

AUBURN PUBLIC INQUIRY

Before the Commissioner: Mr Richard Beasley SC
Counsel Assisting: Mr Paul Bolster
Officer Assisting: Mr Darren Sear

Held at Level 1, 174 Phillip Street, Sydney, NSW

On Wednesday, 26 October 2016 at 4.15pm

1 THE COMMISSIONER: This directions hearing has been
2 convened as a result of a letter received from Sterling
3 Legal, dated 21 October 2016, to Darren Sear of the Auburn
4 Public Inquiry objecting to parts of Counsel Assisting's
5 written submissions being made publicly available. That
6 letter sets out some grounds upon which that application is
7 made.

8
9 Just before hearing whether anyone wanted to say
10 anything further in relation to that letter, I'll note the
11 appearances. Mr Bolster is here as Counsel Assisting, with
12 Mr Sear, the principal investigator. We have Mr Wheelhouse
13 for Mr Oueik and Ms Daher also for Mr Oueik; Mr Duggan and
14 Ms Musgrave for Mr Mehajer; Mr Price for Mr Zraika;
15 Mr Cheshire for Mr Francis and others.

16
17 MR CHESHIRE: Yes, and others.

18
19 THE COMMISSIONER: So they're the appearances.

20
21 All right, Mr Wheelhouse, do you want to say anything
22 further about the letter of 21 October 2016?

23
24 MR WHEELHOUSE: I do, Commissioner.

25
26 THE COMMISSIONER: Go ahead.

27
28 MR WHEELHOUSE: Mr Oueik applies for a ruling under
29 section 12B of the Royal Commissions Act that the following
30 paragraphs of the submission of Counsel Assisting not be
31 made public: 36 to 45, pages 9 to 11.

32
33 THE COMMISSIONER: Sorry, are they the pages those
34 paragraphs are on?

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36 MR WHEELHOUSE: Yes, the paragraph number first and the
37 page second.

38
39 THE COMMISSIONER: Yes, all right.

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41 MR WHEELHOUSE: Then SA6 to SA20.

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43 THE COMMISSIONER: So that's new from the letter?

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45 MR WHEELHOUSE: It may be, Commissioner.

46
47 THE COMMISSIONER: When you say that Mr Oueik wants part

1 of the submissions not made publicly available, what the
2 letter says is paragraphs 38 to 54. You've now said 36 to
3 45.

4

5 MR WHEELHOUSE: Yes. Maybe what happened, Commissioner,
6 is that when I prepared the letter, I had a mistake in the
7 pages of my printout of the copy of the relevant document,
8 So I'm trying to fix that up now.

9

10 THE COMMISSIONER: All right, so it is 36 to 45?

11

12 MR WHEELHOUSE: These are the ones I'm interested in that
13 I'm giving you now, Commissioner.

14

15 THE COMMISSIONER: SA?

16

17 MR WHEELHOUSE: It's SA6 to SA20, pages 55 to 56.

18

19 THE COMMISSIONER: Let me find that first so I can see
20 what that's about. What pages did you say?

21

22 MR WHEELHOUSE: Pages 55 to 56. I can hand you a note of
23 what I'm saying.

24

25 THE COMMISSIONER: Well, SA6 on my printout starts on
26 page 54.

27

28 MR BOLSTER: They are the South Auburn submissions.

29

30 THE COMMISSIONER: No, I understand that, but --

31

32 MR WHEELHOUSE: Can I hand you the page I have.

33

34 THE COMMISSIONER: These are proposed findings in relation
35 to South Auburn, anyway.

36

37 MR WHEELHOUSE: Yes, but they deal with Francis matter,
38 if I can put it that way. Then paragraphs 426 to 428,
39 page 75.

40

41 THE COMMISSIONER: Yes, then MS15.

42

43 MR WHEELHOUSE: MS15 on page 79, and WS5, page 113.

44

45 THE COMMISSIONER: All right, yes.

46

47 MR WHEELHOUSE: I'm going to read on to the transcript

1 basically what you have got there, Commissioner.
2

3 We say that the publication of material in aid of an
4 inquiry has the capacity to seriously damage reputations of
5 individuals in a non-compensatable way. You may be aware,
6 Commissioner, that my client has been the subject of
7 extensive media material dating back well prior to the
8 commencement of the Inquiry. He has been the subject of a
9 veritable cyclone of media material.

10
11 Commissioner, this applies both to ultimate
12 determinations and submissions made in support of those
13 determinations. People out there don't necessarily draw a
14 distinction between the two types of documents. We say,
15 Commissioner, that the publication of paragraphs that rely
16 on the evidence of Mr Francis and the assumptions drawn
17 from that evidence would have the capacity to greatly
18 injure Mr Oueik's reputation.

19
20 In relation to the evidence adduced from Mr Francis
21 given to the Inquiry and the use of that evidence by
22 Counsel Assisting, we say that both Mr Oueik and Mr Francis
23 have been denied procedural fairness.

24
25 Mr Oueik was denied procedural fairness in that he has
26 been prevented from adducing evidence that demonstrates
27 that at the time Mr Francis gave evidence, he was suffering
28 from a psychiatric disability that greatly affected the
29 reliability of his evidence.

30
31 Now, Commissioner, I've read my learned friend's note
32 which he handed to me just before coming in here. His
33 suggestion that nothing was put by me in relation to
34 Mr Francis's medical conditions is not correct,
35 Commissioner. If I could take you to page 1810 as an
36 example.

37
38 THE COMMISSIONER: Page 1810, just let me get that. I've
39 got it. Yes?

40
41 MR WHEELHOUSE: I started off attempting to cross-examine
42 about - this is the kitchen conversation, Commissioner.

43
44 THE COMMISSIONER: Yes, what line do you want me to look
45 at?

46
47 MR WHEELHOUSE: The bit I'm taking you to now starts at

1 line 7. On the previous page, I'd been seeking to put
2 questions about the kitchen conversation and putting to him
3 unreliability of memory, as it was 10 years ago, and that
4 came to nothing. So then I got to line 7 on page 1810.
5 Then I said:

6
7 *Also, in relation to variations and the*
8 *various versions, I can't put the various*
9 *versions to him. I am in difficulty in*
10 *that respect.*

11
12 Then I put:

13
14 *There is a substantial difference between*
15 *what he says in his oral evidence to what*
16 *he says in his statement.*

17
18 My learned friend Mr Bolster helpfully said, in effect, "It
19 can be put, but you know the consequence"; namely, it was
20 going to be rejected.

21
22 Then at line 38, I tried to get in the psychiatric
23 material. You know, Commissioner, and I know, but no-one
24 else knows, that the psychiatric material is of particular
25 significance.

26
27 THE COMMISSIONER: To what?

28
29 MR WHEELHOUSE: To Mr Francis's state of mind and the way
30 he acted in the way he did.

31
32 THE COMMISSIONER: When?

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34 MR WHEELHOUSE: At the time he gave his evidence in the
35 private hearing.

36
37 THE COMMISSIONER: But the medical evidence doesn't talk
38 about his state of mind in the private hearing; it talks
39 about his state of mind when he was examined, which was
40 later.

41
42 MR WHEELHOUSE: What it talks about is a propensity for
43 him to act in a particular way, but, of course,
44 Commissioner, I'm not --

45
46 THE COMMISSIONER: It doesn't say anything about his
47 medical condition at the time he gave evidence at the

1 private hearing.

2

3 MR WHEELHOUSE: With respect, Commissioner, I cannot
4 debate it because I am sworn to uphold the confidentiality
5 of it, and I would make a submission to the contrary if
6 I could.

7

8 THE COMMISSIONER: No, you can make any submission you
9 want about it now and you can make any submission you want
10 to make about PH3. Those confidential medical exhibits,
11 have been made available to you. You can make any
12 submission you want about them in your written submissions.
13 I may not make all of those submissions publicly available,
14 but I don't need to rule on that now, but you're not
15 prevented from making any submission you want to make about
16 the contents of those medical reports.

17

18 MR WHEELHOUSE: I would need to get copies of them. I was
19 only able to read them. I had to hand them back.

20

21 THE COMMISSIONER: Well, I'm not aware that you didn't
22 have copies, but I made a direction that they be made
23 available to you.

24

25 MR WHEELHOUSE: I then wanted to put it in. I wanted to
26 cross-examine Francis about his medical evidence. At
27 line 38, I said:

28

29 *Q. Mr Francis, when you gave your*
30 *evidence at the private hearing is it*
31 *correct that you were suffering from a*
32 *medical condition?*

33 *MR CHESHIRE: I object to that. It is a*
34 *matter for expert evidence, apart from*
35 *anything else.*

36 *THE COMMISSIONER: I don't know that you*
37 *need to put that. There is private hearing*
38 *evidence about that.*

39

40 Then I said:

41

42 *We don't have access to that, from where*
43 *I stand here now, unless I can have*
44 *available that evidence and tender it*
45 *separately.*

46

47 The matter then proceeds, and I said:

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I have a question about this witness's mental state as something he must know about. He either knows of his own knowledge or he has got advice about it. Secondly, the question of whether that affects his reliability, in his opinion, can't incriminate him.

I am there submitting that I should be able to use what's in the psychiatric report to cross-examine him.

THE COMMISSIONER: Yes, right.

MR WHEELHOUSE: And you say:

I don't know that that's right --

THE COMMISSIONER: Yes:

I don't know that that's right. Could we leave this topic for a moment because I think anything about this topic should be in a private hearing rather than public.

Then you moved on to wanting to ask the witness about his version of events concerning the kitchen. Then later on, at T1891, I said:

I make a direction that exhibit PH3 can be available for access to be looked at by the representatives of former Councillor Oueik.

So I made them available to you.

MR WHEELHOUSE: I looked at them, yes.

THE COMMISSIONER: Right, and you didn't do anything further.

MR WHEELHOUSE: But I understood that I couldn't on the basis of two things: first of all, Mr Francis has taken objection to any further questions in relation to what I would call neutrally the kitchen conversation; and, secondly --

THE COMMISSIONER: Well, that's a separate issue. He

1 did --

2

3 MR WHEELHOUSE: And, secondly, when I sought to
4 cross-examine on the kitchen conversation, I was in trouble
5 because (a) I couldn't cross-examine on material that might
6 tend to incriminate him; and (b) I was seeking to
7 cross-examine specifically on whether or not the medical
8 evidence that was available had an effect on his
9 reliability.

10

11 THE COMMISSIONER: Well, there was no ruling made that you
12 couldn't ask him any questions about his medical condition
13 because you didn't press it. The medical reports were made
14 available to you and nothing further happened.

15

16 In relation to asking the witness questions about the
17 conversation concerning the kitchen cabinets, you were
18 permitted to ask any question you wanted. It's just that,
19 ultimately, I have ruled that he could claim the privilege
20 against self-incrimination.

21

22 MR WHEELHOUSE: That put me in a situation where
23 I couldn't ask any questions given that --

24

25 THE COMMISSIONER: No, you were able to ask any questions
26 you wanted. What I couldn't do is compel the witness to
27 answer you.

28

29 MR WHEELHOUSE: No, Commissioner, I took the opinion,
30 which was reasonable, that I just didn't want to waste
31 hours putting questions which would then be subject to your
32 ruling and they would be objected to.

33

34 THE COMMISSIONER: You certainly were not stopped from
35 asking any question you wanted. I had to make a ruling
36 because a claim for privilege was made by Mr Francis and
37 I ruled I couldn't force him to answer the questions,
38 because the legislation does not allow me to, and that's
39 where it was left.

40

41 MR WHEELHOUSE: I would respectfully submit that I have a
42 contrary view of that, but, Commissioner, at line 44, at
43 page --

44

45 THE COMMISSIONER: Just stop. When you say 44, do you
46 have a page number?

47

1 MR WHEELHOUSE: That's the line number. It is 1811.

2

3 THE COMMISSIONER: Page 1811, line 44?

4

5 MR WHEELHOUSE: Yes. You say, Commissioner:

6

7 *As I have treated this is that you want to*
8 *and have made an attempt to ask questions*
9 *concerning the version of events that*
10 *Mr Francis gave at the private hearing and*
11 *any statement concerning his renovation to*
12 *his kitchen and what was said to your*
13 *client about that and a claim for privilege*
14 *against self-incrimination has been made*
15 *about that --*

16

17 THE COMMISSIONER: And then I said, "and I won't compel
18 the witness to answer."

19

20 MR WHEELHOUSE:

21

22 *-- and I won't compel the witness to*
23 *answer. I don't think I can compel the*
24 *witness to answer any questions on that*
25 *topic.*

26

27 THE COMMISSIONER: Yes.

28

29 MR WHEELHOUSE: Then I said:

30

31 *Quite specifically, Mr Commissioner, I wish*
32 *to put directly the conversation that is*
33 *recorded at transcript page 1048, which is*
34 *my client's version of the conversation,*
35 *and I assume that --*

36

37 Mr Cheshire said, "I claim privilege", and you then say to
38 me, Commissioner --

39

40 THE COMMISSIONER: Yes, but your submission, and the
41 letter from Sterling Legal, makes the assertion that you
42 were not permitted to cross-examine Mr Francis upon the
43 evidence he gave during the private hearing that has now
44 been reproduced in the submissions and that is just not
45 right. You were permitted to ask any question you wanted;
46 I just couldn't compel an answer.

47

1 MR WHEELHOUSE: Commissioner, could I take you to line 14
2 on page 1812:

3

4 *THE COMMISSIONER: I will take it that you*
5 *have attempted to put your client's version*
6 *of the conversation.*

7 *MR WHEELHOUSE: I wish to get an express*
8 *denial in relation to the gift and favour*
9 *conversation, if I can describe them*
10 *mutually. I can give you the transcript*
11 *references, if you wish, Commissioner.*

12 *THE COMMISSIONER: Why don't you do that.*
13 *You want to put a different version of*
14 *Mr Francis's account and you want to put*
15 *Mr Queik's version of the account.*

16 *MR WHEELHOUSE: Yes.*

17 *THE COMMISSIONER: Which is at transcript*
18 *page what?*

19

20 I then refer --

21

22 *THE COMMISSIONER: Yes, and I'm trying to help you by*
23 *saying I'm not going to make any adverse ruling against*
24 *your client on the basis that you didn't attempt to put to*
25 *him a different version of events. I just couldn't compel*
26 *Mr Francis to answer these questions.*

27

28 *MR WHEELHOUSE: Well, Commissioner, I think we're probably*
29 *just at cross-purposes. I understood --*

30

31 *THE COMMISSIONER: I don't think so.*

32

33 *MR WHEELHOUSE: I understood from that exchange that it*
34 *was futile for me to put any question in relation to the*
35 *kitchen conversation or his psychiatric state at the time*
36 *of that conversation.*

37

38 *THE COMMISSIONER: Well, in relation to the kitchen --*

39

40 *MR WHEELHOUSE: -- because it would be the subject of a*
41 *ruling by you that he was entitled to claim privilege.*

42

43 *THE COMMISSIONER: In relation to the kitchen, there was*
44 *an objection and I ruled a particular way. So you weren't*
45 *stopped from asking the question. I couldn't compel an*
46 *answer.*

47

1 In relation to the medical reports, you didn't take it
2 further after you got access to them.

3
4 MR WHEELHOUSE: But, Commissioner, my understanding was
5 that any questioning in relation to the kitchen would have
6 resulted in an objection on privilege - my learned friend
7 foreshadowed that, even when I was trying to explain the
8 proposition to you - and that, consistent with your prior
9 rulings, Commissioner, I would not be able to extract an
10 answer. That was my understanding of the Commissioner's
11 ruling.

12
13 THE COMMISSIONER: But Mr Francis claimed the privilege;
14 I couldn't compel him to answer. You're not looking
15 at, "I wish to put to the witness". This is page 813 at
16 line 37:

17
18 *MR WHEELHOUSE: Yes. I wish to put to the*
19 *witness there were no similar*
20 *conversations, but there was one*
21 *conversation.*

22 *THE COMMISSIONER: Just dealing with that,*
23 *does Mr Francis claim the privilege?*

24 *MR CHESHIRE: Yes.*

25
26 So it was about not being able to compel him to answer
27 questions, not in relation to saying, "You can't put a
28 different version of a particular conversation to
29 Mr Francis." All right.

30
31 MR WHEELHOUSE: Commissioner, it may be that I'm putting a
32 position which I understood to apply on the day.

33
34 My learned friend Mr Bolster sought to ask a number of
35 questions, for example, about how it was that option (e)
36 and/or (g) became inserted into the Marsden precinct.
37 I think this is 1705 and following. I'm sorry, starting at
38 page 1704, Mr Francis declined to answer any of those
39 questions on the basis they may - yes, I think it starts at
40 1704, Commissioner.

41
42 Consistent with that ruling, if he was cross-examined
43 on this topic, he would claim incrimination and you,
44 Commissioner, would rule accordingly. I therefore
45 understood that that topic of cross-examination of
46 Mr Francis had effectively been closed down starting at
47 page --

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THE COMMISSIONER: I'm not following what you're seeking to make of this.

MR WHEELHOUSE: What I'm seeking to say, Commissioner, is this: at page 1704, my learned friend Mr Bolster sought to cross-examine, Mr Francis about how it was option (e) and option (g) appeared in the council recommendation for the rezoning of the Marsden Street precinct to B4.

THE COMMISSIONER: Right.

MR WHEELHOUSE: As soon as those questions were asked, Mr Cheshire, on behalf of his client, objected on the basis that they were incriminating and you, Commissioner, upheld those objections.

THE COMMISSIONER: Right.

MR WHEELHOUSE: I understood, as a consequence of that, that Mr Francis was not amenable or available for cross-examination in relation to how it was that options (g) and (e) came in to the council recommendation.

THE COMMISSIONER: Well, I don't know. I've made a ruling on Council Assisting's questions.

MR WHEELHOUSE: But, Commissioner --

THE COMMISSIONER: Anyway, the transcript is there.

MR WHEELHOUSE: Commissioner, I don't assert for one moment that I wasn't given PH3 to read. If there's a suggestion that I said to the contrary, that is withdrawn, and that is not what I put in my submission. What I'm putting is that what I couldn't do - if I have liberty now to use that medical report in my submission, I'll certainly take that liberty - was utilise that medical evidence in the process of cross-examining Mr Francis about the kitchen conversation in 2006, which is what I wanted to do.

THE COMMISSIONER: Well, you could have sought to. Whether I would have allowed you to cross-examine Mr Francis about his medical condition is a hypothetical I won't answer now because I didn't have to at the time and now I don't have to deal with that, but no-one stopped you.

1 MR BOLSTER: Aren't the practicalities of this that any
2 questioning along the lines that my learned friend is
3 agitating now would have been objected to, because it is
4 the opposite proposition that I was seeking to get from
5 Mr Francis that Mr Wheelhouse wanted to put to him, and he
6 wasn't prepared to answer it to me and --

7
8 THE COMMISSIONER: Well, they may have been, they may not
9 have been. I mean, consistent with the approach
10 Mr Cheshire took, they probably would have been. However,
11 we don't know. We would just be guessing, in some ways
12 but an educated guess.

13
14 MR WHEELHOUSE: Commissioner, I have to say that once your
15 ruling was made in respect of that topic - that is to say,
16 Mr Bolster was not allowed to cross-examine on the topic -
17 it would be a very imprudent counsel who would not accept
18 that he is bound by that ruling and seek to change what was
19 extremely clear.

20
21 Commissioner, you gave a very lengthy discourse on
22 the following day in relation to the ruling on the whole
23 Marsden Street precinct matter. In dealing with my learned
24 friend Mr Cheshire's claim for privilege, you examined most
25 precisely why it was he was entitled to claim privilege in
26 respect of the very questions that I was seeking to put.

27
28 THE COMMISSIONER: Well, that may have flowed on. If
29 you'd asked questions, I may not have compelled him to
30 answer them, I don't know.

31
32 MR WHEELHOUSE: I accepted your ruling and abided by it.
33 It would be very imprudent for a counsel to do otherwise,
34 Commissioner.

35
36 THE COMMISSIONER: You could have tried, but it may be
37 consistent with the ruling depending on the way you phrased
38 the question, I don't know. Maybe there wouldn't have an
39 objection - who knows? Maybe there wouldn't have been a
40 claim for privilege.

41
42 MR DUGGAN: Commissioner, can I make a submission? The
43 reason I interrupt is that if I'm successful with my
44 submission, it may deal with Mr Wheelhouse's concerns.

45
46 THE COMMISSIONER: Sure.
47

1 MR DUGGAN: I'm happy to make it later, but it may
2 shortcut this --

3
4 THE COMMISSIONER: Yes, go on.

5
6 MR DUGGAN: Thank you. My submission is that obviously
7 Council Assisting --

8
9 THE COMMISSIONER: Sorry, Mr Duggan, are you joining in
10 the objection? Is this to do with that or --

11
12 MR DUGGAN: No, it is a slightly different point.

13
14 THE COMMISSIONER: Are you going to tell me why I'm right
15 in which case you can definitely go on.

16
17 MR DUGGAN: I'm going to completely sidestep and approach
18 it from a different angle.

19
20 THE COMMISSIONER: All right.

21
22 MR DUGGAN: The submissions of Counsel Assisting obviously
23 make a number of recommended findings that would have
24 reputational consequences and that's clearly what's driving
25 my learned friend behind me.

26
27 THE COMMISSIONER: The finding might; the submission
28 doesn't necessarily. Anyway, go on.

29
30 MR DUGGAN: Well, it has the ability to affect reputations
31 in this way - that it's picked up by the media and the
32 media reports it in a particular way.

33
34 THE COMMISSIONER: Sure, all right.

35
36 MR DUGGAN: The difficulty from my perspective is that
37 there is a gap between the submission being made by my
38 friend Counsel Assisting and me responding to it, and that
39 gap is of a number of weeks.

40
41 THE COMMISSIONER: Oh, I see.

42
43 MR DUGGAN: So there is no doubt it will be reported
44 before I get a chance to put an answer to it.

45
46 In my experience, and it may not be the same in all
47 public inquiries, but with the Royal Commission into

1 Institutional Responses to Child Sexual Abuse and with ICAC
2 the approach taken by the Commissioners in those inquiries
3 is to make an order that the submissions of Counsel
4 Assisting be confidential and not be published unless and
5 until further order.
6

7 For example, what the Royal Commission does with its
8 various case studies is it publishes the submissions at the
9 same time that it publishes its findings so there can be no
10 unfair prejudice suffered by someone along the way because
11 they can't immediately meet an accusation.
12

13 THE COMMISSIONER: Yes, I see. You're saying, Mr Duggan,
14 if Counsel Assisting's submissions are made publicly
15 available before your client has had his chance to say
16 something contradicting them or giving context or
17 explaining them that that is potentially, I wouldn't say
18 it's unfair but not as fair as if they are released at the
19 same time?
20

21 MR DUGGAN: That's right, and particularly with the way
22 the media operates, without meaning to be disparaging, the
23 explanation is not always as reportable as the accusation
24 or the recommended finding.
25

26 For example, one that I'm particularly concerned about
27 is SA17, which is on page 55 of the report --
28

29 THE COMMISSIONER: Page 55 of the report? I haven't done
30 that yet.
31

32 MR DUGGAN: I'm sorry, page 55 of the submissions. I hope
33 it is not --
34

35 THE COMMISSIONER: I can guarantee you there is no report.
36 Page 55?
37

38 MR DUGGAN: Yes, SA17.
39

40 THE COMMISSIONER: Yes, I see.
41

42 MR DUGGAN: I will be making a number of submissions
43 against that, but if the media were to pick that up, they
44 would say, "Well, Counsel Assisting is seeking this
45 finding", and that would have reputational consequences for
46 my client.
47

1 In any event, we simply say there is no public
2 interest in releasing the submissions now. Other public
3 inquiries adopt the approach that I've described and we
4 would submit that is appropriate in this case.

5
6 THE COMMISSIONER: I have to say my initial reaction to
7 what you have just put is that it sounds reasonable.
8 I think there is clearly a public interest in the
9 submissions of Counsel Assisting in a public inquiry being
10 made publicly available, but in terms of timing, I'm not
11 sure that there is any huge public interest in them
12 necessarily having to be made publicly available before the
13 other parties have said Counsel Assisting is right or wrong
14 or they are indifferent on any particular submission that
15 Counsel Assisting has made.

16
17 Does anyone else have a view about that?

18
19 MR PRICE: Commissioner, we support that view. That would
20 take out a lot of the difficulties that I would have wanted
21 to be heard on specifically. I think that is a sensible
22 course.

23
24 MR CHESHIRE: Commissioner, I have to say I had come with
25 a similar proposal. I discussed it with Mr Wheelhouse
26 before.

27
28 I may say something additional that may lead to that
29 point. I had not understood from the debate between
30 yourself and Mr Wheelhouse that you were saying that there
31 had been or might be some breach of the rule in *Browne v*
32 *Dunn*. It seemed to be --

33
34 THE COMMISSIONER: Even if it applies, and I'm not sure
35 whether it does or it doesn't.

36
37 MR CHESHIRE: Yes, even if it applies.

38
39 MR WHEELHOUSE: No, I don't make that submission. I didn't
40 make that submission.

41
42 THE COMMISSIONER: That's what I was trying to give some
43 reassurance about - that if *Browne v Dunn* applies, it can't
44 be taken against you because you had a go.

45
46 MR CHESHIRE: Exactly and, in that case, what it seems to
47 be is Mr Wheelhouse saying to you, "I wasn't able to ask

1 the questions", and you saying back to him, "You were able
2 to ask them, but you weren't able to get an answer."

3

4 THE COMMISSIONER: Yes.

5

6 MR CHESHIRE: In a sense, it's a different way of putting
7 the same thing; in other words, we did not get the evidence
8 that Mr Wheelhouse wanted to put. But if there's no *Browne*
9 *v Dunn* issue, in a sense, it doesn't matter.

10

11 THE COMMISSIONER: Precisely.

12

13 MR CHESHIRE: As I understand what you are saying to
14 Mr Wheelhouse, he can make whatever submissions he likes
15 about PH3 or anything else in whatever terms he likes and
16 then you will deal with it on its merits and Mr Bolster
17 will have a chance of responding.

18

19 So if that's right, the complaint is more about the
20 contents of the submissions and that what is being
21 presented is a one-sided story without the opportunity of
22 responding, first of all, to make the submissions about PH3
23 and Mr Francis, and also about Mr Oueik's responses and
24 what he would wish to say and what he has said in his
25 evidence, which Mr Wheelhouse may say was unfairly put, for
26 instance, by Mr Bolster.

27

28 One can understand why that might give an unfair
29 representation - we would say from this side, as it were,
30 from the Bar table that it gives an unfair representation
31 of how matters are presented.

32

33 There is one other --

34

35 THE COMMISSIONER: I am sorry to interrupt. I suppose
36 also if these submissions were oral, you would have Counsel
37 Assisting --

38

39 MR PRICE: That's right.

40

41 THE COMMISSIONER: -- and then you would immediately have
42 a response from the other interested parties saying
43 whatever they wanted to say and you wouldn't have this gap.

44

45 MR CHESHIRE: And although there's open justice in the
46 courts, which would mean that probably one could get access
47 to submissions, written submissions, generally they are not

1 published at the time when they are served upon the court.
2 It would only be after a judge has at least heard oral
3 argument so it's all done in the public domain at the same
4 time.

5
6 There is one further issue that occurred to me
7 specific to Mr Francis, perhaps using Mr Francis as an
8 example. If Mr Wheelhouse goes into issues of PH3, as he's
9 likely to, as indeed I'm likely to, they will be addressing
10 parts of Mr Bolster's submissions. In a sense, there would
11 then be a further disconnect if Mr Bolster's submissions on
12 Mr Francis on a particular issue were public, but what
13 Mr Wheelhouse and I said in response were not public
14 because we go into saying, "Oh, yes, you said that, but
15 PH3..."
16

17 I don't ask you to anticipate what we are going to say
18 about which paragraph of Mr Bolster's submissions, but it
19 may be that a submission might wish to be made by
20 Mr Wheelhouse or myself that, in fairness, not only should
21 parts of our submissions not be made public - for instance,
22 PH3 type issues - but it would then flow that parts of
23 Mr Bolster's should also not be made public.
24

25 I don't want to develop that because at the moment
26 there is nothing to respond to, but it's certainly
27 conceivable. That, in my submission, would reinforce the
28 position that you should consider all of the submissions
29 together, and that may also include Mr Bolster's replies.
30

31 You may decide from a pragmatic point of view that
32 it's all too hard, open justice demands it all go in, or
33 there are certain topics that you can actually redact, in
34 which case there should be consistency of redaction on that
35 topic across the three. In my submission, it would be
36 difficult to anticipate all the possibilities and --
37

38 THE COMMISSIONER: No, we would drive ourselves nuts
39 trying to do that now.
40

41 MR CHESHIRE: -- without the necessity of trying to do it
42 now of releasing Mr Bolster's submissions unredacted, and
43 I say there is not that necessity; it is simply not
44 required at that stage.
45

46 THE COMMISSIONER: What do you say about that - just that
47 issue?

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MR BOLSTER: I don't have a firm view on that issue. I'm entirely in your hands, Mr Commissioner. I don't have a problem with my submissions not being made public. It's not something that I --

THE COMMISSIONER: You mean not being made public before everyone else has had a --

MR BOLSTER: Yes. It is not something that I need or want. If it assists the Inquiry, I'm happy to have it either way.

THE COMMISSIONER: All right. Mr Wheelhouse, can I ask you in relation to what Mr Duggan has raised and what Mr Cheshire has raised, would that cover your concerns if there was no direction for public availability of submissions until everyone's submissions were --

MR WHEELHOUSE: Yes, you've raised the question, Commissioner. I was concerned about the one-sided allegation out there in the public arena without having the reasonable chance to respond to it, and it could be misused by the media. Commissioner, I accept Mr Cheshire's helpful submission and --

THE COMMISSIONER: Are you pressing the objection in the letter? If I were to rule that, until further direction, Counsel Assisting's written submissions not be made publicly available at least until the submissions for all the parties have been provided to the Inquiry, would you still want to press your objection?

MR WHEELHOUSE: No, Commissioner, what I would prefer to do is: first of all, the objections have been encapsulated in the written submission I handed to you rather than the letter. If there's any suggestion in the letter that I didn't have access to PH3, well, then, that's not correct.

I would be content, Commissioner, to leave the matter not withdrawn but in abeyance until such time as all the material is served and is available to you and then we can perhaps revisit the discussion when we know the contextual environment. Is that a suitable answer, Commissioner?

THE COMMISSIONER: Well, you've said you don't want to

1 press it today, but you're not abandoning it?

2

3 MR WHEELHOUSE: Yes.

4

5 THE COMMISSIONER: So I won't make a ruling.

6

7 Having heard what, in particular, Mr Duggan and
8 Mr Cheshire have said about the timing of submissions being
9 made publicly available, I think I'd lean towards a
10 consideration that is along the lines that there is a
11 public interest in submissions being made publicly
12 available in a public inquiry, but I am also inclined of
13 the view that the fairest means of doing that, which still
14 achieves that public interest, is that the submissions be
15 made publicly available when everyone has had the chance to
16 file their submissions.

17

18 What I think I'll do then is - I'll write something
19 out, but I'll just talk out loud for the moment - I'll
20 continue the direction that Counsel Assisting's written
21 submissions not be made publicly available for the time
22 being until further direction.

23

24 By "not being made publicly available", I also mean to
25 include that the interested parties that have received them
26 are not to provide them to anyone that is not an interested
27 party in the proceedings.

28

29 I think we will defer further consideration and ruling
30 on that matter about public availability of the submissions
31 until Counsel Assisting's submissions in reply are served
32 on everyone. At that point, the submissions won't be
33 immediately made publicly available and if we have to, at
34 that stage, come back and have a further directions hearing
35 about whether they should be or should not be as a final
36 matter and get me to give a ruling, we will do that then.

37

38 MR WHEELHOUSE: I'm content with that, thank you,
39 Commissioner.

40

41 THE COMMISSIONER: Is everyone happy with that?

42

43 MR PRICE: Yes, Commissioner, but can I say on behalf of
44 Mr Zraika that I had a list of objections and paragraph
45 numbers. My position would be, if I read them on to the
46 record now or went into them in any detail, to adopt
47 Mr Wheelhouse's position. However, I don't abandon them at

1 this point, but if I could perhaps put that in writing --

2

3 THE COMMISSIONER: Perhaps send a letter.

4

5 MR PRICE: Yes, I could do that, and just with the basic
6 basis of the objections.

7

8 THE COMMISSIONER: All right.

9

10 MR PRICE: And it could be dealt with in the same way,
11 potentially at the same time, if at all.

12

13 THE COMMISSIONER: Just to finish those, though,
14 particularly to help both Mr Wheelhouse and Mr Price, the
15 objection is deferred at the moment. My current thinking
16 along these lines, without giving a ruling now or making a
17 final decision, is that in terms of the procedural fairness
18 issues that you've raised, Mr Wheelhouse, in my view, you
19 weren't prevented from asking questions concerning the
20 conversation that Mr Francis says he had with Mr Oueik in
21 the private hearing concerning the kitchen cabinets at all.
22 What happened was that I have ruled that I couldn't compel
23 an answer from Mr Francis.

24

25 My current thinking is also that you weren't prevented
26 from seeking to use the confidential medical exhibits in
27 any way you see fit, and you are certainly not prevented
28 from making any submission you want to about the contents
29 of those medical reports. Let me just draft something up
30 then.

31

32 MR BOLSTER: I'll give Mr Wheelhouse a copy of the
33 exhibit.

34

35 **SHORT ADJOURNMENT**

36

37 THE COMMISSIONER: I'll read this ruling.

38

39 1. This directions hearing has been convened as a
40 result of a letter dated 21 October 2016 from Sterling
41 Legal (the legal representatives of Mr Oueik) to the Auburn
42 Public Inquiry (the objection letter).

43

44 2. In that objection letter, amongst other things,
45 Mr Oueik seeks to have parts of Counsel Assisting's written
46 submissions not made publicly available. Those submissions
47 have been served on all interested parties but, on

1 18 October, I directed that they not be made publicly
2 available until 25 October and that direction has continued
3 to the present time. Mr Price of counsel has also a
4 similar objection for his client, Mr Zraika.

5
6 Some submissions were made about this matter today and
7 written submissions were received from Counsel Assisting,
8 as well as from Mr Wheelhouse, senior counsel for Mr Oueik,
9 but during the course of the discussion, I heard
10 submissions from Mr Duggan, counsel for Mr Mehajer, and
11 from Mr Cheshire, senior counsel for Mr Francis.

12
13 Those submissions concerned whether the fairest course
14 in the Inquiry was to defer making Counsel Assisting's
15 submissions publicly available until all parties had the
16 opportunity to file and exchange their written submissions.
17 This would ensure, they contended, that when the
18 submissions were made publicly available, that more than
19 "one side of the story" was publicly available by way of
20 submission. It was submitted to me that this approach
21 would be consistent with the approach taken by other
22 inquiries and investigative bodies.

23
24 It seems to me this might be a preferable course, and
25 both Mr Wheelhouse and Mr Price indicated it would go a
26 long way to alleviating their clients' concerns.
27 Mr Wheelhouse indicated that if I made a direction such as
28 suggested by Mr Duggan, he would defer his objection and
29 reconsider later. I will adopt this course as I think it
30 is the fairest.

31
32 I therefore direct that Counsel Assisting's written
33 submissions not be made publicly available until further
34 direction and I will make a further direction about that
35 after receipt of all submissions including Counsel
36 Assisting's submissions in reply (if any).

37
38 All submissions will, however, need to comply with the
39 current timetable. While I will bring the issue of
40 objection of public availability of submissions back for
41 further argument, if necessary, I have indicated briefly
42 today that I currently do not accept the arguments made by
43 Mr Wheelhouse for not ultimately making the written
44 submissions publicly available. That can be a matter for
45 final determination later, however, after further argument,
46 if necessary.

47

1 Does everyone understand that? I'll just emphasise
2 again that when I've directed that the written submissions
3 not be made publicly available, that means that the
4 interested parties that have them are not to make them
5 available to anyone beyond those that they need to for the
6 purposes of receiving advice.

7
8 Is that all we need to do today then? There's a
9 timetable in place for the written submissions in place
10 already, isn't there? I did that on the last occasion.

11
12 MR BOLSTER: Yes.

13
14 THE COMMISSIONER: Does anyone have anything further to
15 add?

16
17 MR PRICE: No.

18
19 MR CHESHIRE: No, thank you.

20
21 MR BOLSTER: No, thank you.

22
23 THE COMMISSIONER: We will adjourn the Inquiry again.
24 Thank you.

25
26 **AT 5.05PM THE INQUIRY WAS ADJOURNED ACCORDINGLY**

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