were to cause him concern about the role of Mr Hoffmann until Mr Hoffmann himself drew attention to them by his letter of 12 January 2009. As Mr Hoffmann had not identified himself or requested an oral hearing prior to that point he could not complain about being overlooked. The Commissioner had, by his letters of 19 and 20 January, given him an opportunity to give oral evidence. He had never given a satisfactory explanation of why he did not take advantage of that offer:

> "In those circumstances it seems to us that the proper conclusion on the evidence was that Mr Hoffmann effectively declined what was, on 20 January, a reasonable opportunity to give oral evidence at some point in the following two weeks."

Conclusions

60. The Board considers that the Chief Justice rather than the Court of Appeal reached the correct conclusion as to the point at which the Commissioner and his staff must first have become aware of the significance of the part that Mr Hoffmann played in the story. The matters to which the Board has referred at paras 45 and 47 above show that the Commissioner focussed on Salt Cay as early as September 2008. Furthermore the terms in which the Hon Michael Misick was examined by counsel to the inquiry on 15 January 2009 show that the latter was very well briefed about Mr Hoffmann and the role that he had played in respect of the Salt Cay development. With hindsight, it would have been better and fairer if the Commissioner had notified Mr Hoffmann, before the start of the oral hearing in TCI, that his conduct was a subject of the inquiry and that he was entitled to be represented at its hearings. The Board can, however, understand how it came about that he was not.

61. It seems clear, from the summary set out in the Annexe, that the Commissioner and his staff focussed initially on attempting to obtain information from the members of the House of Assembly and the Cabinet Secretary, the Permanent Secretaries and under Secretaries. The stated intention was that the Commissioner would then decide upon those whose conduct was the subject of the inquiry or who were implicated or concerned in its subject matter and afford them the opportunity to testify. This plan was derailed by the obduracy of members of the Assembly in attempting to bring the inquiry to a halt by judicial review and in failing to respond to the Commissioner's invitation to provide relevant evidence. This forced him to group the proposed oral hearings into stages. The first stage, unusually, involved calling those whose conduct

formed the express subject matter of the inquiry, the members of the House of Assembly suspected of corruption. The reason for this, as the Commissioner explained in para 1.6 of his Report was that these oral hearings were necessary "in the main to secure full disclosure of interests from Ministers and other Members of the House of Assembly".

62. It seems to the Board that, perhaps understandably having regard to the pressure that he was under and the difficulties that he was experiencing, the Commissioner had not at this stage turned his attention to the question of whether any developers fell within the scope of section 7(1) of the Ordinance. It was only when Mr Hoffmann's letter was read to the inquiry that the Commissioner, belatedly, appreciated that justice required that he should be afforded the opportunity to give oral evidence to the inquiry.

63. Is the fact that Mr Hoffmann was denied the opportunity to take part in the first stage of the oral hearings a procedural shortcoming that should have led the Chief Justice to order that any adverse findings in relation to him should be removed from the Report, and that should lead the Board to make a declaration that he has been unfairly treated? The Board thinks not. The findings that it has just made will stand as part of the record, but the Board agrees with the Chief Justice that overall Mr Hoffmann was fairly treated.

64. The Board does not consider that, if Mr Hoffmann had been represented at the hearing of the evidence given in the first stage of the oral hearings, intervention by the lawyer representing him would have been likely to alter the overall import of the evidence given at that stage. Before the Court of Appeal his counsel gave examples of the questions that might have been posed to witnesses. They would have been largely designed to obtain confirmation of the evidence that he was subsequently to give in his statements. As the Court of Appeal observed at para 61 it is hard to see how this would have added much to the examination of the main protagonists already conducted by their own counsel.

65. The critical question is whether the Commissioner afforded, by his letter of 20 January, a fair opportunity for Mr Hoffmann to give oral evidence to the inquiry. The Board agrees with both the courts below that he did.

66. Mr Hoffmann had, on his own evidence, spent about three months in TCI after the Commission of Inquiry had been set up. His letter of 12 January made it clear that he was aware of the allegations that his participation in the Salt Cay project involved corruption. Had he wished to give oral evidence the Board would have expected him to do his utmost to take advantage of the request to do so made in the letter of 20 January. He himself has given no explanation of why he did not do so. He has given

no explanation for the delay between 20 January, when the letter was sent to him and 26 January, when Mr Katan responded on his behalf. Mr Katan's explanation of the delay was that Mr Hoffmann's schedule was planned well in advance and that it was not always possible to gain instructions from him immediately. That does not explain why Mr Hoffmann could not have corresponded more expeditiously with his lawyer, had he wished to do so, nor indeed does it state that he did not do so. The reason given to explain Mr Hoffmann's failure to comply with the request to give oral evidence was that "owing to pre-existing commitments it would be extremely difficult for him to attend before the Commission within the timetable provided". Without any evidence from Mr Hoffmann of the overriding nature of those commitments the Board agrees with the Court of Appeal that the proper conclusion on the evidence is that Mr Hoffmann effectively declined what was, on 20 January, a reasonable opportunity to give oral evidence at some point in the following two weeks. Thereafter the Commissioner did all that fairness required by admitting lengthy written evidence from Mr Hoffmann, coupled with submissions from his lawyer both before and after the issue of a Salmon letter.

67. For these reasons the Board rejects the arguments advanced on behalf of Mr Hoffmann in respect of the procedural fairness of the inquiry. It accordingly humbly advises Her Majesty that this appeal should be dismissed.

68. The appellant to pay the respondent's costs unless written submissions are received within 28 days.

ANNEXE
Procedure Adopted by
the Commissioner, as summarised by the Chief Justice

[76) In his opening statement, the Commissioner explained that he had not, at that stage, been able to detail the procedure that he would follow but he gave his initial view of the manner in which it would deal with persons possibly implicated:

> " ... the Secretary will write to persons who may have particular means of knowledge or who may be implicated by information already before the Commission. [The secretary] will seek specific information and, where appropriate, written material and documents or records. In each such case, common justice requires that I should inform those who may be so implicated of the gist of any information before me suggesting such knowledge or implication.... The next stage ... will be to invite them to give information orally, which may be in the form of evidence on oath or by way of affirmation ... "

[77] In a press statement dated 17 September 2008, the Secretary stated:

> "Sir Robin hopes that the Commission will move to the Turks and Caicos Islands ... to obtain further information and to convene formal public hearings. At those hearings, he expects to invite or, if necessary summon, persons to give evidence and/or produce documents ... "

[78) On 3 October 2008 it was pointed out that letters had been sent to each member of the Government and elected member of the Assembly and the Commission had more recently extended the same invitation to assist the Inquiry to the Cabinet Secretary and Permanent Secretaries and Under Secretaries. It continued:

> "There will be, in any event, public hearings ... at which evidence may be called, and at which anyone who, on due notice from the Commission, appears to it to be a subject of the Inquiry or implicated or concerned in its subject matter, will be given an opportunity to testify."

[79] That was repeated on 10 October 2008 but, in the press statement of 6 November 2008, it was stated that the Commissioner intended to summon the Premier and other Ministers to attend and continued:

> For that purpose, and to give an opportunity to anyone to give evidence who appears to the Commission to be" implicated or concerned in the subject matter of the Inquiry, it will conduct

> oral hearings in the Territory ... Such hearings may be held in public and/or private, and evidence maybe taken orally on oath or in writing, as the Commission considers appropriate."

[80] On 17 November 2008, this was repeated including the fact that "evidence may be taken orally on oath or in writing, as Sir Robin considers appropriate" and that he would "shortly notify those whom the Commission intends to examine on oath and/or those whose evidence he wishes to take, giving advance notice of the matters on which he wishes to hear evidence."

81] On 25 November 2008, it was announced that the oral hearings had to be deferred to the New Year and, on 10 December 2008, it announced the hearings were to commence on 13 January 2009. It is explained that evidence would first be taken from Ministers and members of the Assembly and the Commission would then take, "oral evidence from others over a range of issues within its terms of reference. Finally, it will give an opportunity to give evidence to those whom it considers and notifies may be implicated or concerned in any subject matter of the Inquiry" and it would publish by 23 December 2008 a provisional programme indicating the names of those to give evidence and when they will be required to give it.

[82] The press statement of 23 December 2008 set out in some detail the procedures to be followed at the hearings. It explained the rights of persons, whose conduct the Commissioner considered to be a subject of the Inquiry or to be implicated or concerned, to have an attorney present and gave the basis upon which the Commissioner had determined the procedure to be followed at the hearings:

> "In doing so, he has kept in mind the essentially inquisitorial nature of the inquiry set by; 1) the great breadth of its subject matter and length of the period to be investigated; 2) the short time within which his Report is to be submitted, originally four - now seven - months; and 3) the tentative and preliminary nature of his first and main task, namely to inquire where there is information of *possible* corruption or other serious dishonesty in recent years on the part of or in relation to past and present elected members of the Territory's legislature.
>
> The Commissioner is not a Court or Tribunal with power to *determine* any issue of fact in the Inquiry or to *direct* any particular outcome. In particular it is not his job to make findings of guilt or in exoneration of those against whom allegations may have been widely and publicly
> made. The most he can do, should he conclude that there is information of *possible* venality, is to consider whether to recommend a further and more searching investigation, or investigations,by some other body ....

> The Commissioner intends to exercise his power to take all evidence in public and on oath or by affirmation, save where persuaded the interests of the public and/or justice require otherwise .... In all of this, the Commissioner will endeavour to conduct the Inquiry in such away that it does not risk prejudicing the fairness of any subsequent proceedings."

[83] He concluded with the procedures, of which the first is to examine the elected members;

> "The second stage of the hearings, which should begin during the third week of the hearings, will be devoted to the oral evidence of others. The Commissioner will notify in advance the gist of such evidence to those whom he considers may be adversely affected by it Counsel to the Commissioner (sic) will examine each witness in chief. With the permission of the Commissioner, each witness may be cross-examined by or on behalf of any person the subject of the evidence or implicated or concerned in the subject matter of the evidence. The witness may then be further examined by Counsel to the Commissioner.
>
> At the third stage of the bearings, the Commissioner will give an opportunity to any person to give evidence in response to any oral evidence which he, the Commissioner, considers may adversely affect or cause concern to that person. The Commissioner may, in his discretion receive any such evidence orally or in writing .... Any person, who, at the direction of or with the acquiescence of the Commissioner, gives evidence in writing, will have a reasonable time within which to do so."

[84] The fourth stage~ refers to the right of counsel to make submissions either orally or in writing. The statement then reminds the public that some evidence provided to the Commission was given in confidence and continues:

> "Thus, the information to be given by witnesses in stage two of the hearings can be but a fragment of all the information before the Commissioner, to each part of which he will have to give the weight he: considers it deserves. The final stage of the Inquiry will be for .the Commissioner to prepare a Report and Recommendations to the Governor, as required by his Terms of Reference. In the course of doing so, he may form a provisional view from his consideration of *all the material before him* that there is information of possible corruption or other serious dishonesty on the part of a person or persons worthy of further and more searching investigation. In that event, he will inform any such persons in writing of that provisional view and invite his or her comments before finalising the report and recommendations."

[85] On 12 February 2009, the Commission reiterated that the findings and recommendations in the final report would be made after taking into account the responses of individuals given to what are described as "minded to find and/or recommend" letters.

[86] Finally, on 16 April it was announced that the Commission:

> "has notified all those, in respect of whom it may make adverse findings, of the nature of those provisional findings. It has now received most responses, but awaits a few more.
>
> The purpose of the exercise, often referred to as a *Salmon Exercise* ... is to give the recipients an opportunity to make representations to the Commission before it considers and makes its final findings and recommendations. Receipt of any such letter is not to be taken by its recipient or anyone learning of it as, in itself, a finding of impropriety against the recipient. ... The Commission hopes to have received all the remaining responses to its *Salmon* letters by 21st April. It has been considering and taking into account those already received, and will do the same for those~ to come, before reaching its final conclusions in accordance with its terms of reference."