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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

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September 26, 2013

MEDIA RELEASE

RE: Findings of the Office of the Director of Public Prosecutions (ODPP) pertaining to Special Statutory Investigation - Concerning Complaint Regarding the Award of Contracts to Construct, Repair, and Rent Shops at the Spalding Market

1. Pursuant to a formal referral of the above captioned matter to me by the Contractor General dated September 16, 2013 and pursuant to the powers vested in me by Section 94 of the Jamaican Constitution, I have, with the assistance and in consultation with two Crown Counsel, reviewed the documents submitted to us by the OCG and we hereby set out our findings on the matter below.

SUMMARY OF ALLEGATIONS

2. In January 2013, the Office of the Contractor General (hereinafter referred to as the 'OCG') received an anonymous letter from a 'concerned citizen of Spauldings' complaining about the construction of shops in the Spalding market by persons affiliated to Mr. Richard Azan, Member of Parliament for North West Clarendon, without the permission of the government. The letter further complained that the buildings were also rented and the Parish Council was not receiving the revenue from the rental of these buildings, although the Spalding Market was their property.

Consequent on this letter of complaint, the OCG commenced an investigation in March 2013 into the 'circumstances which surrounded the alleged award of contract(s) to construct repair and to rent shops at the Spalding Market.'

3. Their investigations unearthed the following:

- Mr. John Bryant, of Bryant's Construction obtained a contract with the Clarendon Parish Council after a valid tender process for the rehabilitation of the Spalding Market in Clarendon.
- The contract awarded to Bryant Construction was for the specific purpose of renovating the Spalding Market, and did not extend to the construction of wooden shops.
- Between September 2012 and December 2012, ten (10) wooden shops contained in four (4) wooden structures were erected by Mr. John Bryant in the parking lot of Spalding Market at a cost to him of approximately one hundred and seventy five thousand dollars (\$ 175,000) each.
- Two (2) of these shops were completed for the grand opening of the market on September 5, 2012.
- Among the attendees at this opening ceremony were: The Honourable Prime Minister of Jamaica Mrs. Portia Simpson-Miller, The Honourable Mr. Noel Arscott, Minister of Local Government and Community Development, His Worship the Mayor Mr. Sean Barnswell, The Honourable Mr. Richard Azan, Member of Parliament for North West Clarendon, Mr. John Bryant of Bryant's Construction, staff of the Parish Council and vendors.
- The shops were on display at the ceremony, and the Honourable Mr. Richard Azan, Member of Parliament for North West Clarendon, in his address there mentioned the presence of the shops and indicated that 'the Clarendon Parish Council would regularize the whole thing with Mr. Bryant and the vendors.'¹ He also stated that the shops were to open for operation the following morning.²
- On the same day of the opening ceremony, in the presence of Mr. Richard Azan, Mr. John Bryant asked Mrs. Bridget Daley- Dixon, Constituency Secretary at the Northwest Clarendon Constituency Office of the Honourable Mr. Richard Azan to collect the sums that would be charged for rental on his behalf; She agreed to this arrangement.³
- The respective tenants who had rented the wooden shops entered into formal Rental Agreements. The owner of the shops as stated on the Rental Agreement was Mr. John Bryant. The property being rented was described as shops located at Spalding Market, Spalding, Clarendon.

¹ Appearance of the Honourable Mr. Richard Azan , Member of Parliament for North West Clarendon before the Contractor General on April 29, 2013 - pages 53-54.

² Statement of Mr. Ralston Peters, Former Commercial Services Manager at the Clarendon Parish Council dated April 16, 2013.

³ Statement given to the OCG by Mrs. Daley –Dixon on April 15, 2013, page 2; Appearance of Mr. John Bryant before the Contractor General on May 9, 2013, page 38; Appearance of the Honourable Mr. Richard Azan , Member of Parliament for North West Clarendon before the Contractor General on April 29, 2013, pages 58 -59.

- The shops were rented at five thousand dollars (\$5000) per month. As agreed, this money was paid to Mrs. Bridget Daley- Dixon, Constituency Secretary at the Northwest Clarendon Constituency Office of the Honourable Mr. Richard Azan.
- Rental payments and security deposit sums were paid to Mrs. Daley- Dixon by the respective tenants of the wooden shops for the period September 6, 2012 to February 6, 2013. Thereafter the matter was brought into the public domain and all payments to her ceased. On the directive of the Parish Council the money that had been collected during the period was later handed over to them by Mr. John Bryant.
- The Mayor Mr. Scean Barnswell indicated to the OCG that on the opening of the Spalding Market when it was put to him by Mr. Richard Azan that the ‘model’ shops were built by the contractor, Mr. Bryant, he the Mayor, had no objections because they would have served a purpose for the vendors.⁴
- Mr. John Bryant indicated to the OCG that upon the construction of the shops, he intended to recover the money he had spent to construct the shops from the rent that was collected from the vendors. As soon he had collected this money, he had intended to hand over the shops to the Parish Council.⁵
- Mr. Scean Barnswell further indicated to the OCG that given his ‘no objections’ on the day of the opening ceremony, it could have been interpreted that it was okay for the contractor to proceed with the construction of the shops.⁶ He said he was advised in October 2012 by the Commercial Services Manager, Mr. Ralston Peters that payments were being made at the Constituency Office⁷. Upon receiving this information he gave instructions to him to have the matter investigated. However, these investigations were not done up to the end of the year, and he did not enquire about it.
- Mr. Ralston Peters, however, strenuously denied receiving any such instructions from the Mayor. In fact he stated on oath to the OCG that he was the one who, on several occasions, both inside and outside of Council Meetings invited the Mayor to ‘do something about it.’⁸

⁴ Appearance of His Worship The Mayor Mr. Scean Barnswell before the Contractor General on May 7, 2013 - pages 16-20

⁵ Appearance of Mr. John Bryant before the Contractor General on May 9, 2013, pages 46-47.

⁶ Appearance of His Worship The Mayor Mr. Scean Barnswell before the Contractor General on May 7, 2013 - page 21

⁷ Appearance of His Worship The Mayor Mr. Scean Barnswell before the Contractor General on May 7, 2013 - pages 9,12

⁸ Appearance of Mr. Ralston Peters, Former Commercial Services Manager, before the Contractor General on April 30, 2013 - pages 34

4. Allegations of Knowingly Misleading the Contractor- General made against His Worship the Mayor Mr. Scean Barnswell

- Mayor Scean Barnswell was summoned before the Contractor-General on April 29, 2013 pursuant to Section 18 of the Contractor General Act.
- The Contractor- General expressed the view that Mayor Scean Barnswell undermined his creditworthiness and thereby misled the Contractor General in his responses to the enquiry as to whether he had shared the responses to the requisitions of the Contractor General with anyone. A transcript of the actual evidence was provided to the ODPP by the OCG.

5. ISSUES FOR DETERMINATION

The report indicates as follows:

- The Contractor-General, pursuant to sections 21 and 29 of the Contractor General Act, refers to the Honourable Director of Public Prosecutions, for due consideration, whether the conduct of Minister Richard Azan, MP for Northwest Clarendon, Mr. John Bryant, Bryant Construction, and Mrs. Bridget Daley- Dixon, Constituency Secretary, give (s) rise to a Conspiracy to Defraud the Revenue of the Clarendon Parish Council and/or any other criminal acts.
- The Contractor- General refers to the Honourable Director of Public Prosecutions, His Worship the Mayor Scean Barnswell, in knowingly misleading the Contractor-General during the conduct of the Section 18 Judicial Proceeding, contrary to Section 29 of the Contractor General Act.

Given the foregoing we have identified two (2) issues for determination:

- i) Is there sufficient material in the report and its attachments to form the basis for the prosecution of:
 - a) Minister Richard Azan, MP for North West Clarendon
 - b) Mr. John Bryant
 - c) Mrs. Bridget Daley- Dixonfor breaches of any applicable laws?

- ii) Is there sufficient material in the report and its attachments to form the basis for the prosecution of His Worship the Mayor Scean Barnswell for misleading the Contractor General contrary to section 29 of the Contractor General Act?

6. **THE LAW**

The laws applicable in the consideration of this matter are as follows:

- **Section 94 of the Constitution**
- **The Contractor General Act**
- **The Common Law related to Conspiracy to Defraud**
- **The Corruption Prevention Act 2000**

SECTION 94 OF THE CONSTITUTION

The functions of the Office of the Director of Public Prosecutions (ODPP) *inter alia* are to:

- To institute and undertake criminal proceedings;
- To take over criminal proceedings initiated by others;
- To discontinue criminal proceedings; and,
- To consider any referral which has been transmitted to the ODPP for a determination of whether there is any basis in fact or law for the initiation criminal proceedings

Section 94 (6) of the Constitution states that the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority in the exercise of the powers conferred upon the Office by this section.

I will now outline our findings consequent on the consideration of the material submitted to us and the applicable laws as researched.

Issue One

Whether the conduct of Minister Richard Azan, MP for Northwest Clarendon, Mr. John Bryant, Bryant Construction, and Mrs. Bridget Daley- Dixon, Constituency Secretary, constitute the offence of Conspiracy to Defraud the Revenue of the Clarendon Parish Council.

COMMON LAW

Consideration of Conspiracy to Defraud

The leading case of *Scott v Metropolitan Police Commissioner [1975] AC 819*, at page 840 defines Conspiracy to Defraud as:

“An agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his.”

The case further elaborates that to defraud ordinarily means:

“to deprive a person dishonestly of something which is his or of something to which he is or would or might, but for the perpetration of the fraud, be entitled... a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy was directed.”
(Supra, p. 839)

The key ingredient in this offence is that of “dishonesty” which must be proved by the prosecution in the mind of the guilty party. *Scott v Metropolitan Police Commissioner [1975] AC 819*, *Wai Yu-Tsang v the Queen [Privy Council Appeal No. 18 of 1991]*. As you are aware, it must always be borne in mind that in a criminal case, the prosecution always has the burden of proving that case against each accused beyond a reasonable doubt. This extends to all the elements that comprise the offence. What has to be determined therefore is whether the conduct of Mr. Azan, Mr. Bryant and Mrs. Daley Dixon amounted **in law** to dishonesty. The case law would suggest that it is an objective test. *R v Deb Baran Ghosh (1982) 75 Cr. App. R. 154*.

In *R v Anthony Allsop (1977) 64 Cr. App. R. 29*, it was held that:

“Where a person intends by deceit to induce a course of conduct in another which puts that other’s economic interests in jeopardy he is guilty of fraud even though he does not intend that actual loss should ultimately be suffered by that other.”

In other words:

“the primary objective of fraudsman is to advantage themselves; the detriment that results to their victims is secondary to that purpose and incidental.”[supra, p.31]

7. MR. RICHARD AZAN (Member of Parliament)

The allegations suggest that at the very least Mr. Richard Azan was very supportive of the decision made by Mr. Bryant to construct wooden shops in the parking lot of the Spalding Market. It is undisputed that he spoke to Mr. Bryant about it before its execution, and that on the day of the opening ceremony at the Spalding market, he ‘introduced’ two completed wooden shops as the new home for the vendors of haberdashery goods.

However, an analysis of Mr. Azan’s actions as outlined in the material presented does not in our view give any support to the ingredients of a conspiracy in law on his part to defraud the Parish Council of revenue. In that regard the following points underscore this assertion and are worthy of note:

The Parish Council knew of the fact of the construction of these wooden shops.

- (i) The pronouncements made by the Honourable Mr. Richard Azan at the opening ceremony were certainly not clandestine. It was made at a function attended by several members of the Parish Council, to include the Chairman of the Parish Council, his Worship, The Mayor, Mr. Scean Barnswell (hereinafter referred to as “the Mayor”). The Mayor has admitted that he indicated on the day of this ceremony that he gave the shops his blessing. It is of note that Mr. Azan also announced that occupation of the shops would commence the following morning. Any reasonable belief therefore that they were model/display shops as has been asserted by the Mayor in responses to the OCG, would certainly be unfounded.
- (ii) The announcement made by Mr. Azan in that public forum which was reportedly televised, would have placed the entire Parish Council on notice of the existence of these shops in the market. Further, from all accounts they were quite conspicuously placed in the parking lot of the Spalding Market.
- (iii) It is to be noted also that the existence of the wooden shops was the subject of discussions at several Council Meetings.⁹ Undoubtedly therefore the Parish

⁹ The shops were the subject of discussions at Council Meetings on September 19, 2012, September 27, 2012 and November 22, 2012. All Councillors were present at the November 22, 2012 meeting; Appearance of Mr. Trevor Gordon, Councillor before the Contractor General on May 02, 2013 - pages 14, 16, 18 & 30-31.

Council was well aware of the presence of these wooden shops in the Spalding Market and of the purpose for which they had been constructed.

8. Members of the Parish Council knew that no revenue was being collected by the Parish Council for the shops.

- (i) In his response to questions asked by the Contractor- General, Mr. Richard Azan disclosed that the Mayor was aware that Mr. Bryant would expend his own money in the construction of the shops, and that arrangements would need to be made for him to recover it. At page 22 of the transcript Mr. Azan said:

“A: I can’t remember the date but I remember that Mr. Bryant discussed with me about the vendors and some of the vendors were saying it before when the police were saying that when the market was completed they cannot remain on the street, and Mr. Bryant said that some of the vendors approached him about the construction of these shops. I said to him I would have some discussion with the Mayor and I would get back to him. Well, time was on me, I know I had discussion with the Mayor, he said that the Parish Council didn’t have the funding to construct the building, if he is willing to, it is no problem, the Parish Council along with Mr. Bryant would make the necessary arrangements.”

(Emphasis ours)

- (ii) Mr. Trevor Gordon, Councillor, stated that he attended a meeting on the 21st of September 2012 at the Mayor’s Parlour where the matter was discussed. Mr. Richard Azan, Member of Parliament, Mr. Wayne Brown Acting Secretary General, and Mr. Wayne Mitchell Superintendent of Roads and Works were also present. At that meeting the Mayor said he would look into the matter.¹⁰
- (iii) According to Mr. Ralston Peters, Commercial Services Manager, he became aware of the fact that the revenue from these shops was not being collected by the Parish Council on the 28th of September 2012. On that same date, he also became aware that the owner of the shops was Mr. John Bryant. As the matter of market fees was a part of his specific portfolio, he brought this to the attention of the Chairman of the Parish Council, The Mayor, Mr. Scean Barnswell. He also brought it to the attention of the Council on more than one occasions. He was directed by the Chairman, Mr. Scean Barnswell in the Council meetings to discuss other issues as *‘the shops not costing the Council anything’*¹¹

¹⁰ Appearance of Mr. Trevor Gordon, Councillor, before the Contractor General on May 2, 2013 - pages 37-38.

¹¹ Appearance of Mr. Ralston Peters, Former Commercial Services Manager, before the Contractor General on April 30, 2013 - pages 75-76

(iv) From the material provided it appears, therefore, that members of the Parish Council were aware of the dire need for more shops in the Market. They were, however, hamstrung in addressing the problem as the Parish Council was not in a financial position to do so. The shops built at the expense of Mr. John Bryant came as a 'win-win' solution to the problem and was a welcome resolution they thought, to the dilemma which faced the vendors as they were about to be displaced from the streets. Consequently their livelihood would have been threatened. The 'illegal' construction of these shops was unfortunately considered by all parties including the Parish Council to be a small price to pay as 'the ends justified the means.' A cynic could argue that this thought process was in keeping with the pre-existing aura of informality that vendors usually took advantage of in their interaction with properties under the Parish Council's supervision.

9. There was collective and deliberate laxity of the Parish Council in addressing the situation.

(i) The laxity of the Parish Council in addressing the situation seems to have been predicated on the fact that the shops were not an immediate financial burden on the Council. Discussions on how to handle the financial arrangements concerning them was not a priority of the Chairman or members of the Council present at Council meetings. The following extract of the sworn testimony of Mr. Ralston Peters, Commercial Services Manager to the OCG is worthy of note:

Miss Wright (OCG): "Page 4 of your statement, the last paragraph: I got the impression that the Mayor was avoiding the issue as he reiterated that the shops are not costing the council anything. Can you clarify or provide us with any reason why [he] (you) would have gotten that impression?"

A: I can recall one or two instances in actual meetings where I made direct reference to these shops, because of my concern, of course, about the fact that we are now- the term we are using is 'regularizing' – in terms of the fact that – can I say, we didn't seem to be putting any urgency into this being done. Trying to speak of the matter in the meeting and being directed by the [C]hairman to something else before I make the point, and if I insisted I will get a response such as what I have in the – because I was told, it was said on more than one occasion that the shops not costing the Council anything.

Q; The Mayor actually said that?

A: Yes.

A; It is a pity, as I said the Minutes don't capture everything.

Q: September, November?

A: Certainly even later than that, because I remember in one of the later meetings, it could be in December, for instance, when I kinda stood my ground, and of course they complained and they—that is not for the record.

But it is not the kind of setting where you can say as you feel; it is being directed by a chairman, I don't know probably like here, that if the Contractor General says it is so, you don't contradict him. So I'm being told technically: this is what we want to discuss; those shops not costing us anything. That's the impression I got.

- (ii) Critically, the Mayor indicated in his responses to the OCG that he became aware of the fact that payments were being made at the Constituency Office from as early as October 2012.¹² Up to January of the following year though, no steps had been taken to do anything about it.
- (iii) According to Councillor Mr. Trevor Gordon, the fact that it was common knowledge that the Chairman of the Parish Council Mayor Scean Barnswell was fully aware of it could have resulted in the belief that that there was no impropriety and that proper procedure would be adopted in due time.¹³ This he suggests may have accounted for the nonchalance of members of the Parish Council in having it addressed.

10. Breaches of the Established Approval Processes/Procedures is not an indication by itself and without more that there was a Conspiracy to Defraud.

- (i) This Approval Process was outlined to the OCG by Mr. Wayne Mitchell, Superintendent of Road and Works.¹⁴ This process involved the preparation and submission of the requisite drawings to the Road and Works Department for the plan to be assessed. The Plans are ultimately taken to a Planning Meeting of the Council for final approval.
- (ii) **Despite this time-honoured and established procedure/protocols, other persons who were examined on oath by the OCG pointed out that the erection of structures in markets without Parish Council Approval was a very common practice in Clarendon and throughout Jamaica. In most instances, the Parish**

¹² Appearance of His Worship The Mayor Mr. Scean Barnswell before the Contractor General on May 7, 2013 - pages 9,12

¹³ Appearance of Mr. Trevor Gordon, Councillor before the Contractor General on May 2, 2013 - pages 35-36, 48

¹⁴ Appearance of Mr. Wayne Mitchell, Superintendent of Roads and Works, before the Contractor General on May 2, 2013 - pages 173-175

Council would formalize arrangements with the persons who had done the construction if they considered the structures to be useful.

- (iii) Councillor Trevor Gordon, for example, in describing his observations of Parish Council operations stated:

"A: ...Since I have been there even the Chapleton Market somebody lease it out or occupy it and since this Administration, from March they sort of regularize it with the person

CHAIRMAN (the CG): You said which market, Chapleton?

A: Yes.

CHAIRMAN: Strange persons came and leased the property?

A: and the Parish Council went in there and saw the need for it and said they are not going to lick it down, they are going to reimburse the person or something to that effect."¹⁵

A:¹⁶ ***The whole idea of people building shops in markets is a common thing; everybody builds shops all over***

- (iv) Mr. Richard Azan in his sworn responses to the OCG stated:¹⁷

"CHAIRMAN: Just to be clear. Your understanding is that having spoken to the Mayor it was up to him to take it to a subcommittee?

A: To a committee

CHAIRMAN: For an approval?

A: For approval"

- (v) Given the *laissez-faire* practices of the Parish Council in the approval of structures on its properties, there is no material proffered by the OCG which would successfully cast any doubt on the fact that Mr. Azan may have held the erroneous view that approval and construction of the wooden shops could be sought and obtained in the manner he described, his long history as a previous member of the Parish Council notwithstanding.

¹⁵ Appearance of Mr. Trevor Gordon, Councillor before the Contractor General on May 2, 2013 - pages 32

¹⁶ Appearance of Mr. Trevor Gordon, Councillor before the Contractor General on May 2, 2013 - pages 35

¹⁷ Appearance of Mr. Richard Azan before the Contractor General on April 29, 2013 - pages 23

- (vi) **The material available as previously described and analyzed is not sufficient in our view to prove to the requisite standard required by the criminal law the mens rea, that is, the criminal intention which is a key ingredient in the proof of ‘dishonesty’ vis a vis the “conspiracy to defraud’. This applies to Mr. Richard Azan, Mr. John Bryant, and Mrs. Bridget Daley Dixon.**

11. MR. JOHN BRYANT (the contractor)

- (i) The material disclosed that while completing renovations to the main building at the Spalding Market, Mr. John Bryant was approached by vendors who enquired of him as to whether he could also construct some shops. He thereafter spoke to Mr. Richard Azan, Member of Parliament about this venture. He was assured by Mr. Richard Azan that he would have discussions concerning this with the Mayor. Shortly afterwards, **but before** Mr. Azan gave him a response, he went ahead and constructed two wooden shops. These shops were displayed on the day of the opening of the Spalding Market, and received the ‘blessing’ of both Mr. Azan and the Mayor. Mr. Bryant expended 1.7 million dollars on his account of his own money, in the construction of ten shops. Between September and December 2012 during the construction of these shops, there is no material which would show that Mr. Bryant was interrupted in any way nor did anybody serve a cease and desist order on him. He rented these shops to the vendors at a cost of \$5000 per month.
- (ii) We are of the view that though the conduct of Mr. John Bryant clearly breached the established Approval Process of the Clarendon Parish Council, it was insufficient without more to constitute a Conspiracy to Defraud.

Our basis for this view is as follows:

- (iii) **There is no material that discloses any dishonesty on his part.**

The analysis from paragraph 4(i) to (vi) above in relation to Mr. Richard Azan also applies here. Further, from the material, it is clear that Mr. Bryant, acted in good faith that the Parish Council would have granted formal approval for the work he had done in erecting the wooden shops. Given the public recognition and approval given to his work at the opening ceremony he had every reason to believe that the Parish Council was pleased with the venture. In that regard the responses of Mayor Barnswell to the OCG are noteworthy:

“Miss Simpson: Okay. But could you say then it is safe for you to assume that given your no objection or your blessings on the day, it is okay for the contractor to proceed with the shops that were discussed at the opening?”

*Mr. Barnswell: It could be interpreted that way.*¹⁸

(iv) **Mr. Bryant's Dealings were Transparent.**

Of particular note is the fact that he established a formal rental collection process that was transparent. When the OCG probed this issue they were presented with a formal spreadsheet by Mrs. Daley- Dixon and receipt book of payments made by each of the vendor. The shops were rented for a modest amount and only a miniscule \$213,000 had been collected between September 2012 and January 2013 that had been handed over to the Parish Council on request. He would still therefore be out of pocket to the tune of \$1.7 million. Looking at the case law previously discussed at page 6 above, **where is the material that discloses that Mr. Bryant had an objective to advantage himself?** The answer would have to be there is none.

- (v) We respectfully disagree with your views of the OCG that when Mr. Bryant handed over the money during your investigations that this was “proof that Mr. Bryant realized that the money as not due to him.” (Page 135 of the OCG Report) On the contrary, we find that it demonstrates his candor and his willingness to fully co-operate with the investigations. We note his language when he appeared when he gave sworn testimony to the OCG:

CHAIRMAN: The money that was used for the building materials to build the wooden shops where that money come from sir?

A: From me, sir,

CHAIRMAN: Have you gotten back any of that money to date?

*A: No, Sir, the little rent what me collect them take it back sir.*¹⁹

- (vi) It is very clear from this language that he believed he was entitled to this ‘liddle money’, and did not at all believe himself to be a part of any conspiracy to defraud the revenue of the Parish Council when he collected this rental money.
- (vii) Having carefully examined the material therefore, we have no reason at all to doubt Mr. Bryant, when he states that he intended to hand over the shops to the Parish Council as soon as he had recouped his money from the rental of the shops.²⁰ There was therefore no material to support the allegation of a conspiracy

¹⁸ Appearance of Mayor Scean Barnswell before the Contractor General on April 29, 2013 - pages 23

¹⁹ Appearance of Mr. John Bryant before the Contractor General on May 9, 2013 - page 59

²⁰ Appearance of Mr. John Bryant before the Contractor General on May 9, 2013 - pages 69

to defraud. There was no agreement to do an act in breach of the criminal law. Although there were clear breaches of the protocols which guided the erection of those shops and the collection of rent in respect of Parish Council property, these breaches did not rise to the threshold required by the criminal law. These breaches were administrative in nature as opposed to criminal.

12. MRS. BRIDGET DALEY-DIXON (Constituency Secretary for North West Clarendon)

- (i) In his sworn response to requisition by the contractor General, Mr. Azan stated, in answer to Requisition No. 3, that;

“Sometime in late September 2012 on the night of the opening of the market the vendors requested a meeting with me as Member of Parliament. I along with Mr. Trevor Gordon, Councillor for the Spalding Division, met with the vendors. Also present was Mr. Bryant and my constituency secretary.

During this meeting a payment fee of Five Thousand Dollars (\$5,000) monthly was agreed to. It was also agreed, that as a temporary basis, until the Parish Council was able to regularize the situation and the payment procedure, that the rental payments would be made to Bryant’s Construction at my constituency office and Mrs. Bridgette Bailey-Dixon, my constituency secretary, was the person appointed by Mr. Bryant to make collection of the rental on behalf of Bryant’s Construction. I was never involved in the collection of rental, nor was I ever involved in the day to day running of the shops.

I was not aware that the Parish Council had not taken charge of the shops until the matter became public. Thereafter, upon enquiry, I became aware that no agreement had been arrived at between the Parish Council and Bryant’s Construction with respect to the manner in which Bryant would be compensated and I spoke with Mr. Bryant and advised him to seek to hand over the shops to the Parish Council and seek to conclude an agreement with them as to how he would be compensated. I also spoke to the Mayor in this regard.”

- (ii) Further, In the Field Interview that was conducted by the OCG officers with Mrs. Daley-Dixon dated April 15, 2013, she stated that:

“About a day or two after the opening of the market, there was a meeting which was held at the Constituency Office, between Mr. Azan and Mr. Bryant. I was introduced to Mr. Bryant by Mr. Richard Azan

after the meeting. Mr. Azan told me that Mr. Bryant was the person who built the shops at the market, he was the contractor.”

She said that prior to that she did not know Mr. Bryant and that she met him through Mr. Azan. She stated further that:

“Mr. Bryant suggested to me that a rental agreement be used and gave me the terms of the rental agreements. I created the rental agreements, showed them to Mr. Bryant for his approval. Mr. Bryant approved it and I gave him a copy. The rental agreements were signed when the tenants came to make the initial payments and deposit. I signed the agreements on behalf of Mr. Bryant.

Mr. Azan did not object to the payments being collected by me at the Constituency Office and no subsequent objections were voiced by Mr. Azan”

- (iii) Having regard to the fact that Mrs. Daley Dixon appeared to have been acting on the instructions of Mr. Bryant and with the full knowledge of the Mr. Azan and the Councillor, Mr. Trevor Gordon, we do not find that there was any dishonesty in her actions nor do we see any intention to defraud the Parish Council. It was also stated in the transcript of Mr. Trevor Gordon, at pages 61-70 that her function in that regard was only meant to be temporary and that there was every intention to regularize the arrangement vis a vis Mr. Bryant, the Parish Council and the vendors.
- (iv) Here again in the particular similar analysis previously posited in respect of Mr. Azan and Mr. Bryant at page 8 above, there is a lack of material to show any dishonesty vis a vis a conspiracy to defraud on the part of Mrs. Daley Dixon. In terms of oversight, the real responsibility appeared to have rested with the Mayor to ensure that the proper procedures were adhered to at every stage once the idea to erect these shops was floated.

13. CORRUPTION PREVENTION ACT

- (i) Section 14 of the Corruption Prevention Act sets out various offences under the Act.

Section 14 of the relevant sections of the Act read thus:

14. (1) A public servant commits and act of corruption if he

(a) ...

(b) in the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person;

...

(3) A person commits an act of corruption if he instigates aids, abets or is an accessory after the fact or participates in whatsoever manner in the commission or attempted commission of or conspires to commit any act of corruption referred to in subsection (1) or (2).

(4) Any citizen or resident of Jamaica or any corporation, either aggregate or sole, any club, society or other body of one or more persons, who offers or grants, directly or indirectly, to a person performing a public function in a foreign state, any article or money or other benefit, being a gift, favour, promise or advantage in connection with any economic or commercial transaction for any act to be performed by or for the omitting to do any act by that person in the performance of that his public functions, commits an act of corruption.

.....

(6) Any public servant who improperly uses for his own benefit or that of a third party –

(a) any classified or confidential information that he obtains as a result of or in the course of the performance of his functions; or

(b) any property belonging to the Government or any statutory body or authority or any government company or any body providing public services which he has access as a result of or in the course of the performance of his functions,

commits an act of corruption.

- (ii) We have considered the relevant provisions of the Corruption Prevention Act and there was no material provided that supported the conclusion that any of these parties should be charged under these provisions.**

14. Issue Two

- (i) *Whether His Worship the Mayor Scean Barnswell, knowingly misled the Contractor-General during the conduct of the Section 18 Judicial Proceeding, contrary to Section 29 of the Contractor General Act; If so, should criminal proceedings instituted against him.*

(ii) **THE CONTRACTOR-GENERAL ACT**

By virtue of sections 21 and 29 of the Contractor-General Act, the matter has been referred to the Director of Public Prosecution by the Contractor General to determine the issues listed above.

Section 29 reads:

“Every person who –

(a) Willfully makes any false statement to mislead or misleads or attempts to mislead a Contractor-General or any other person in the execution of his functions under this Act; or

(b) Without lawful justification or excuse –

(i) Obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under his Act; or

(ii) Fails to comply with any lawful requirement of a Contractor-General or any other person under this Act; or

(c) deals with any documents, information to things mentioned in section 24 (1) in a manner inconsistent with his duty under that subsection, shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

- (iii) That the Contractor General was performing his functions pursuant to Section 18 of the Act in instituting investigations and judicial proceedings into the matter is indisputable. Prima facie, in looking at the chronology of the responses given to the Contractor General, it appears that Mayor Scean Barnswell sought to mislead the Contractor General on the issue of whether he had “shared” his responses to the OCG’s Statutory Requisition sent to him by the Contractor General’s Office after being summoned to appear before the OCG, with anyone. For our purposes the relevant questions were asked by Mr. Craig Beresford, Senior Director, Office

of the Contractor General at pages 46-48 of the transcript of the judicial proceedings, *see Appendix B*.

- (iv) It was actually only after a brief recess to allow the Mayor, to consult with his attorney that he actually admitted that he had shared the responses with Mr. Abe Dabdoub, attorney for Mr. Azan. He was in fact told by Mr. Beresford that he had misled the Committee and the Panel initially with his response, causing the Chairman, much to the Chairman's ire, to tell him, **"...please don't insult anybody's intelligence, with the greatest of respect. Just answer the question straight, that is all we ask you, with the greatest of respect..."**
- (v) Mr. Barnswell, in fact admitted, at page 50, line 1, that he misled the panel with his responses. His explanation was that he was merely seeking to get advice from senior legal counsel in relation to the responses to the requisition. Somewhat curiously, he thereafter admitted that he had not shared said responses with his own legal counsel, Mr. Seymour Stewart.
- (vi) In seeking to mislead the panel, Mr. Barnswell, has therefore committed an offence contrary to *Section 29(a) of the Contractor-General Act*.
- (vii) Having established that he did mislead the panel, what then should be the sanction? Section 29 of the Act sets out the penalty for a breach of that section. He could be brought before the Resident Magistrate's Court and be the subject of a fine of \$5000 if convicted.
- (viii) However, at page 55 of the transcript, after further questioning by the Chairman, Mr. Barnswell stated, **"Right. At first I had said no, I didn't share my answer with anyone but I went outside and came back in to advise the Commission that I had no intention to mislead the Commission. I had indeed spoken to Mr. Dabdoub not knowing that he represented Mr. Azan, if I had known, I wouldn't have."**
- (ix) The Mayor as a public official and Chairman of the Parish Council must be held to the highest standard of probity. He must expect to be held accountable, whether administratively and or in the criminal if there has been a clear breach of the criminal law. Given the circumstances of this case and the material presented, that is, the sworn testimony presented in Judicial Proceedings conducted by the Office of the OCG pursuant to section 18 of the Act, I am of the view that a failure to

initiate prosecution will have a profound effect on public morale given the fact that the elements of the offence have been made out. One other factor which grounded my decision to initiate the prosecution in this matter was the aura of evasiveness that permeated the Mayor's sworn testimony while he answered questions from the OCG pursuant to *section 18 of the Contractor General Act*. In all the circumstance there is clear evidentiary material to institute criminal proceeding against Mr. Scean Barnswell for "*Attempting to Mislead the Contractor General contrary section 29 of the Contractor General Act*".

15. CONCLUSION

- (i) Given all the circumstances that surround how these shops came to be constructed and how payments came to be made at the Constituency Office of Mr. Azan, it is fair to conclude that the Parish Council did not consider itself to have been **deprived dishonestly** of something which is [theirs] or of something to which [they] are or would or might, but for the perpetration of the fraud, be entitled... "*Scott v Metropolitan Police Commissioner, already cited*.
- (ii) Further, it is also fair to conclude that there is no material to suggest that Mr. Azan, Mr. Bryant and Mrs. Daley-Dixon had the primary objective of "advantaging" themselves which the case law referred to at page 6 indicates is critical to prove dishonesty, which is one of the main ingredients in the offence of "Conspiracy to Defraud". There was therefore insufficient material on which to ground as a matter of law an agreement to commit a criminal offence. The actions of Mr. Azan, Mr. Bryant and Mrs. Daley-Dixon did not disclose the criminal offence of Conspiracy to Defraud. Therefore there could be no viable prosecution brought against any of these three (3) individuals.
- (iii) In my view the clear inference to be drawn from the inaction of the Parish Council with regard to the construction of the shops and the subsequent payment of rental to Mrs. Daley-Dixon at the constituency office was that there was acquiescence with the arrangements for re-payment of Mr. Bryant for the monies that he had expended in the building of these shops. It would seem therefore that the Parish Council did not consider themselves entitled to any revenues from these shops and had no immediate expectations of revenue/profit from the rental of these shops. In any event, the particular shops which were chattels and not a part of the realty had not only been erected at Mr. Bryant's expense and who at the very least would still hold a proprietary interest in them.

- (iv) The critical issue which takes center stage is the flagrant disregard for the established Approval/Administrative Processes/Procedures within the Parish Council for the construction of buildings on government property under their purview. Regrettably, there was:
- a) a lack of sufficient and workable checks and balances within the Clarendon Parish Council structure, which was facilitated by an insufficient separation of powers;
 - b) a demonstrable lack of leadership by the appointed authorities in the Parish Council, especially the Mayor, Scean Barnswell which paved the way for the erection of these shops without the appropriate approvals and the adoption of the wrong methodology for the collection of and accounting for the rentals.
- (v) This lack of leadership juxtaposed with the clear practical and emotional need of the vendors, the *laissez faire* culture surrounding the use of Government property under the Parish Council's supervision and the unfortunate acquiescence of Mr. Azan to the use of the constituency office for the collection of rent from these shops cumulatively concretized and exacerbated what were really, at its highest, administrative breaches. The sanctions attached to the criminal law would be highly inappropriate in these circumstances as the material that we have analyzed reveals that the breaches were of an administrative nature only. It then falls to the relevant authorities in the government structure who supervise the Parish Councils and the relevant authority who supervise the Member of Parliament to administer such sanctions as they deem appropriate within the context of the issues arising in this matter.
- (vi) The Office of the DPP having perused and analyzed all of the material provided to us see no basis in the criminal law or fact to ground criminal charges in respect of the offence of Conspiracy to Defraud, or under the Corruption (Prevention) Act against anyone.
- (vii) There is however, clear evidentiary material to institute criminal proceeding against Mr. Scean Barnswell for ***“Attempting to Mislead the Contractor General contrary section 29 (a) of the Contractor General Act”***.
- (viii) The ODPP in the discharge of its public duty under the Constitution has in good faith brought to bear in its preparation of this legal opinion our usual objective

professional methodology which pays the very greatest respect to the material provided by the referring entity and the relevant law.

- (ix) The ODPP has expressed our great appreciation and commendation for the thorough compilation and presentation of the reference material from the OCG.

Sincerely,

Paula V. Llewellyn, Q.C.

Director of Public Prosecutions