

**Commission of Inquiry**  
Box 20  
Swan Building  
26 Victoria Street  
Hamilton HM 12  
294-0415 or 294-0416  
[commission@inquirybermuda.com](mailto:commission@inquirybermuda.com)

11<sup>th</sup> October 2016

## COMMISSION RULING

A summons was issued by the Commission on 7<sup>th</sup> October addressed to BECL and marked "FAO Mr. Delroy Duncan Trocan Management Limited". The Summons required the Company to attend here this morning and to produce four categories of company records that are described in it. The production was required here at 10 o'clock this morning. Mr. Johnston of Counsel and Mrs Johnston have appeared for the Company. Mr. Delroy Duncan has appeared in person. I'll say no more until the end of this Ruling about Mr. Delroy Duncan personal position.

On behalf of the Company Mr Johnston objected to the validity of the Summons under Rule 8 of the Commission's Rules of Procedures. That Rule requires the objection to be made in writing to the Chairman who will determine whether or not to revoke or vary the subpoena on the ground put forward. In fact the objection was not made in writing and that was on the ground that we were told that the Summons was not seen by Mr. Duncan or on behalf of the Company until yesterday afternoon. In those circumstances Mr. Johnston has made the objection orally today and it was agreed, expressly agreed by him & by Counsel for the Commission that all four members of the Commission being present the Ruling should be made by them as a body.

I should give something of the background. The Summons in question is in fact the third which has been issued requiring production of the documents specified in it. The first was addressed to Mr. Donal Smith a Director of the Company who responded to it that the documents were company documents not his personally. For that reason a second summons was issued addressed to the Company BECL and to Trocan who we understand are its company administrators. The third summons is addressed to BECL alone although as stated above it is marked for the attention of Mr. Duncan of Trocan. Following the second summons BECL began proceedings

before the Supreme Court challenging the validity of the appointment of the Commission & on individual grounds the validity of the Summons. That Summons was issued on 29<sup>th</sup> August. It was heard by the Chief Justice on 2<sup>nd</sup> September and he gave his ruling on 7<sup>th</sup> September. There was a further hearing before him on 6<sup>th</sup> October which appears to have proceeded on the basis that the only significant remaining issue that's to say remaining before him was whether the summons could properly require production of documents to fewer than all four of the Commissioners. In August when the second summons was issued only two Commissioners of four were present in the jurisdiction. In that context the Chief Justice observed I would respectfully add understandably – that that objection might be overcome if a fresh subpoena were issued requiring attendance before all four Commissioners who are at present sitting here in Bermuda. That is how the third summons came to be issued and returnable today.

The Counsel, Mr Johnston objects on two grounds. First he says that the new summons is invalid because the first summons – the previous summons one should say strictly the second summons, has not been formally discharged and he says secondly that the new summons fails to give necessary information about the documents and why they are required. The first objection raises the question whether the Chief Justice simply overlooked the possible difficulty when he made the suggestion that he did. For our part, we would not hold that the third summons was invalid on that ground. However we are troubled by practical difficulty to which I will come to below. As for the second objection that is whether the new summons fails to give necessary information about the documents and why they are required we dismiss that objection. There is ample support both in the summons and as given in the affidavit sworn previously by one of the Commissioners to support their requirement that is made.

So I return to the practical difficulty which is this. According to the judgment of the Chief Justice. According to paragraph four of the judgment of the Chief Justice he said this. He referred to a previous ex parte hearing before Mr. Justice Hellman on 30<sup>th</sup> August 2016 and the Chief Justice observed that Mr Justice Hellman “very properly adjourned the matter for an ex parte on notice Hearing as an obviously

controversial stay was sought. In lieu of an interim injunction or stay to hold the writ he ordered BECL to deliver the documents sought forthwith to the Court to be held under Seal until the determination of the injunction application or until further Order of the Court. The Chief Justice's order affirmed that form of Order made by Mr. Justice Hellman. That Order was clearly made on the basis that what was called "documents sought" would be and were at the time of the Chief Justice's judgment being held by the Court under Seal. And that was subject to any further Order by the Court. We do not consider that it would be appropriate for the Commission to attempt or to appear to bypass that Order by requiring that the Company to make further hard copies of documents which may be held electronically by Trocan or by Mr Duncan on its behalf. Therefore whilst we consider that the first objection should be dismissed we feel unable to compel production of the documents without leave from the Court as Mr. Justice Hellman's Order requires. Matter is further complicated because we are told that "the documents" meaning physical copies of documents which are stored electronically with Trocan or maybe elsewhere, are held by Mr. Woloniecki of Counsel pursuant to an agreement made between Counsel in the course of the former proceedings. Its not necessary for us to resolve that issue today. It will be a matter for the Court. And so in conclusion we reject the Claims made under Rule 8 Sub Rule 4 of the Commission's Rules. We order production of the documents specified in what I have called the new or the third summons subject to obtaining leave from the Court pursuant to the Order of Mr. Justice Hellman. We further direct that the application to the Court be made forthwith. We appreciate the difficulties caused by the pending hurricane. The Commission meaning all four members will be able to receive the documents at 2 p.m. on Friday 14<sup>th</sup> October, that's 2 p.m. this week and requires the parties to use their best endeavour to obtain the Court's Ruling before that time.

If there are any further submissions on the practical aspects of what I have just said we will of course hear them now.

Finally with regard to Mr. Delroy Duncan all we propose to say is that the summons in question and the Order we have made was issued against the Company not against Trocan or against him personally. If as we understand he has a role as

Director of the Company he may be indirectly involved but we say no more than that.