

**IN THE MATTER OF AN INQUIRY UNDER THE COMMISSIONS  
OF INQUIRY ACT OF SAINT LUCIA**

**REPORT OF THE COMMISSION**

**May 6<sup>th</sup>, 2009**

**TO HER EXCELLENCY THE GOVERNOR GENERAL OF SAINT LUCIA**

A. The Appointment

1. By an instrument issued by Her Excellency Dame Calliopa Pearlette Louisy, Grand Cross of the Order of Saint Lucia, Dame Grand Cross of the Most Distinguished Order of St. Michael and St. George, Dame Commander of the Order of St. John, Governor General of Saint Lucia on the 29<sup>th</sup> day of January 2009 and published in the Extraordinary Issue of the Government Gazette on that day we Sir Fenton Ramsahoye, Knight Grand Cross of the Most Distinguished Order of the Nation of Antigua and Barbuda and of Her Majesty's Counsel as Chairman and Mustapha Ibrahim, Retired Justice of Appeal and John Reginald Phelps Dumas, Retired Ambassador and Retired Head of the Public Service of Trinidad and Tobago as members were appointed a Commission of Inquiry to inquire into certain matters concerning the public of Saint Lucia with the following Terms of Reference:

- (1) To investigate the execution and administration of Road Development Projects (RDP) 001 and 002 undertaken by and on behalf of the Government of Saint Lucia;

- (2) To investigate the administration of the affairs of the National Conservation Authority (NCA) pursuant to its statutory powers during the period April 2000 to December 2004;
- (3) To investigate the financial involvement of the Government of Saint Lucia in relation to the payment of US\$17,092,350 to the Royal Merchant Bank of Trinidad and Tobago to satisfy debts owed by Frenwell Limited;
- (4) To investigate any losses suffered by the Government of Saint Lucia in relation to payments and/or expenditure concerning the matters specified and referred to at (1) and (3) above;
- (5) To inquire into any losses suffered by the National Conservation Authority as a result of faults in administration in the period referred to in respect of the matters specified at (2) above;
- (6) To investigate whether any losses identified were the result of breaches of the civil and/or criminal law;
- (7) To investigate whether any losses suffered may be recoverable in civil proceedings;
- (8) To investigate whether in relation to numbers (1), (2) and (3) above there is or may be criminal liability which may be the subject of prosecution in the criminal courts;
- (9) To consider the conduct of persons concerned in the above matters under reference to determine whether they performed their duties and fulfilled their obligations in a manner which was lawful and proper.

AND to make recommendations.

In accordance with further directions by Her Excellency the Governor General given on the 11<sup>th</sup> March 2009 the time for the Commission to investigate and report was extended to the 7<sup>th</sup> May 2009.

B. The Scope of the Inquiry

2. The Government of Saint Lucia embarked upon a Roads Development Project which involved the construction of new roads under the control of the Ministry of Communications Works Transport and Public Utilities (MCWTPU). Only two of the roads falling within the Project were under the remit of this inquiry the two projects being described as RDP001 and RDP002. The Commission was required to investigate the execution and administration of these two projects. The administrative structure which was put in place to deal with the two projects became the subject of investigation as was the actual process of execution of the works which were done to construct RDP001 and RDP002. The second matter to be examined was the administration of the affairs of the National Conservation Authority, a statutory corporation which was established and administered under the National Conservation Authority Act, Chapter 6:01 of the Laws of Saint Lucia. The third and last subject was the investigation of the financial involvement of the Government to Saint Lucia in relation to the payment of US\$17,092,350 to the Royal Merchant Bank of Trinidad and Tobago to satisfy debts owed by Frenwell Limited.
3. The Commissioners were required to investigate whether any loss was suffered by the Government of Saint Lucia in respect of the three matters mentioned above. The Commissioners on the basis of the oral evidence and documentary

material which became available have concluded for reasons which will be given below that the Government of Saint Lucia did suffer loss in respect of all such matters.

#### The Rochamel Affair: Frenwell Limited

4. The Government of Saint Lucia on the 17<sup>th</sup> December 1997 entered into a development and concession agreement with investors for the establishment in Saint Lucia of a phased touristic development on the Causeway Lands at Rodney Bay, Quarter of Gros Islet. Dr. Kenny Anthony then the Prime Minister and Minister of Finance of Saint Lucia acted for the Government. The other parties to the agreement were Rochamel Development Company Limited a Saint Lucian Company represented by Gavin French, Pigeon Point Hotels Limited a Saint Lucia Company represented by Scott D. Miller and Rochamel Construction Company Limited, a Saint Lucian company also represented by Gavin French. Rochamel Development Company Limited “the developer” owned 35 acres of the Causeway lands and it was provided by the development and concession agreement that 15 of the 35 acres were to be dismembered for the construction thereon of a 300 room hotel resort which was to be fully equipped as a first class hotel resort within two years from the 1<sup>st</sup> January 1998. Pigeon Point Hotel Limited “the Hotel Company” was formed for the purpose of establishing the resort. The issued shares in the Hotel Company amounted to 100,000 of which 87,125 were held by Rochamel Development Company Limited and 12,875 by Hyatt Hotels of Saint Lucia Limited “the Management Company”. The work of

construction under the agreement was to be done by Rochamel Construction Company Limited on behalf of the developer who had an obligation subject to availability, suitability and qualifications to use Saint Lucian contractors and personnel in a ratio of five Saint Lucians to every foreigner for all the development works on the Causeway lands.

5. The agreement for the establishment of the hotel was executed in Saint Lucia. It gave permission to the Developer as a development alien exemption from the provisions of the Aliens (Landholding Regulation) Act 1973 and extended the exemption to its nominee or subsidiary companies. The Developer was entitled upon Government's agreement with its plans and specifications to have its developments on the land declared to be Approved Tourism Products. Permission was given for the operation of foreign accounts. Tax exemptions were given in relation to stamp duties and Capital Transfer Taxes and these were extended to nominee and subsidiary companies of the Developer. Permission was granted for the Developer to have a licence to hold shares in the Hotel Company and licence fees were waived. The Government of Saint Lucia agreed to enter into a Guarantee and Indemnity agreement with the Royal Merchant Bank of Trinidad and Tobago to assure funding from that Bank for the construction of the Hotel Resort. In terms of the agreement the Government of Saint Lucia was to give a Debt Service Guarantee capped at a maximum liability of US\$4 million and a further Cost Over-Run Guarantee capped at US\$8.75 million during the construction phase and operation of the resort. The guarantee was to be a last resort guarantee but in the event it was called upon the amount

paid by the Government of Saint Lucia was to be converted into equity in the Hotel Company by the issue to the Government of redeemable Preference Shares in the Hotel Company to the appropriate value of the money paid.

6. The construction company was itself granted concessions by way of the issue of an annual Trade Licence and a fifteen year exemption from income and corporation taxes. It also received a 100 per cent waiver of all import duties and consumption taxes on all building materials, plant and machinery, furniture, fittings, fixtures, equipment and construction items imported for the construction furnishing, fitting out and equipping the Hotel Resort carried out within fifteen (15) years of the opening of the Resort. These concessions were to be extended to any other development of a Tourism Product undertaken on the said Causeway lands in which the Construction Company might be engaged as Contractor. Work permits were to be granted to personnel in the proportion of five Saint Lucians to one foreigner. The concessions granted to the Developer if not exercised by it could be granted to the Construction Company in relation to foreign exchange accounts.
7. The Hotel to be built was by the agreement declared an Approved Tourism Product and was given complete exemption from all property and income taxes for fifteen (15) years from the opening of the Hotel. The Hotel Company was granted development alien status and its shareholders were exempted from income taxes on their dividends for fifteen (15) years from the opening of the Hotel. The Hotel Company was also given by the agreement permission to operate a foreign exchange account. Its shareholders were to be allowed to

repatriate dividends free of income tax, corporation tax or withholding taxes or any other taxes whatsoever for fifteen (15) years from the opening of the Hotel Resort. Waivers were granted for three years in respect of Hotel occupancy tax commencing from the opening of the Hotel Resort. Work permits to permit the exchange of overseas staff, a casino licence upon the passing of legislation to allow gaming in Saint Lucia, a 100 per cent waiver of all import duties and consumption taxes on all furniture, fittings, equipment and items imported for the refurbishment of the Hotel Resort within fifteen (15) years of the opening of the Resort as well as exemption from customs duties, consumption taxes and stamp duties on equipment connected with water sports were also granted. It was to be issued with a Trade Licence while it operated as well as a Trade Licence to Red Sail (a Hyatt affiliate) to operate a water sports centre at the Resort as well as work permits for management.

8. The Management Company was by the agreement permitted to hold shares in the Hotel Company with a waiver of licence fees. It was entitled to an annual Trade Licence while a Management Company for the Resort or any other development on the Causeway Lands, to exemption from all taxes on management fees and expenses reimbursement for fifteen (15) years from the opening of the hotel, to permission to operate foreign exchange accounts and to repatriate all its management fees free from income tax, corporation tax, withholding taxes or any other tax whatsoever for fifteen (15) years from the opening of the Hotel Resort. It was entitled to work permits for foreign personnel and the exchange of overseas staff was to be facilitated by the Government.

9. A Deed of Guarantee and Indemnity was executed on the 13<sup>th</sup> February 1998 between the Government of Saint Lucia acting by Dr. Kenny Anthony the Prime Minister and Minister of Finance and the Royal Merchant Bank of Trinidad and Tobago and Finance Company Limited "The Royal Merchant Bank". The Government guarantee as envisaged by the development and concession agreement of 17<sup>th</sup> December 1997 was to be for two sums being US\$8.75 million in respect of cost over-runs and US\$4 million in respect of Debt Service costs. The Deed of Guarantee and Indemnity executed between the Government of Saint Lucia and the Royal Merchant Bank was much wider in scope and was expressed to be to support bonds in the sum of US\$30 million to be issued by the Pigeon Point Hotel Limited for the purpose of constructing a 300 room Resort Hotel at Pigeon Island, Causeway, Saint Lucia. It was expressed to be governed by the laws of Trinidad and Tobago and under it the Government of Saint Lucia agreed to submit to the jurisdiction of the Trinidad and Tobago Courts. This deed of guarantee also referred to the debt service and cost over-run guarantees mentioned and also referred to in the development and concession agreement of the 17<sup>th</sup> December 1997. It also referred to a Trust Deed executed on the 17<sup>th</sup> December 1997 between Pigeon Point Hotel Limited and the Royal Merchant Bank whereby the Bank became Trustee for the bondholders who were expected to subscribe for the bonds in the sum of US\$30 million which the Pigeon Point Hotel Company proposed to issue. By the terms of the Deed of Guarantee and Indemnity the Government further agreed to guarantee for the benefit of the Trustee and the bondholders the payment of US\$8.75 million in respect of cost

over-runs and US\$4 million in respect of debt service and to pay interest on all monies demanded under the guarantee including the two last mentioned sums which total US\$12,750,000. Interest is not defined in the Deed of Guarantee and Indemnity but it is defined in the Trust Deed as Prime plus margin. Prime is the arithmetic average of the commercial prime or base lending rates of the Chase Manhattan Bank, Bank of New York and Citibank while margin means 1 per cent per annum or 1.25 per cent if an option to create US\$6,000,000 in new bonds was exercised. The option was exercised so the margin was 1.25 per cent.

10. The effect of the Deed of Guarantee and Indemnity which was executed by Dr. Kenny Anthony the Prime Minister and Minister of Finance on behalf of the Government of Saint Lucia was to extend the liability of the Government by the addition of interest to the maximum of US\$12,750,000 at which the liability was capped in respect of cost over-runs and debt service costs involved in the construction and operation of the Resort when the development and concession agreement was executed on the 17<sup>th</sup> December 1997. The last mentioned agreement had provided that if there was a call on the guarantee and the Government of Saint Lucia paid under it as a guarantee of last resort the Government of Saint Lucia was entitled to an equity in the hotel to the value of the amount paid under the guarantee which by that agreement had been capped at a maximum of US\$12,750,000. This guarantee by the Government was in addition to all other guarantees and securities which the Royal Merchant Bank took from the parties when money was borrowed from it in connection with the Resort. In addition to the guarantee of US\$12,750,000 the Government of Saint

Lucia gave other guarantees to support the construction of the Resort. Guarantees were given by the Government of Saint Lucia when two sets of bonds were issued by the Hotel Company for US\$30 and US\$6 million respectively on the 30<sup>th</sup> June 1998 and 6<sup>th</sup> October 1999 and for US\$16 million on the 13<sup>th</sup> September 1999 when Causeway Hotels Limited, another company, borrowed money to meet costs of constructing and equipping the Hotel. These three guarantees last mentioned were given by Dr. Kenny Anthony on behalf of the Government of Saint Lucia but they are not the subject of this inquiry. There is no evidence that the Government was called upon to make any payment under them.

11. We are concerned as a result of our Terms of Reference with the debts of a company known as Frenwell Limited. This company was incorporated in Saint Lucia by Mc Namara and Company on the 14<sup>th</sup> January 2000 its directors being listed as Gavin French and Robert Mc Clellan. On the 17<sup>th</sup> December 1999 prior to its incorporation it entered into an agreement with the Royal Merchant Bank to borrow US\$3,850,000 for the purchase of cumulative preference shares issued by Pigeon Point Hotels Limited with a face value of that sum. The agreement of 17<sup>th</sup> December 1999 was followed by two further loan agreements between Frenwell Limited and the Royal Merchant Bank dated 18<sup>th</sup> February 2000 for the sum of US\$8,750,000 and 30<sup>th</sup> June 2000 for the sum of US\$4,000,000. The sum of US\$8,750,000 was expressed to include a re-financing of the sum of US\$3,870,000 borrowed on 17<sup>th</sup> December 1999 so that the total of the loans taken from the Royal Merchant Bank by Frenwell Limited became

US\$12,750,000. The monies loaned were in terms of the loan agreements to purchase cumulative preference shares in Pigeon Point Hotels Limited. Frenwell Limited was not a party to the development and concession agreement of 17<sup>th</sup> December 1997. It was formed afterwards and we inquired as to the reason for its formation because the monies it borrowed were subject to re-payment by the Government of Saint Lucia under separate agreements made between the Government of Saint Lucia for which Dr. Kenny Anthony acted and the Royal Merchant Bank. These separate agreements which were made on 18<sup>th</sup> February and 30<sup>th</sup> June 2000 were described in the documents as Put Option Agreements. Although they were not described as guarantees they were instruments by which the Government of Saint Lucia became liable to answer for the debts of Frenwell Limited which were created by the loan agreements. In this respect they carried one of the elements known to a guarantee in English law and the law of Trinidad and Tobago. By their terms they allowed the Royal Merchant Bank as lender to call upon the Government of Saint Lucia to purchase the loans which Frenwell Limited took by purchasing them from the Royal Merchant Bank in the event Frenwell Limited defaulted. Frenwell Limited was not shown to have assets and it did default. Our inquiry into the formation of Frenwell Limited shows that it was allegedly formed at the request of the Government of Saint Lucia as a device to deal with payment of the sum of US\$12,750,000 which was the total amount the Government of Saint Lucia agreed to guarantee under the development and concession agreement of 17<sup>th</sup> December 1997. The Deed of Guarantee and Indemnity executed in favour of the Royal Merchant Bank on the 13<sup>th</sup> February

1998 did not mention the provision in the development and concession agreement of 17<sup>th</sup> December 1997 that in the event the Government of Saint Lucia was called upon to pay under its guarantee it was entitled to an equity of corresponding value in Pigeon Point Hotel Limited. The Royal Merchant Bank was not a party to the development and concession agreement. Its recourse for payment of the sum of US\$12,750,000 was to the Deed of Guarantee and Indemnity and the Put Option Agreements which were all executed by Dr. Kenny Anthony on behalf of the Government of Saint Lucia.

12. The Commission saw no material which caused the monies under the Deed of Guarantee and Indemnity and the Put Option Agreements for US\$12,750,000 plus interest to be called in by the Royal Merchant Bank. The Royal Merchant Bank not having been a party to the development and concession agreement could make no claim under it. That Bank was entitled to claim under the Deed of Guarantee and Indemnity of 13<sup>th</sup> February 1998 and under the Put Option Agreements of 18<sup>th</sup> February and 30<sup>th</sup> June 2000. In the event the Bank did so the procedures specified in those documents had necessarily to be followed. However, the Government of Saint Lucia admitted that it was obliged to pay the sum of US\$12,750,000 plus interest and did not require these procedures to be followed by the Royal Merchant Bank. The Government of Saint Lucia took the position that the money was owing and had to be paid. The Government did as will be seen contest the amount of interest which the Bank claimed and this led to Dr. Kenny Anthony travelling to the Royal Merchant Bank in Trinidad to deal with interest charges which he considered to be too high.

13. Where the Government of Saint Lucia gives a guarantee involving any financial liability the guarantee is not binding upon Government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament because of the terms of section 41 of the Finance (Administration) Act, Chapter 15:01 which reads as follows:-

***S.41 A guarantee involving any financial liability is not binding upon Government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament.***

This provision is followed by section 42 of the Act which reads as follows:-

***S.42(1) There shall be charged upon and paid out of the Consolidated Fund all debt charges for which the government is liable.***

***(2) For the purpose of this section, debt charges including interest, sinking fund charges and any other charges related to the repayment or amortization of loans and advances or in satisfaction of any obligation arising from a guarantee given in accordance with section 41.***

The guarantees in the development and concession agreement, the Deed of Guarantee and Indemnity and the Put Option Agreements were never put before Parliament for approval by resolution. As a result there was no direct authority for money payable under the guarantees or any of them to be taken out of the Consolidated Fund as is contemplated by sections 41 and 42 of the Finance (Administration) Act. In December 2002 the Government of Saint Lucia wanted to borrow US\$41 million from the Royal Merchant Bank to meet capital

expenditure and to pay the debts incurred by Frenwell Limited. A motion to enable the money to be borrowed was put before Parliament. It was approved by the House of Assembly on the motion of Dr. Kenny Anthony the Prime Minister and Minister of Finance on the 17<sup>th</sup> December 2002. The motion was passed by the Senate on the 20<sup>th</sup> December 2002. It is appropriate to set out the full terms of the resolution which were as follows:-

### **RESOLUTION**

***WHEREAS it is provided by section 39 of the Finance (Administration) Act 1997, No.3, that the Minister of Finance may, by Resolution of Parliament, borrow from any bank or other financial institution for capital or recurrent expenditure of Government.***

***AND WHEREAS it is further provided by section 42 of the said Act that there shall be charged upon and paid out of the Consolidated Fund debt charges for which the Government is liable;***

***AND WHEREAS the Minister for finance considers it necessary to enter into a fully underwritten Fixed Rate Bond facility of US\$41,000,000 (or its equivalent in Eastern Caribbean Dollars), at an issue price of 100% par value, with the RBTT Merchant Bank Ltd, for the purposes of financing the Government's Capital Works Programme and for refinancing Government's obligations in respect of the former Hyatt Hotel;***

***AND WHEREAS the interest on the facility is fixed at 7.75%.***

***AND WHEREAS the interest payments are payable semi-annually in arrears and the repayment of the principal is by twenty equal, consecutive, semi-annual payment of US\$2,050,000;***

***AND WHEREAS the period of repayment of the facility is ten years;***

***BE IT RESOLVED that Parliament hereby authorises the Minister for Finance to enter into a Fixed Rate Bond facility of US\$41,000,000 with the RBTT Merchant Bank Ltd for the purposes of financing Government's Capital Works Programme and for refinancing Government's obligations in respect of the former Hyatt Hotel.***

***Passed in the House of Assembly this 17<sup>th</sup> day of December, 2002***

***MATTHEW ROBERTS,***

***Speaker of the House of Assembly.***

***Passed in the Senate this 20<sup>th</sup> day of December, 2002.***

***HILFORD DETERVILLE,***

***President of the Senate***

14. The motion presented to Parliament invoked as its authority the provisions of section 39 of the Finance (Administration) Act subsection 1(a) of which provides:

***39 Loans and Authority to sign thereof***

- (1) The Minister may, by resolution of Parliament, borrow from any bank or other financial institution for any of the following purposes –***

- (a) the capital or recurrent expenditure of the Government.***

The reason for invoking section 39(1)(a) was because a part of the US\$41 million was intended to meet expenditure on capital works which the Government of

Saint Lucia had undertaken but it was also intended that the other part should be used to refinance Government's obligations in respect of the former Hyatt Hotel. The truth was that the obligations which the Government of Saint Lucia intended to meet were the loan monies which Frenwell Limited had borrowed and the interest which the Government was obliged to pay to the Royal Merchant Bank under the Deed of Guarantee and Indemnity and the Put Option Agreements. It was presumed that the members of the Legislature knew that the loan monies were used to support Pigeon Point Hotel Limited. We conclude that the nature of the proceedings by virtue of which the resolution was passed were irregular but since the members of Parliament must have known that the Government was borrowing money to satisfy obligations it undertook in connection with the Resort the payment although done through an irregular procedure was not unlawful. We conclude that the money paid was lost and that the Government and people of Saint Lucia received nothing in return for the money so paid to the Royal Merchant Bank even though it was intended by the terms of the development and concession agreement of the 17<sup>th</sup> December 1997 that if the Government was called upon to pay it would receive a corresponding equity in the hotel.

15. After the resolution was passed and the Government of Saint Lucia assumed thereby the authority to borrow US\$41 million from the Royal Merchant Bank it did so. The Royal Merchant Bank did not however pay the US\$41 million to the Government. The Royal Merchant Bank purported to deal with the sum of US\$41 million which it was lending to the Government of Saint Lucia in the following way:-

- (a) It deducted US\$17,092,350 for the debt of Frenwell Limited comprising the loans plus interest.
- (b) It deducted a further US\$584,000 for fees.
- (c) It paid as balance US\$23,323,000 to the Government.

The Government did not dispute that Frenwell Limited borrowed US\$12,750,000 from the Royal Merchant Bank to purchase cumulative preference shares in Pigeon Point Hotel Limited but the difference between that sum and US\$17,092,350 which the Royal Merchant Bank took represented interest in the sum of US\$4,342,350 which the Government considered to be excessive. Dr. Kenny Anthony the Prime Minister and Minister of Finance travelled to Trinidad and Tobago to intercede with the Royal Merchant Bank over this interest payment. The Bank agreed to reduce the interest by US\$2.5 million and this sum was later refunded or otherwise dealt with for the credit of the Government. Taking into account the reduction of interest by US\$2.5 million the total sum which the Government lost was US\$14,592,350 together with fees included in the sum of US\$584,000 part of the last mentioned amount being attributable to that portion of the US\$41 million dollar loan which went to settle the debt of Frenwell Limited.

16. The procedures which were followed subsequent to the development and concession agreement of 17<sup>th</sup> December 1997 led to the loss by the Government and people of Saint Lucia of the monies paid in respect of the debt of Frenwell Limited. The Government received no equity in Pigeon Point Hotel Limited and under the documents presented to the Commission it was entitled to none. The

Government did not pay any debt in the sum of US\$12,750,000 plus interest for Pigeon Point Hotel Limited. That money was paid for Frenwell Limited. As a result of the manner in which the transaction was done the Government had no recourse in equity against Pigeon Point Hotel Limited because it did not as a guarantor pay Pigeon Point Hotel's debt. The Government had no agreement with Frenwell Limited whereby the cumulative preference shares purchased by Frenwell Limited from Pigeon Point Hotel Limited could be claimed by the Government from Frenwell Limited. The shares so purchased have remained with Frenwell Limited. No shares were passed by Frenwell Limited to the Government and people of Saint Lucia.

17. It was suggested to the Commission by Mr. Astaphan Counsel for Dr. Kenny Anthony that the shares when purchased by Frenwell Limited were charged to the Royal Merchant Bank as Trustee for the Government of Saint Lucia. There is no document in the whole transaction which bears this out. There was in writing a charge on the shares which Frenwell Limited purchased with the loan monies but that charge was in favour of the Royal Merchant Bank as Lender. The Royal Merchant Bank had the right to take action to enforce the charge on the shares but it was not obliged to do so because the Government of St. Lucia paid the debt and freed the shares of the charge leaving Frenwell Limited with unencumbered Cumulative Preference Shares in Pigeon Point Hotel Limited. It was argued for Dr. Kenny Anthony that the shares were valueless because of the failure of the Pigeon Point Hotel Company but whether the shares were valueless or not the Government of Saint Lucia received none. The money paid to settle

the debt of Frenwell Limited was a loss which the people of Saint Lucia bore without compensation.

18. It was also argued by Mr. Astaphan that the Government of Saint Lucia gained by the project which is now a source of income and employment for workers of Saint Lucia as well as a source of income for the Government. There is no doubt that the project which is now part of the Sandal's family of hotels will bring employment, benefit and income as was contended by Mr. Astaphan but it appears to the Commission that those benefits would in any event have been gained and that the monetary loss suffered by the Government and people of Saint Lucia ought not to have occurred if efforts had been made to protect the government and people from uncompensated loss when it paid the debts of Frenwell Limited.
19. The considerable amount of documentation done in connection with the borrowing of money from the Royal Merchant Bank in connection with the resort hotel project was done in Trinidad and Tobago by Trinidad and Tobago lawyers. The documents provided harsh conditions of borrowing by way of interest and other charges. They were aimed at protecting the Lender but did not include provisions for the protection of the borrower. The Government became obliged to protect itself but the only occasion on which it attempted to do so was in the development and concession agreement of the 17<sup>th</sup> December 1997 when it was provided that the government was to have corresponding equity in the hotel company if it became obliged to pay under the guarantee it gave to assist in the provision of funding for the hotel resort project. As has been seen nothing came

out of that provision because of subsequent events leaving the Government with nothing by way of equity. The value of any equity in the hotel company depended upon the successful construction and operation of the hotel resort. The Government of Saint Lucia assumed no obligation in this respect. According to sworn testimony by Dr. Kenny Anthony in Court proceedings connected with the borrowing of money from the Royal Merchant Bank for purposes connected with the hotel resort project the Government of Saint Lucia took no responsibility for supervising the implementation of the project. It relied on the technical persons hired by the Royal Merchant Bank to supervise the construction of the hotel. The Royal Merchant Bank had retained its own Quantity Surveyors and Engineers who were Goodridge and Associates and Doley and Associates who were reputable firms in Saint Lucia and the Government was of the view that it could rely upon the expertise and experience of the firms hired by the Bank to properly supervise the construction of the hotel. It appeared to the Commission that the hotel was constructed, furnished and equipped but the hotel company fell short of needed capital to continue and despite the injection of investment monies and the support which the Government gave to the project it failed because the owners who were investing in it decided that they would not invest further funds in the company. The hotel company was put into receivership on the 12<sup>th</sup> December 2001 by the Royal Merchant Bank which was owed money for which it had hypothecations mortgage debentures and floating charges over the company and its assets as well as guarantees by the Government of Saint Lucia.

20. When the receivership commenced on the 12<sup>th</sup> December 2001 with Mr. Alkinson as the appointed Receiver he issued statements showing the financial condition of the hotel business. He valued the hotel, its plant and equipment in excess of US\$75 million. The Government of Saint Lucia had not yet paid any money in respect of debts owed or created by the Pigeon Point Hotel Company Limited for debt service or cost overruns for which the Government's guarantee had been given so there was at the time no question of the Government having an equity in the hotel company. At the time the Receiver was appointed the hotel was a going concern and the appointment of a Receiver was likely to result in a forced sale because the hotel company was unlikely to be able to pay its debts without a further injection of capital. The Receiver sold the assets of the hotel company in June 2002 for the sum of US\$40 million. At that time the Government of Saint Lucia which had no equity in the hotel company was in no position to question the sale without the Government having been called upon to pay under its guarantee which by the agreement of 17<sup>th</sup> December 1997 had been capped at US\$12,750 million but which under the deed of guarantee and indemnity signed later by Dr. Kenny Anthony required payment of that sum together with interest.
21. The Receiver appointed by the Royal Merchant Bank did not deal with the debt of Frenwell Limited and his accounts do not show that the debts of Frenwell Limited were treated as a liability of the hotel company. The sale of the hotel assets was completed between June and July 2002 without the government's guarantee having been called upon in accordance with the Deed of Guarantee and Indemnity or the agreement of 17<sup>th</sup> December 1997. Up until the sale the debts

of Frenwell Limited had not been paid. In November 2002 without the guarantee being invoked in accordance with its terms the Government of Saint Lucia by resolution referred to above was authorised to borrow US\$41 million. The money was borrowed from the Royal Merchant Bank which paid itself from the proceeds US\$17,092,350 for the debt and interest owed by Frenwell Limited as well as US\$584,000 for fees due to the Bank in connection with the loan of US\$41 million. The interest on the debts of Frenwell Limited as has been seen was reduced by US\$2,500,000 following the intervention of Dr. Anthony. The net amount paid by the Government of Saint Lucia towards the debt of Frenwell Limited was completely lost to the Government and people of Saint Lucia.

22. With the loss of its assets the Government and people of Saint Lucia could have no effective recourse either in law or equity against the Pigeon Point Hotel Company itself for recovery of the amount which was lost. So far as the debt of Frenwell Limited was concerned this company had no substance save for the cumulative preference shares it purchased in the hotel company which lost its assets in the sale thus rendering it useless to pursue any remedy against the company if it was possible to do so. The Government and people of Saint Lucia would have had some leverage as a minority shareholder at the time of the sale of the assets of the hotel company if it had cumulative preference shares in that company but it had none. It is also to be observed that at the time of the sale the Government had not paid any debt. Such a payment would have been the foundation of any claim by the Government but nothing could be legitimately paid

until after the resolution was passed by Parliament when the assets of the hotel company had already been realised and used to pay debts.

23. We did not discern any attempt to protect the Government and people from this loss. The Prime Minister and Minister of Finance had responsibility for this transaction whereby the money was lost. The project had been well conceived at first. However, there was no supervision or control by the Government over the construction, equipping and management of the resort. The project as it was conceived failed without the Government and people being protected from the total loss of US\$14,592,350 and the costs associated with the repayment of the debts owing by Frenwell Limited . We consider that the Government was obliged to protect itself by ensuring that it had an equity in a viable concern in the event it was called upon to meet debts of the hotel company. At this inquiry Dr. Kenny Anthony through his Counsel took the position that the equity would have been valueless because of the failure of the company. We consider that it would have been prudent for the Government of the day to ensure that it had an equity in the hotel simultaneously with its being called upon to pay any of the hotel company's debts in accordance with the development and concession agreement. Indeed that was the clear understanding when the agreement of 12<sup>th</sup> December 1997 was signed by the Prime Minister and Minister of Finance. It had been expressly so provided in the agreement.
24. There was no evidence that high level public servants who were engaged in the offices of Dr. Kenny Anthony the Prime Minister and Minister of Finance were involved in the decision making process concerning this transaction. All of the

relevant documents which supported the liability of the Government and people of Saint Lucia to pay monies in connection with the resort were signed by the Prime Minister who intervened when the interest charges were thought to be excessive as indeed they were. The Commission endeavoured without success to get information from Mr. Gavin French who was the moving figure behind the establishment of the resort but without any success whatsoever. Mr. French gave no statement and supplied no information to the Commission but we feel that he was in a position to say why the project failed in the hands of the hotel company and how it came about that the Government and people of Saint Lucia were left to carry the burden of considerable uncompensated financial loss.

25. The agreement of 17<sup>th</sup> December 1997 signed by Dr. Kenny Anthony the Prime Minister and Minister of Finance established a contractual relationship between the Government of Saint Lucia and Pigeon Point Hotel Company Limited. In the events which occurred the failure of the hotel company meant that a recommendation to seek recovery from that company would be useless. There is no oral or documentary evidence establishing a contractual relationship between Frenwell Limited and the Government of Saint Lucia but even if there was it would be useless to pursue a remedy against Frenwell Limited which as far as the documentary evidence goes holds cumulative preference shares in a company that had no value at the time when Frenwell's debts were paid by the Government of Saint Lucia. We consider that the loss to the Government and people of Saint Lucia is irrecoverable.

26. The events which led to the development of the hotel resort commenced in December 1997 with the signing of the agreement. The money which was lost was paid in 2002 and it is now seven years since the loss occurred. In the event there was litigation there may be time bars in the way of the Government both at law and in equity because of delay. The loss of public funds is a serious matter. We consider and we do recommend that in matters concerning the recovery of public funds time bars should be removed both at law and in equity by appropriate legislation which would restore the centuries old rule that time did not run against the Crown in civil and criminal cases. The removal of a time bar will signal to persons dealing with public funds that wherever possible the Crown may sue both at law and in equity without being faced with a time bar. We consider that the loss which the Government and people of Saint Lucia suffered in this matter was the result of maladministration and we would recommend that where the Government enters into contracts for the procurement of goods and services the law regulating such agreements should be strictly followed. There were irregularities in public administration resulting in loss to the Government and people of Saint Lucia. Public servants who should have been involved in the transaction at the level of Heads of Departments were not and we consider that if they were concerned there would have been measures undertaken to ensure that the Government did not undertake any liability beyond what was agreed in the agreement of 17<sup>th</sup> December 1997 in respect of a capped liability and might have ensured the benefit of equity in the hotel investment for the people of Saint Lucia in the event the Government was made to pay. The documents presented

to the Commission fell far short of what was necessary to protect the Government and people. The entire transaction required a hands on approach by the Government at every stage after the development and concession agreement was executed in December 1997. We also consider that where the Government guarantees the debts of other persons the resolution under the Finance (Administration) Act should give details of the liability so that both the members of Parliament and the national community should understand the liability which was undertaken by the taxpayer in order that the demands of accountability and transparency required by good governance will be satisfied.

#### The National Conservation Authority

27. We were required by our Terms of Reference to investigate the administration of the affairs of the National Conservation Authority “the Authority” also referred to herein as NCA and to inquire into any losses suffered by it as a result of faults in administration in the period April 2000 to December 2004. The Authority is a statutory corporation established pursuant to the National Conservation Authority Act, Cap. 6:01 of the Laws of Saint Lucia “the Act” and has all the powers which are necessary to enable it to carry out its statutory duties and functions subject to such control as is specified in the Act on the part of a Minister to whom responsibility for it is assigned by the Prime Minister. It is wholly funded by the Central Government of Saint Lucia. Its Corporate structure requires the appointment by the Minister of a Board comprising a chairperson, a deputy

chairperson and not less than seven or more than nine members. A member of the Board may hold office for not more than three years but is eligible for re-appointment. The Minister has power to revoke the appointment of a member of the Board. The Minister determines the remuneration by way of fees or travelling or other allowances of members of the Board. The Authority has with the approval of the responsible Minister the power to appoint a General Manager who is the Chief Executive Officer of the Authority. He is not a member of the Board.

28. In the period under our remit a Board was constituted and a General Manager was in office. Mr. Antonious Gibson who was the Chairperson of the Board at the relevant time gave evidence before the Commission. The General Manager at the time was Mr. Henry Charles. The Commission was informed that he had ceased to hold office and was employed in Guyana. Efforts which were made to have him come to Saint Lucia to assist the Commission in its work proved futile. The oral and documentary evidence before the Commission suggests that he played a major role in the administration and management of the Authority and it was unfortunate that he took no part in the work of the Commission. Under the Act he had certain statutory duties which were expressed. He had the duty to assign duties to members of staff and the further duty to facilitate access by the auditor to and providing him with information on the operation of the Authority. The documentary material before us showed that there were numerous allegations of mismanagement and corruption on the part of the General Manager resulting in the loss of public money. The Commission is in no position

to pass judgment with respect to these allegations which ought to have been the subject of investigation by the appropriate authorities when the allegations became known with a view to prosecutions or to recovery of monies lost by appropriate legal procedures. We are obliged to observe however that the allegations remain and Mr. Charles may wish to have the opportunity now or at a future time to show to the Government and people of Saint Lucia that they are not well founded. Some of the allegations are repeated from audit reports which were conducted into the affairs of the Authority by the office of the Director of Audit in 2003 and in 2005 by Mr. Eustace Monroe who gave evidence before the Commission.

29. The office of the Director of Audit was concerned in determining whether the Authority's operations met required standards and complied with the provisions of the Act. The Report disclosed a number of deficiencies in several areas of operation and are summarised as follows:-

A Functions

- (i) the NCA had not undertaken a number of its responsibilities (a lack of resources and expertise was the main reason given for this situation);
- (ii) Board committees had not submitted formal reports. Indeed, no written mandates of these committees appeared to exist;
- (iii) no mandates of the Rapid response and Rangers Units existed.

B. Appointment of staff

- (i) in apparent contravention of the Act, no evidence was seen of ministerial approval of staff appointments;
- (ii) terms and conditions of employment (salaries, letters of appointment, etc.) were not seen.

C. Finance

- (i) the annual budget was not adequately prepared;
- (ii) actual expenditure was not classified in accordance with the budget, nor was Cabinet approval for expenditure seen;
- (iii) monies provided by the government had not been fully retired at the end of the 2002/3 financial year.

D. Accounts

- (i) personal emoluments were not properly classified or recorded;
- (ii) there was no segregation of duties in the preparation, verification and payment of wages to seasonal workers;
- (iii) specimen signatures of authorized personnel were not seen;
- (iv) disbursement analysis classification was not in harmony with annual budget classification;

- (v) revenue collected was being paid into the Consolidated Fund, whereas the NCA was a “distinct and legal entity”;
- (vi) cash book operations left much to be desired;
- (vii) there was inadequate recording of government subventions;
- (viii) there was no fixed asset register, and logbooks were not maintained.

E. Reporting

In contravention of the Act, annual reports were not being laid before Parliament.

F. Licences

*Inter alia*, the licences register was not adequately maintained.

30. In 2005 the Report of Mr. Monroe who conducted a further audit disclosed the same deficiencies which the office of the Director of Audit reported in 2003 and disclosed further shortfalls which had manifested themselves. The Commission heard the evidence of the Chairman Mr. Antonious Gibson who gave a written statement and Mr. Monroe as well as the evidence of Mr. Dylan Bourne who had served as an Accountant with the Authority from February 2004 to May 2005. Mr. Gibson who was aware of the report made by Mr. Monroe was represented at the hearings of the Commission by Mr. Thaddeus Antoine. Mr. Monroe was required to consider and report upon whether the Board of the Authority had effectively exercised its mandate in accordance with the Act and also to investigate how confidential information concerning the Authority had become public. Mr. Monroe had found the same deficiencies which had been

found by the office of the Director of Audit in its 2003 Report but he also addressed other matters which suggested that there was maladministration. The Act contemplated an organisation to be governed by a ministerially appointed Board which was to determine policy in accordance with the provisions of the Act. The day to day administration was to be carried out by appointed staff of which the General Manager was the Head. He was responsible for assigning duties to staff. As it turned out he was also in charge of the Short Term Employment Programme (STEP) the finances of which were separate from the general finances of the corporation even though the corporation was responsible for its administration. The General Manager in dealing with this programme dealt directly with the Ministry which was responsible for the Authority and with the Ministry of Finance.

31. The relationship between the Board and the General Manager was not sound. The Chairman said that the General Manager was not initially very co-operative that he was frequently absent and that his financial management when questioned by the Chairman led to aggressive and hostile behaviour on the part of the General Manager. The Chairman led us to believe that the Board did not effectively deal with the General Manager who acted as if the Board did not exist. Both Mr. Monroe in his report and Mr. Bourne in his evidence took the position that the General Manager had not acted in accordance with the directives of the Board in some instances. Mr. Bourne declared that he also had problems with the General Manager while he served as Accountant when he sought to inquire into questionable payments by the General Manager which did not have the

approval of the Board but which the General Manager claimed had to be taken care of in a speedy manner. Mr. Bourne said that the General Manager withheld information from him and was uncooperative when he made requests. His one year contract was not renewed. He felt this might have been because of the antagonism of Mr. Charles towards him.

32. Advances were made from the funds of the Authority to members of the Board and members of staff. Under the provisions of the Act the funds of the Authority were to be applied to discharge its obligations and performing its functions under the Act which did not provide for the making of advances. The Chairman Mr. Gibson said he received an advance of \$5,000 in 2001 to meet medical expenses by an arrangement between the General Manager, Mr. Charles and himself. Mr. Monroe found that the advance had not been repaid but at the time of the hearings before the Commission it had been repaid. Mr. Gibson said that he expected that the advance would have been defrayed by an honorarium which he expected to receive for performing duties as General Manager when the General Manager was absent. The Act did not allow the Chairman to act as General Manager and the payment of such an honorarium would have been entirely outside the Board's authority. The Board had the power to appoint a General Manager with the approval of the Minister to act if the General Manager was to be absent but the Act was not administered with this provision in mind. Neither the Board nor the Minister recommended or approved the payment of an honorarium to the Chairman and it did not appear to the Commission that this matter was lawfully dealt with. At the end of his evidence before the Commission

the Chairman suggested that the Commission consider recommending its payment. The Commission could not take seriously a suggestion in which outrage would be founded on an illegality which the Act was intended to prohibit. With respect to the advances to staff members the Commission saw no authority for it. Even if the Board had authority to resolve that advances of salary or other emoluments could be made there was no resolution or regulation made to authorise it or to provide for the repayment of advances. In the circumstances the entire procedure concerning advances was irregular. The making of advances in the public service is not unknown but there are procedures laid down for this. A statutory corporation will be obliged to have similar procedures in place lawfully to enable advances to be made and to be repaid.

33. The September 2003 report of the Audit Director found that NCA staff were being appointed in apparent contravention of the Act, in that no evidence was seen of prior ministerial approval of such appointments. Also, terms and conditions of employment (salaries, letters of appointment, etc.) were not seen.

This situation appears to have been the norm even though many workers in the Short-term Employment Programme (STEP) seem to have received contracts. From what we heard, however, the operation of that Programme was of particular concern.

According to Mr. Gibson's Witness Statement, the STEP existed before the creation of the NCA and was run by Mr. Henry Charles. When Mr. Charles was appointed General Manager of the NCA, Mr. Gibson said, "he came in with "(the STEP)." Mr. Gibson continued: "The NCA had no control as to who was on the

Programme or indeed the Programme itself... The General Manager saw the Programme as his own and in fact the Ministry of Finance dealt with him directly. I was never called or invited to discussions as it related to STEP as Chairman of the NCA. The Board of the NCA was unable to obtain statements from the General Manager especially financial statements at the end of every programme.” In his appearance before us, Mr. Gibson confirmed that the Board “had no idea” what was happening on the STEP.

34. The charge of Mr. Charles’ managerial exclusivity on the STEP was supported by Mr. Bourne. He argued that although there were separate accounts for the STEP and the NCA, the former was nonetheless “an integral part” of the latter. It was however Mr. Charles who handled recommendations for employment on the STEP and signed many, if not most, of the employment contracts. (Other contracts appear to have been signed either by employees of the NCA or by persons employed as supervisors only for the twice-yearly periods – August/September and November/December – of the Programme.)

Mr. Bourne did not know who monitored the STEP prior to his period with the NCA, but said he incurred the wrath of certain persons when he sought to be “more rigorous” regarding the operation of the Programme. His life was even threatened, and he had to make a report to the police.

The separate accounts of the NCA and the STEP clearly led to confusion. Mr. Bourne told us that his involvement “only included...the financial record-keeping aspect of (the STEP)”; he did not validate signed contract forms or determine who got paid. These latter functions were apparently handled by others,

especially Mr. Charles. Where payment to STEP employees was concerned, however, there remains a lack of clarity.

Mr. Bourne says that the NCA Accounts Department would pay out cheques to workers on the basis of signed contract documents submitted by Mr. Charles. Mr. Monroe did find, however, that before Mr. Bourne's arrival at the Authority individuals had been paid without contracts.

For his part, Mr. Gibson told us that for STEP payments "the monies were prepared, collected from the Treasury, bagged or cheques made by the NCA. Some district representatives came up and collected their fifty bundles, (and) in some areas the district representative would ask the NCA to go down and pay the people for them, and so it was a to and fro. Constituencies that were close by came in and collected their monies from the NCA, and it was different types of payment that went on." And all this money, Gibson added, was controlled by Mr. Charles, who would tell the Board how much funding was available for this or that STEP period but who would not brook intervention: "we (the Board) were not allowed to talk; we were brushed down."

35. It is difficult not to conclude that employment on the STEP was dictated principally by political considerations. Mr. Gibson told us that each parliamentary representative of the 17 constituencies would select 50 names to be sent to the "NCA office which housed STEP, for the preparation of contracts" for the two annual STEP periods. Some representatives would send 50 names for the first month of each period and a replacement 50 for the second month. Mr. Charles would prepare "the costing".

In such an environment which, from what Mr. Gibson said, seems to have had the blessing of the Ministry of Finance, it should surprise no one that proper, accountable and transparent structures of operation not only did not exist but were frowned upon; disorder was embraced with open arms.

36. The investigation by Mr. Monroe also disclosed that persons without ID Cards were given contracts where STEP workers did not wish to do jobs away from the beach. He also said that it was alleged that Mr. Charles used an office assistant of the Authority to work on a few occasions at his restaurant holding on for a cook who had taken time off for banana harvesting and that the cook was paid by the Authority during the harvesting period. Such an allegation suggests criminal wrongdoing and it is a matter which ought to have been referred for criminal investigation. The Commission cannot itself undertake a criminal investigation into the loss of public funds. The Commission takes the same position in relation to an allegation which was denied that the stepdaughter of Mr. Charles was paid under the Beautification Programme run by the Authority even though she never worked on the Programme.
37. The method of employment specified in that Act was that appointments of staff were to be made with the approval of the Minister upon such terms and conditions as were necessary for the proper carrying out of the functions of the Authority under the Act. The Chairman of the Board could not be a member of staff. Yet he claimed that in the absence of Mr. Charles he doubled up as General Manager. This situation should never have occurred and it is evidence

that the separate functions of Board and Management became blurred. The Chairman's fees when he so acted were doubled.

38. Mr. Gibson's attorney, Mr. Thaddeus Antoine, agreed on April 8 that there was no legal authority, none whatsoever for Mr. Gibson to act as General Manager. The Act provides that in the absence of the General Manager the Board may, by instrument in writing and with the approval of the Minister, appoint a person to act as General Manager during the period of absence, upon such terms or conditions as the Board may determine. Asked about this in his appearance before us on April 9, Mr. Gibson asserted that the provisions of the Act had indeed been adhered to, thus clearly contradicting what his own attorney had told us the day before. Mr. Gibson however said he was unable to produce the relevant instrument then added mystifyingly that the approval for him to act as General Manager was recorded in the minutes of the Board.

39. The September 2003 report of the Office of the Director of Audit listed a number of deficiencies in two areas of finance and accounts. So did the Monroe Report of March 2005. The Act contains provisions under the title "Power to charge fees and sell services", divided into "Finances of Authority", "Borrowing Powers", "Application of funds", "Accounts and Audit" and "Report."

Statements prepared by Chartered Accountants Claude V. Griffith & Co. for the financial years 2000/1, 2001/2, 2002/3 and 2003/4 (all ending March 31), which reached us only on April 9, give little or no indication of what transpired.

It would appear that in 2000, of total receipts of \$2,106,846.00, receipts from the provision of licences represented a mere \$350.00 (the government's allocation that year was \$2,099,994.00). By the following year, the \$350.00 had become zero, and thereafter disappeared completely from view.

The overwhelming bulk of the NCA's funds was provided by the Government of Saint Lucia. That is not in any way surprising. However, the NCA's accounts were in such disarray that Griffith and Co. were unable to go beyond an entry called "Other" under the heading "Receipts" (which of course included an entry showing the government's annual subvention). The amounts under "Other" vary from a low of \$1,700 in 2001 to a high of \$21,981 in 2002, dropping to \$8,742 in 2004. We have no idea what the amounts represent because the information is inadequate.

We wish to note, however, that in every financial year for which Griffith provided statements the NCA's expenditure exceeded income: by \$56,599 in 2000, \$1,240,987 in 2001, \$717,682 in 2002, \$605,944 in 2003, and \$1,421,591 in 2004. Indeed, the salaries and wages bill alone exceeded the Authority's total receipts in 2001, 2002 and 2004 – in 2004 by more than \$600,000!

The shortfalls in income seem to have been met in part by a bank overdraft, an arrangement which began in 2002. But even that arrangement has not greatly helped. It is true that the overdraft declined from \$176,615 in 2002 to \$53,699 in 2004, but it is also true that cash in bank declined precipitously from \$179,299 in 2001 to a paltry \$200 in 2004.

40. The NCA budget was an important area of demonstrated weakness. The Authority's budget was not large: it varied from a low of EC\$1,879,995 in 2001 to a high of EC\$2,826,981 in 2002; in 2004 it was EC\$2,018,021. In the scale of things, these are not large sums of money, and ought to be easily manageable.

According to Mr. Gibson, however, the NCA's funds (nearly all of which came from quarterly government allocations) would begin to run out by the end of the second month of the year, i.e., in the first quarter. The Authority would then have to commit funds from the second quarter, and so on throughout the year. "When you got to the last quarter," Mr. Gibson said, "you had to borrow money from next year's budget...(Y)ou were always short."

Mr. Gibson appeared to attribute this unhappy situation only to the inadequacy of the budgetary allocation for the NCA, but Mr. Bourne had another view.

There were, he told us, "several instances where the amounts allocated for the STEP programme were depleted and workers were actually paid from funds allocated for the operations of the NCA." The Accountant would have to "dip into the other (NCA) account." Since Mr. Charles exercised total control over the STEP, and regarded the Board with contempt and the Accountant with hostility, the dip disclosed what was a regular feature of financial administration.

41. In his appearance before us on April 14, Mr. Bourne said that he recalled "an excessive amount of spending outside budgeted provisions. There were times when...it was more the rule than the exception that...there would have been expenditure for certain (unexpected or unbudgeted items) which management at

the time”, i.e., Mr. Henry Charles, “would have just informed me at a moment’s notice...needed to be settled...Often times those payments...represented agreements entered into at a moment’s notice as well.” There were also instances of “questionable payments or ...amounts being paid, items of a questionable nature which were paid out to third parties.”

We have no indication, other than the bank overdrafts referred to above, that the NCA borrowed any money.

It is evident from our findings above that the NCA did not fully satisfy its obligations under the Act in relation to finance. In his Witness Statement Mr. Gibson said that, despite constraints, his Board “worked efficiently.” On his watch the NCA had “(seen) through the implementation of the beautification programmes, the much-needed Rapid Response Unit, which brought security to the tourist area of Rodney Bay, the security and cleanliness of (the) beaches, and vendors’ kiosks for the beaches and look-out points.” He did nonetheless feel that certain changes should be made, and in the same Witness Statement proposed that the NCA should concentrate on the issue of beautification: tourism duties should be left to agencies like the Tourism Ministry, and matters like the hostess programme. He felt that the Rangers and Rapid Response units should also go elsewhere. In his appearance before us on April 9 he said “the two highlights” of NCA activity were the Rapid Response programme, which he now saw as “para-military”, and the hostess programme.”

In 2003 the Office of the Director of Audit found that the NCA was not properly carrying out its legal responsibilities. In 2005 Mr. Monroe made a similar finding, though attempts on April 8 by Mr. Gibson's attorney, Mr. Antoine, to elicit from Mr. Monroe precise information of the number of its functions under the Act that the NCA had failed to carry out were not successful.

42. Mr. Bourne told us that what he found when he assumed duty in mid-February 2004, a few weeks before the end of 2003/4 financial year (the NCA had been in operation since 1999), was that there "seem(ed) to have been absolutely no accounts kept. There were no formal records of account-keeping, (and) the only thing in place seem(ed) to have been source documents which were filed or stored in boxes, supposedly awaiting someone to come and do some data entry to prepare accounts in that regard." Mr. Bourne added that by the time he left the NCA in March 2005 he had "completed much of the data entry stage of the accounting process..."

Mr. Bourne felt that the General Manager withheld information from him, was uncooperative, and became antagonistic to him, presumably because of the frequency and nature of his requests. It is true that the person identified in the Act is the auditor rather than the Accountant, but it is also obvious that it is principally the Accountant who prepares the books for audit. If he is kept in the dark, comprehensive records obviously cannot be produced for audit.

If such records cannot be produced, or even prepared, the requirements of the Act logically become moot, and the law is further violated. It is not only the Audit

Director's Office and Mr. Monroe that complained, or Mr. Bourne. In their four financial statements, Griffith and Co. (para .) use the same language in their covering letters:

“Our examination indicated serious efficiencies in the systems of internal control. As a consequence, we were not able to satisfy ourselves that all expenses of the Authority had been reflected correctly or that recorded expenses represented valid transactions of the Authority. As a result, we were unable to determine whether adjustments were required to the components making up the statement of income and expenditure.

“In view of the possible material effects on the financial statements of the matters described in the preceding paragraph, we are unable to express an opinion as to whether these financial statements are presented fairly in accordance with generally accepted accounting principles.”

That is as diplomatically damning a judgment as any responsible accountants would normally allow themselves to deliver.

43. One reason adduced for the financial and accounting deficiencies of the NCA was the fact that the position of Accountant we not filled until 2003, four years after the Authority came into being.

Mr. Gibson told us on April 9 that the delay was due to foot-dragging by the relevant Ministry, which, despite recommendations from the Board, “was not

prepared to go that way” until the 2003 report of the Audit Director’s office. In addition, there had been a rapid turnover of such staff: three persons in succession held the post between 2003 and 2005.

Procurement was yet another area of NCA financial activity which, at least in part, was handled by Mr. Charles in a slapdash way. Mr. Monroe in his report points to deficiencies in procedures for procurement of goods and services. Gym equipment was purchased without Board approval, and the reason for such purchase was given by the General Manager as reflecting a policy for the NCA rangers to be engaged in physical exercises. No information is provided on who formulated and approved this “policy”.

An even greater sum of money (US\$11,357.46) was paid in January 2001 to a US-based company for CB radios for the Beach Ranger Department of the NCA. Up to the date of the Monroe Report (August 2005), none of the radios and accessories had been received. Why this particular US company was chosen is not clear, and the reason given by the General Manager for payment in full up front – that the NCA was desperate for the radios – is wholly unacceptable.

Another 2001 payment was made from NCA funds to H&M Holdings for the purchase of cellular telephones for workers in that year’s election campaign. Why NCA monies should be used for electioneering purposes is not clear, and is obviously not in consonance with the Act. Worse, the amount paid was, according to Monroe, “to be refunded to the Authority.” Up to the time of his report it had not been; perhaps it still has not been refunded.

There are other instances in the Monroe Report of non-existent monitoring of payments made, e.g., on the Beautification Programme.

The examples above, and others identified by Monroe, show a clear pattern of grossly deficient procedures for the procurement of goods and services. Fundamental rules are missing, or, if in place, not adhered to. There is a cavalier approach to public funds which, as Monroe observes, “allows room for manipulation and fraud”.

44. Confidentiality is one of the crucial elements of a well-functioning administration. The Monroe Report all but accuses Mr. Bourne of being the source of information leaked from the NCA to the public. In his appearance before us on April 14 Mr. Bourne angrily rejected the charge, and said he had been contemplating legal action against Mr. Monroe for defamation. He had however decided against that course of action.

Just the same, he admitted that confidential NCA documents had found their way into the public domain, and said he had been told that two “disgruntled members of staff” were the guilty parties.

#### The Road Development Project

45. In order to upgrade the standard of St. Lucia’s road network a road condition study was conducted in 1998 by Trintoplan – an engineering consultant. The findings of the study classified 25 percent of the secondary roads in St. Lucia as poor, very bad and in need of maintenance or improvement. Trintoplan

recommended the implementation of a roads development programme (RDP) to rehabilitate, reconstruct and improve 116.2 km of roads at an estimated cost of \$105.78Million EC.

Eight separate projects were identified and they are numbered RDP 1 to 8 respectively. RDP 1 was from Soufriere to Choiseul and RDP2 was from Choiseul to Black Bay. These two projects were in respect of 28km of roads and this inquiry is only concerned with RDP1 and RDP2 (the project).

46. Lagan Holdings Limited of Belfast, Northern Ireland the contractor, is hereinafter referred to as (the Contractor) and DIWI Consult International is referred to as (the Project Manager). The total contract price for the project was agreed between the Government and the Contractor as \$43,750,000 EC dollars. It was a measured work contract. The commencement date for the work was July 1, 2002 and the completion date was to be 547 days after commencement that is December 2003. The project was financed partly by a loan from the Caribbean Development Bank and partly from local revenue. Due to a number of events, that is:

- (a) Variation in the scope of work related to telecommunication and water mains facilities and electricity facilities,
- (b) Variation in the scope of work related to earth retaining walls,
- (c) The presence of unsuitable material below road formation level, and
- (d) The effects of inclement weather,

the Contractor made claims which were granted for several extensions of time for the completion of the works. The work was completed 33 months after its commencement at a cost of \$99,791,745.62. To this was added interest payments of \$1,395,119.12 making the total cost of \$101,366,873.74. This was 132 percent over the original contract price. The project was eventually handed over to the Government in April 2005.

47. The Contractor had made a number of additional claims to the contract price. These were:

(a)	Compensation events -	\$16,532,913.70
(b)	Earthworks re-rating	\$ 7,046,364.70
(c)	Prolongation costs	\$18,619,804.99
(d)	Variation of Price	\$ 730,706.77
(e)	Extended Insurance	\$ 931,054.87
(f)	Materials handed to Cable and Wireless	\$ 344,819.59; and
(g)	Delay and disruption	\$11,061,542.22

making a total of \$55,267,199.84. This amount when added to the final measured works of the project of \$44,524,545.78 made a final amount of \$99,791,745.62 which, when added to the interest payments of \$1,395,119.12 resulted in a total cost of \$101,366,873.74.

48. The procedure for processing claims made by the Contractor was that the claims were made to the Project Manager, who when satisfied that they were allowable would certify them and pass them on to the Project Co-ordinator (who for some

time was Mr. Albert Jn. Baptiste. If the Project Co-ordinator was satisfied that a claim so made was within the scope of the contract he would then forward it to the Permanent Secretary for payment.

49. By a Consultancy Agreement made on July 13<sup>th</sup>, 2000 between the Government of St. Lucia and the Project Manager, the latter undertook to perform services pertaining to the preparation and execution of a Road Development Programme. This Programme includes RDP 001 and RDP 002. The Project Manager was required to exercise reasonable skill, care and diligence in the performance of its obligations under the agreement.

The purpose of the work to be performed by the Project Manager was detailed in the Consultancy Agreement and in Para 5.33 (ii) it was stated that the Project Manager “shall locate and estimate the cost of relocating all public utilities affected by the works” and also liaise with the relevant government authorities during the course of the work. This provision is of particular significance and we shall revert to it later in this report.

50. It is this very considerable increase of \$57,616,123.74 in the cost of the Project that gave cause for great concern by the relevant government authorities and that was basis on which this Commission was appointed in respect of RDP 001 and RDP 002.

1. To investigate the execution and administration of RDP 001 and RDP 002 undertaken by and on behalf of the Government of Saint Lucia

4. To investigate any losses suffered by the Government of Saint Lucia in relation to payments and/or expenditure concerning the matters specified and referred to at (1) above
  6. To inquire whether any losses identified were the result of the breaches of civil and/or criminal law
  7. To investigate whether any losses suffered may be recoverable in civil proceedings
  8. To investigate whether in relation to (1) above there is or may be criminal liability which may be the subject of prosecution in the criminal courts
  9. To consider the conduct of persons concerned in the above matter to determine whether they performed their duties and fulfilled their obligations in a manner which was lawful and proper;  
And to make recommendations.
51. As early as September 8, 2002 some three (3) months after the Project was scheduled to begin the Project Co-ordinator had served notice on the Project Manager that he was experiencing concern at matters which were likely to cause delays to the project. He wrote: "the client at this time cannot entertain delays and increased costs to the Project. It is expected that all will be done to avoid such." Some three (3) months thereafter, on December 4, 2002 by letter to the Permanent Secretary he wrote:
- "Discussion held on site with the Contractor and Engineer on December 2, 2002 seem to indicate that there are some serious issues relating to Cable

and Wireless which require intervention at top management level. Delays in resolving those issues will have some very serious implications for the Government of St. Lucia in terms of claims for extension of time and associated costs (which could easily run into the millions) none of which the Government can afford at this time.

It is imperative that the General Manager of Cable and Wireless be contacted immediately. Grateful for your prompt intervention in this urgent matter.”

52. Since progress of the work was slow but costs were escalating at a rapid rate this apparently prompted the then Honourable The Prime Minister and Minister of Finance to write the President of the Caribbean Development Bank on November 20, 2003, inter alia, in these terms:-

“To date, fifteen months into the project with a completion rate of 35% the contractor is projecting claims in excess of \$20M and has estimated completion at least twelve months behind the initial projected completion date of December 2003.

Government is extremely concerned at these developments and think it necessary to address the Bank on this issue. With public discontent and general dissatisfaction with progress on the increase, there are mounting calls for an inquiry by the public including the political opposition.

The Government of Saint Lucia is convinced that the Bank should do an evaluation of the progress achieved by Lagan.”

53. Cable and Wireless had its telecommunication equipment under the road surface. The Project Manager was responsible for the design and supervision of the works. Cable and Wireless provided the Project Manager with the information they had with respect to the location of the ducts in RDP 001 and RDP 002 and based on that information the Project Manager undertook the designs. The information was that the ducts were at least 2 feet below the surface of the existing road and about 3 kilometres had to be relocated. The Contractor, however, in carrying out initial investigations found that the ducts were much closer to the surface than anticipated. The design required the excavation of the entire road to formation level but because the residual life of the pavement was practically zero the Contractor was required to remove that material and replace it with suitable material. Since these ducts were relatively close to the surface it was impossible for the contractor to proceed immediately with the works because it was found out that this was the situation over the entire road. The Project Co-ordinator was of the opinion that the fault lay with Cable and Wireless.
54. With respect to the water mains (WASCO) there was a similar situation and with respect to the electricity company (LUCELEC) that company was not in favour of the Contractor being responsible for relocating their poles. LUCELEC wanted to undertake those works itself.

Cable and Wireless was not in favour with the sub-contractors proposed by the Contractor with respect to the telecommunication works and this issue was prolonged over a period of time and the solution eventually was that the telecommunication works was removed from the contract by variation order No. 3

and Cable and Wireless was contracted to undertake those works. By variation order No. 2, because of the issues that LUCELEC had with the Contractor the problem was resolved in a like manner as the telecommunication issue. With respect to the water mains the problem was that WASCO did not know exactly where their infrastructure lay and there were certain design issues that had to be resolved by WASCO. As a result the project was delayed.

55. Variation No. 2 occurred on November 26<sup>th</sup> and 27<sup>th</sup>, 2002 and Variation No. 3 on 10 January and so within the first eight months of the Contract three new contractors (one each for each of the Utility companies) were brought in to undertake portions of the contracting work which had the potential significantly to delay the completion of the contract. The Contractor could not commence excavation of the road and put in the sub-base and base until those utility lines were relocated because the Contractor had no control over the utility works.
56. Neither Mr. Gardner, a Chartered Quantity Surveyor who was briefed to assist counsel to the Commission nor the Project Co-ordinator Mr. Albert Jn Baptiste, a qualified engineer, and who was the Project Co-ordinator for some time could say how much of the fifteen months extension to the contract was attributable to the works of the public authorities which were removed from the contract. All that they were prepared to say is that it was substantial. Both those persons were indeed very helpful. Extra costs were claimed and paid as a result of time lost by the utilities work being removed from the contract and placed under the control of the utility companies. These were claimed as loss under compensation events. Three thousand such claims were made by the Contractor but only eleven

hundred were allowed. The others were disallowed because they were either included under another heading or they were measured or they were invoiced elsewhere or they were simply not valid.

As we had said earlier, the Project Manager was required to locate and estimate the cost of relocating all public utilities affected by the works. The Project Co-ordinator had said that the Project Manager in putting together the design for the roads had consulted the utility companies and based on the information received from them the Project Manager proceeded to undertake the designs. But the Project Manager was selected and employed because they were considered to be highly qualified engineers. They, however, designed the roads for the purposes of the tender without themselves doing any or any sufficient investigation into the information which was supplied by Cable and Wireless and by WASCOS. There appears to have been absolute reliance on the information supplied by those utility companies and that reliance has seriously impacted the Project in a negative manner.

57. The Project Co-ordinator was of the opinion that both the utility companies were at fault and are liable for any loss sustained as a result of the incorrect information stated in the designs. The Project Manager was of a like view. Site investigation carried out by the Contractor, however, in preparation for the earth works revealed that the ducts were much closer to the surface than stated by the Project Manager and that fact caused a substantial delay in the performance of the work by the Contractor.

58. Having regard to the contractual responsibility that rested on the Project Manager in locating and estimating the cost of relocation of all public utilities affected by the works it was highly irresponsible for the Project Manager to rely only on the information from the utility companies. They should have done what the Contractor did in testing the accuracy of the information supplied and if they had so done then the delay would not have occurred.
59. In our opinion, therefore, the Project Manager is to be held accountable for much of the costs arising from the delay by the Contractor. The Project Manager may recover all or part of such costs from the utility companies concerned but that is no concern to the Government. It was wrong for the Government to have been called upon to pay that bill. No one before us was able to accurately quantify the amount of that loss sustained and we are of the opinion that an accountant should determine the quantum of that loss before attempting to recover it.
60. Quite apart from the delays at the commencement of the Contract that resulted in an extension of time for completion, there were other matters that occurred that had the effect of extending the completion date by fifteen months with substantial costs to the original contract price. These costs were claimed as:-

(a)	Compensation events	\$16,532,913.70
(b)	Earthworks Re-Rating	\$ 7,046,364.70
(c)	Prolongation Costs	\$18,619,804.99
(d)	Variation of Price	\$ 730,706.77

(e)	Extended Insurance	\$ 931,054.87
(f)	Materials handed to Cable & Wireless	\$ 344,812.59
(g)	Delay and Disruption	\$11,061,544.22

61. It may be that the costs for the initial delay are included in the above. The measured works was \$44,524,545.78 and the additional items listed above was \$55,267,199.84 making a grand total of \$99,791,745.62. It is quite clear that the additional costs are extremely high in relation to the contract price of \$43,750,000.00 and are unacceptable. In his sworn statement given on 22<sup>nd</sup> April 2009 the Honourable Felix Finnistere who was the responsible Minister at the time stated that the contractor made a very bad start to the project and was not prepared for the social and physical conditions which confronted them. He also spoke of a strained relationship between the consultant and the contractor during the performance of the contract. We are of the opinion that these matters must have caused delay which contributed to compensation events, prolongation costs and delay and disruption costs which the Government and people of Saint Lucia paid.

Even though the Contractor had said that the Project in their books had cost them \$104M nevertheless they had put in a claim for \$135M. They were therefore, quite deliberately and fraudulently inflating the amount to which they had said they were entitled by \$31M. When the Project Manager said that \$135M was too much, you're only entitled to \$93M, they then threatened arbitration and said they will go for \$124M. Negotiations followed and they finally settled for

\$99M although the cost in their books was \$104M and they had initially claimed \$135M.

Before proceeding to discuss the events giving rise to the excess costs it would be helpful at this stage to say what is meant by compensation events and compensation costs and prolongation costs.

62. There may be variation to the Contract which may cause additional cost or would prevent the work being completed before the intended completion date and in such circumstances the contract condition 44.2 provides that the contract price shall be increased and/or the intended completion date shall be extended. For a compensation event to be classified as such it must be the result of one of the twelve conditions that are set out in the contract in clause 44.1 at sub-clauses a-l. In this contract the Project Manager issued 240 Variation Orders, instructions both oral and written. In response the Contractor filed a total of 2,353 compensation events claims which fell within the provision of the contract. That number of compensation events was reduced by agreement between the Project Manager and the Contractor to 1,047 with an agreed value of EC\$16,532,913.70.
63. Prolongation costs on the other hand are the result of claims by the Contractor to recover supervisory and attendant costs throughout the entire period covered by the extension of time from January 2004 to March 2005. These costs included (a) site setup, (b) laboratory cots, (c) preliminaries staff, (d) resident engineer, (e) office preliminaries (f) labour (g) mobile plant (h) asphalt plant (i) fuel (j) Needham and Cullen amounting to \$21,288,272.79 less B of Q Bill in time

related items \$2,964,750.00 resulting in an agreed amount of \$18,619,804.99. Prolongation costs are not included in the contract and as such, strictly speaking are not recoverable but certain items claimed are recoverable and perhaps they may have been erroneously classified or the omission in the contract to provide for such costs as prolongation costs was an oversight.

64. Fluctuations in the market prices of basic materials are generally allowed by assessing the net increase or decrease in the prices of these materials between the date of tender and their incorporation in the works. The Contractor claimed for and was granted increases caused by changes in the prices of bitumen, steel, mesh, cement and diesel in the amount of \$730,206.77. But Clause 47 in section V of the contract data provides that:-

“the Contract is not subject to price adjustments in accordance with clause 47 of the conditions of contract.”

Section IV contains the Conditions of Contract. Clause 47 of the conditions provides that:

“Prices shall be adjusted for fluctuations in the cost of inputs only if provided for in the contract data.”

But the contract data do not provide for increases of that kind. Therefore the amount allowed under that head of \$730,226.77 ought not to have been allowed. The Project Manager and the Project Co-ordinator ought to be held responsible for such loss because the former certifies the claim and the latter ensures that it

is made in accordance with the terms of the contract. The claim was not so made.

65. Insurance cover on the Project was extended resulting from the delays in completion. These claims in the amount of \$931,054.87 are in respect of additional premium invoices.
66. These materials purchased by the Contractor for \$344,812.59 were to be used by the Contractor in the telecommunication part of the works. When the telecommunication component was omitted from the contract by variation order No. 3 the Contractor handed over these materials to Cable and Wireless.
67. The amount of this claim which was initially submitted by the Contractor in the amount of \$27.36M was finally negotiated and agreed at \$11.061M

The claim is in respect of the value of the productive plant, maintenance of that plant, productive labour, fuel, lubricants and oils, carriage and brokerage for resources necessarily kept on site during the extended period to complete the works.

The design made by the Project Manager would indicate what the Contractor has to meet. Therefore, the Project Manager has the responsibility for making sure that what the Contractor has to meet is adequately and correctly set down. Mr. Jn. Baptiste had said that the level of sampling employed by the Project Manager was although statistically acceptable, was not sufficient to inform in respect of the varying pavement structure and existing geology. From Soufriere to Choiseul there are tremendous variations in geology, hence the significant variation

between the data acquired at investigation and the reality on ground and construction. In retrospect, the data acquired was grossly inadequate, hence when the Contractor moved in they realized that there was significant variance in the strength at formation level and in terms of the characteristics of the pavement. In hindsight he would say that the investigation was inadequate because there should have been more intensive and elaborate investigation.

68. From the evidence before us it is reasonable to conclude that the soil tests were inadequate and it did not inform the Project Manager as to the nature of the underlying terrain and as a result the design of the road was wrong because they assumed that the subsoil would be what it was not. It is this fact, coupled with reassignment of the utility works that resulted primarily in the significant cost overruns.
69. A special audit report into the project was conducted by the office of the Director of Audit in April 2007. Some of the principal comments and observations in the report were:-
- a. The programme was poorly managed from its inception
  - b. There were a number of areas in which the programme was implemented without due regard to value for money. These are:
    - i. Inadequacies in the project design which resulted in significantly higher costs, indicated that management of the project was inefficient as a result of poor planning and organization.
    - ii. \$11,518,198.38 was expended without proper authority.

- iii. \$1,395,119.12 in late charges was incurred due to late payments, and
- iv. Management fees \$653,167.00 were paid for procurement services, which could have been easily done by the Government.

The report made reference to a CDB report dated May 5, 2004 that stated the following:-

“the designs and drawings produced by the consultant for some elements of the works.... were not sufficiently detailed to allow proper pricing by the Contractor during the bidding process. As a result the Contractor has taken advantage of the opportunity to increase his pricing when required to cost the many variations necessary to resolve the inadequacies of the design.”

Audit was of the opinion that defects and deficiencies in the design of the project contributed to the adverse cost variances, delays in the implementation and other shortcomings of the programme.

The report concluded that deficiencies in project design resulted in the inefficient implementation of the project.

The report criticized the fact that goods and services were not procured in accordance with Government's procurement requirements. It concluded that failing to comply with the controls can result in unauthorised expenditure and other inefficiencies which may adversely affect the success of any project.

70. The Central Tenders Board report stated, that at March 31, 2006 the RDP Consultancy without proper authorization was paid US\$4,239,463.50 (EC\$11,518,198.38). This unauthorized expenditure related to staff fees, out of pocket expenses and additional services. The report stated that 97% of this expenditure was paid before approval was sought from the Central Tenders Board. The report observed that there is no provision in the Consultancy Agreement for the procurement of goods and services. The report further observed that activities in support of the operation which were not part of the consultancy agreement were in the sum of \$7,650,899.20.

The report stated at para 7.26:

“Miscellaneous expenses [which was one of the items claimed under activities in support of the operation] are generally considered as incidental expenses that are immaterial. A sum of \$1,701,910.67 (which was the sum claimed) as miscellaneous expenses which represented 24% of the total expenditure can neither be considered incidental nor immaterial. The classification of such large sums as miscellaneous expenses usually indicate an attempt to disguise the true nature of expenses incurred or could be classification errors.”

71. The Audit Report contained several examples of inefficiencies in the use of the programme’s financial resources. These included:

- (a) The inefficient use of Government’s funds. There was a management fee of 10% in the sum of \$665,166.77 that was added

to the expenditure incurred. The report concluded that the decision to use the Project Manager to procure goods and services instead of procuring goods in accordance with the Government's procurement procedures resulted in avoidable expenditure which consequently increased the cost of the project.

(b) Considerable exchange losses due to currency fluctuations.

Payment for works was partially payable in pounds sterling. The market rate for the pound fluctuated considerably against the EC dollar. The estimated losses suffered by the Government due to depreciation of the EC dollar were approximately \$11.7M. This amount represents more than 10% of the cost of the project. The report opined that such huge losses reflect management's failure to protect Government's financial resources against the adverse impact of currency fluctuations. That loss could have been substantially avoided by a hedge against currency risk. Such failure resulted in gross inefficiencies in the management of Government's financial resources.

(c) There were significant charges due to late payments. These charges amounted to \$1,172,260.52. The report stated that the charges clearly indicated that late payments were made frequently without due regard to efficiency and economy.

(d) Significant amounts were paid in excess of the contract price as the final figures show and the report said that they saw no evidence

to indicate that the implementation of the programme was carried out with due regard to economy.

- (e) Delay in completion time of consultancy.

The consultancy was scheduled to commence in August 2000 and to be completed in July 2005. The actual completion date was March 2006, a time variance of 8 months. This delay in completion impacted negatively on the success and benefit of the project

- (f) The report criticized the fact that the Contractor had inadequate key personnel which resulted in:

- i The Contractor had difficulties during the placement of the sub-base layer as the imported tiff had a higher moisture level than the optimum moisture content, and
- ii. Late submission of works programme.

There was also inadequate supervision by the Ministry. The report observed that during the early stages of implementation, the number of personnel which was dedicated to the programme was insufficient. The situation was further compounded by the Project Co-ordinator having to carry out the duties of the chief engineer of the Ministry as well.

We must note here that the Project Co-ordinator Mr. Jn Baptiste very early on had foreseen the problems that would

arise from inadequate supervision by the Ministry. It appears that calls by him for proper supervision went unheeded. The report further noted that an engineer was not assigned to the Project to visit the site regularly and to deal with situations on site. This inefficiency resulted in inadequate monitoring of the Project by the Ministry and facilitated a backlash of numerous unsupportable claims by the Contractor.

The report expressed the view that management demonstrated a lack of efficiency in the Project. It stated that a significant sum of \$11,518,198.30 was expended without proper authority and amounts totalling \$2,050,286.12 could have been avoided. Management did not agree with this opinion.

72. We have referenced in this report several portions of the Audit Report because we believe that the contents thereof accurately reflect the problems that arose during the works. The issues raised in that report were in retrospect since the report was made in 2007 sometime after the work was completed. In our opinion the writers of the report were fully able to understand what went wrong and why. They had expertise available to them and they were able to comprehensively identify the problems and give the reasons therefor. In any event, the findings in that report were consistent with the evidence that was available to us.

Regrettably, we did not have an accountant to assist us but Mr. Gardner, though not an accountant did his best to assist. We express our disappointment with the fact that the Honourable Minister Finisterre at the relevant time who was present

before us throughout the inquiry elected not to assist the Commission with evidence. His lead Counsel was not present at the time he was invited to give evidence but he was represented by Ms. Fay Finisterre an attorney-at-law. He was familiar with the history of the matter since he was kept informed by the Project Co-ordinator. He may have had his reason not to testify but his failure to do so resulted in a great disservice to the Government and people of Saint Lucia. We note that in April 2005 he made lengthy contributions in the House of Assembly on the subject matter. He then said in the House that “the more realistic price for the project was exactly what the engineers estimate had put in which was \$57million” but in his statement sworn on 22<sup>nd</sup> April 2009 he said that the Consultants DIWI gave a provisional estimate of \$103.3 million in June 2004. Those statements indicated his knowledge of the matters in question. Parliament was never made aware of the Consultant’s estimate. He was served from time to time with all the documents that were placed before us and so it cannot be said that he was unaware of questions and issues raised and the evidence given on those matters. The Commission closed the oral hearings on April 16<sup>th</sup> 2009. In his statement of 22<sup>nd</sup> April 2009 he itemized matters relating to the bidding process, the poor start by the Contractor, details of major reviews by the Bank, follow up action by Cabinet and MCWT/PU presentations to Parliament, monthly reports, process of claims and value of the road. He was present with one or more of his attorneys throughout the hearings and when given the opportunity to give evidence he declined. We say no more about that. Similar comments are made about the failure of the then Honourable Prime Minister to testify. He was

also present for substantial periods of time at the hearing and had copies of all the documents that were placed before us.

73. We now wish to refer to that portion of the evidence of Mr. Jn. Baptiste that was given on April 16, 2009. He was responding to the question about the loss suffered by the Government and people of St. Lucia due to lack of proper management and monitoring and supervision. This is what he said, inter alia,:

“The actual cost of the works undertaken by Lagan, actual cost of the works, physical works, let me put it that way, had we known that Cable and Wireless ducts were relatively close to the surface had we known that there were series of pockets of soft material, had we known all these issues and had we packaged the contract and it had been awarded to Lagan at the rates that he had, forgetting all those claims the actual value of the works as per Lagan rates would have been \$69,179,343.54. That is the actual value of the works done as per Lagan's rates. So in essence the actual value of the claims in terms of prolongation, disruption, delay etcetera which are not works but losses that the Contractor claimed for amounts to \$30.6M. So had we not have any issues with claims, none at all, we had known where the Cable and Wireless ducts were, we had known where all the soft spots were and a contract had been awarded to Lagan at his rates as per the last bid, this would have been what the Government of St. Lucia or the taxpayers would have had to pay, for the actual works.”

74. A substantial portion of the claims related to the utilities issue already discussed and sub-surface materials on which the new road was to be built. With respect to the sub-surface materials that will be encountered we wish to refer to Para 5.26 (d) of the terms of reference of the consultancy agreement that reads thus:

“5.26 The detailed design to be prepared by the Project Manager shall include the following:

(d) an assessment of the type and hardness of materials which will be encountered in the earthworks.”

Since the Project Manager has failed to locate and estimate the cost of relocating all public utilities affected by the works (para 5.33 (ii) of the consultancy agreement and has not made a full and proper assessment of the type and hardness of materials which will be encountered in the earthworks (para 5:26 (d) above then the design was substantially defective and that was the real reason for the cost over runs. We would adopt the method of dealing with this issue as stated by Mr. Jn. Baptiste as stated above and would say that the Project Manager was responsible for the loss of \$30.6M and not the Government. The Government should, therefore, seek to recover that amount from the Project Manager together with interest thereon, for loss sustained as a result of breach of contract.

Mr. Jn. Baptiste, had referred us to a letter he had written to the Permanent Secretary in which he advised that there should be an independent review of the claims made by the Contractor. That was repeated in his review report; he said

but to no avail. The reason he gave for those requests was that the Project Manager was the designer of the project. The Project Manager also reviewed the claims made by the Contractor and determined whether they should be passed for payment or not. It is because the Project Manager not only reviewed the claims but also affirmed them for payment it was highly desirable to have a second opinion by way of an independent review of the claims made since these claims were very substantial.

Having regard to the foregoing all efforts should be made to recover the sum of \$30.6M from the Project Manager as quickly as possible.

75. We wish also to consider the position of the Honourable Minister Finisterre under whose portfolio this Project fell and the Permanent Secretary. Mr. Jn. Baptiste had said that at a very early stage he had drawn to the attention of the Permanent Secretary and the Honourable Minister the problems of delays and the likely cost to the Government in cost overruns of millions of dollars. He also said that he was concerned about the lack of expertise by the Government in the management of the Project. This he did by letters and reports but his advice was not heeded. The Audit Report stated that “the programme was poorly managed from its inception.” They said that their findings revealed a number of areas in which the RDP was implemented without due regard to value-for-money. They found that large amounts of money were expended without due regard to economy. As a result there was failure to optimize the use of Government’s financial resources. There were gross inefficiencies as the management of Government’s financial resources, the report stated.

76. We did not have evidence as to the identity of the officers involved due largely to the refusal of key personnel to testify. But we are of the opinion that the Honourable Minister Finisterre and the Permanent Secretary should be held accountable for much of the blame in this regard. Certainly, persons involved in the financial management of Government's resources could be held accountable and should be for the huge loss incurred by way of late payments but we had no evidence as to where in the public service the fault lies.

The Commission was also required "to investigate if there is or may be criminal liability which may be the subject of prosecution in the Criminal Courts."

We have considered all the evidence placed before us very carefully and we are of the opinion that because the standard of proof in criminal proceedings is proof beyond reasonable doubt there is no sufficient evidence that gives rise to a criminal prosecution.

### SUMMARY

#### The Rochamel Affair: Frenwell Limited

- 77.(i) The Government paid money to the Royal Merchant Bank of Trinidad and Tobago in the sum of US\$14,592,350.00 for the debts of a company Frenwell Limited with which it had no contractual or other relationship and the money so paid was irrecoverable by the Government.
- (ii) The Government acting through Dr. Kenny Anthony the Prime Minister and Minister of Finance gave guarantees capped at US\$12,875 million to meet

service costs and cost overruns when the Pigeon Point Hotel was to be established on the understanding that if the Government paid under the guarantee it was to have an equity in the Hotel Company appropriate to the value of what was paid. The money which was paid in respect of the debt of Frenwell Limited included an amount of US\$12,875 million which was the same as the amount which the Government agreed to guarantee under the agreement of 17<sup>th</sup> December 1997 but the Government obtained no equity in the Hotel Company as was contemplated by that agreement.

- (iii) Save as is hereinafter stated no measures were taken to save the Government from this uncompensated loss. The only action taken to save the Government from loss was the late intervention by the Prime Minister and Minister of Finance which secured a reduction of interest in the sum of US\$2.5 million from an amount of US\$17,092,350.00 which the Royal Merchant Bank had actually taken from the Government in respect of the debt of Frenwell Limited so reducing the loss to US\$14,592,350.00.
- (iv) With respect to the National Conservation Authority, which is a statutory authority established under the National Conservation Authority Act, the Commission found that this corporation was not administered in accordance with the Act which is itself in need of reform. Reports were not laid in Parliament in accordance with the Act to enable the representatives of the people to become aware of the operations of the Authority.

- (v) Audit reports of 2003 and 2005 disclosed that there were mismanagement and irregularities in the conduct of the affairs of the Authority, and that offences might have been committed with respect to the expenditure of public funds entrusted to the Authority. Accounts were not properly kept, and where they were kept the audited accounts indicated serious deficiencies in the systems of internal control. Money was improperly spent causing loss to the Government and people of Saint Lucia. The auditors were not able to satisfy themselves that all expenses of the Authority had been reflected correctly or that recorded expenses represented valid transactions of the Authority.
- (vi) There was no unified financial administration because monies appropriated by government for the Short Term Employment Programme (STEP) which the Authority was obliged to administer were treated separately from the other monies of the Authority and were administered by the General Manager without reference to the Board.
- (vii) A contract for \$43,750,000.00 was signed to meet the costs of the Road Development Projects 001 and 002 but the Projects eventually cost the Government \$101,366,873.74 which was 132 per cent above the contract price. The minimum loss to the Government and people of Saint Lucia was \$30.6 million.
- (viii) The principal cause of the additional costs was design failures in the work of the Project Manager.

- (ix) The Project Manager was itself the sole authority dealing with applications for extensions of time and increased costs.
- (x) There was no independent authority on behalf of the government to monitor the claims for additional costs.
- (xi) The Caribbean Development Bank was alerted by the Prime Minister when the project being only 35% completed the contractor's claims had exceeded the contract price by \$20 million. Other than site visits and reviews after being so alerted the Bank continued to pay while the costs continued to escalate.

### **RECOMMENDATIONS**

1. Every guarantee given by the Government of Saint Lucia must if not given under an enactment be put before Parliament for approval by resolution with full details of the amount guaranteed and the object and reasons for the giving of the guarantee.
2. There should be no time limit in law for the recovery of public funds and appropriate legislation should be enacted to remove any time bar against recovery.
3. Public officers at the highest departmental level should be involved in the executing and monitoring of agreements made with Government and no liability of Government should be sanctioned without the express agreement of law officers of Saint Lucia.

4. The National Conservation Authority Act should be reformed to ensure better and more efficient administration of the Authority as a statutory body.
5. The Short Term Employment Programme (STEP) should be separated from the NCA, which should be responsible only for beautification.
6. The Board of the NCA should be responsible only for policy. Members of the Board should be chosen for competence and integrity.
7. The staff of the NCA should be employed only after proper and transparent procedures are followed and with clear terms and conditions of service.
8. Proper management, financial and accounting systems should be put in place and monitored in respect of construction contracts.
9. There must be a detailed procedure in the construction contracts for handling contract variations and this must be strictly adhered to.
10. Approval for expenditure should not be given if such expenditure requires the prior approval of the Central Tenders Board or some other authority. Such approval should be deferred until the Central Tenders Board or the relevant authority deals affirmatively with the matter.
11. The Contract should require that periodic reports should be made by the Contractor to management in a timely manner to ensure that progress in the works is made within the contract price and that the completion date would not be extended without proper reason.
12. There must be proper and efficient planning of every detail by management (in this case the Project Manager) to avoid delays and cost overruns.

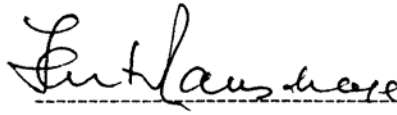
13. There must be adequate supervisory personnel by management on site to ensure that time and cost schedules are met.
14. Management officials should be held accountable civilly for loss arising from breach of responsibilities assigned.
15. The person responsible for the design of the Project should be held fully accountable for loss sustained from defects and deficiencies resulting in such loss.
16. Except in the case of an emergency the Contract should require that goods and services should only be procured in accordance with Government's procurement regulations.
17. The terms and conditions of any contract shall not be varied except with the prior approval of the relevant government authority.
18. Management must ensure that adequate steps are taken beforehand to avoid or minimize loss due to currency fluctuations. As far as possible, the Government should ensure that contract payments are made in local currency.
19. Care should be taken to avoid late payments thereby avoiding charges on such payment.

We have reached our conclusions after consideration of the oral evidence and documentary material presented to us. We regret that Dr. Kenny Anthony and Mr. Felix Finisterre who had ministerial responsibility for matters under our inquiry did not give oral evidence to the Commission. Nevertheless, we were able to give consideration to a considerable amount of documentary material which provided valuable evidence in addition to what was orally received. We are grateful to Mr. Reginald Armour, S.C.,

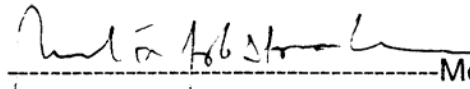
Counsel to the Commission and his assistants Miss N. Watson and Mr. K. Alexander, Attorneys-at-Law who assisted him and to Ms. Lyndell Gustave Secretary to the Commission, to Ms. Brenda Yorke Deputy Permanent Secretary in the Attorney General's Chambers and to all other members of the public service who co-operated in our work and rendered most valuable assistance. We thank in particular all those who sent us written statements and who accepted the Commission's invitation to give oral evidence. We are also indebted to Miss Suzette Hamel-Smith and Mr. Sunil Harrilal of the staff of the Chairman for assistance in the typing and printing of the Report.

Humbly reported by

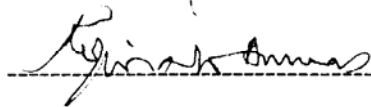
Sir Fenton Ramsahoye Q.C.

-----Chairman

Mr. Justice Mustapha Ibrahim

-----Member

Mr. Réginald Dumas

-----Member

6th May 2009