



Government of Bermuda
Ministry of Legal Affairs

*Update on Legal Settlement with Architects of
New Magistrates Court Building*

By

The Hon. Mark J. Pettingill, JP, MP
Attorney-General and Minister for Legal Affairs

Friday July 26, 2013

Mr. Speaker,

Two weeks ago, I made a Ministerial statement to this House explaining the settlement of the Government's case with Carruthers Shaw and Partners Architects in connection with the construction of the Dame Louis Browne-Evans Building. Last week, Members of the Opposition were allowed to ask questions relating to the settlement. Having received prior approval from yourself, Mr. Speaker, I am now compelled to rise and correct certain factual errors stated by certain members when those questions were put to me.

Mr. Speaker,

Some of the questions asked by certain members of the Opposition contained statements of alleged facts about the background of the case. With your leave, I intend to address those particular assertions by quoting directly from the Hansard Record:

Mr. Speaker,

The Honourable Member from Pembroke West Central, Mr. David Burt stated:

“My first question, Mr. Speaker, is, in his statement last week the Honourable Attorney-General said, and I quote, that “CS&P's claim against the Government was valid and would succeed”. In making that claim, did

the Attorney-General, the Minister or the Cabinet take this view despite the advice that was received from Conyers Dill & Pearman, which was given to the previous Government.”

In a further question, the Honourable Member stated:

“Did the Attorney-General consider the advice given by Conyers Dill & Pearman that said CS&P admitted that over \$1 million of the claim in respect of the Building Project was in relation to anticipated earning which were not due and therefore not owing?”

The Honourable Member continued in a further question, apparently quoting from the Conyers Dill & Pearman opinion (upon which his entire line of questioning was based):

“Did the Attorney-General consider that in awarding, or agreeing to this settlement that CS&P claim consisted of a claim for approximately \$182,000 for anticipated change orders, which had never been incurred, was valid in light of the advice given by Conyers Dill & Pearman that did not consider the claim valid?”

And finally, Mr. Speaker, the Honourable Member stated in his third question:

“Given the advice was received to the previous Government by Conyers Dill & Pearman, which directly contradicts the Attorney-General's claim that CS&P's claim against the Government would succeed, may I ask the Attorney-General what justification did he give the Minister of Finance and the Cabinet that he recommended that we spend money that, according to legal advice given to the previous Government, the Government did not need to spend?”

Mr. Speaker,

At the time these questions were asked, much was made of the alleged Conyers Dill & Pearman advice. I will come to comments made by other members, but let me first provide the factual background to this advice. The advice the Honourable Member relies on for his line of questioning was sought by Mr. Julian Hall acting on the Government's behalf. It was provided by Conyers Dill & Pearman in a letter dated 20 January, 2009.

Mr. Speaker,

The fact is that CD&P advised the Government precisely the opposite of what the Honourable Member suggested. Quoting directly from paragraph 10 of that letter, Conyers Dill & Pearman advised:

“We think it likely that a Court would conclude that the Government was in breach of contract when it terminated the services of CS&P on 2 December, 2008. There was no allegation that CS&P were themselves in breach of their contract such as to justify termination; simply a statement that their services were no longer required.”

The opinion continues:

“This breach of contract gives rise to a claim by CS&P against the Government for such damages as they have sustained by reason of the early termination of their contract.”

Mr. Speaker,

The opinion does state, and I tend to agree, “... that CS&P were not entitled to claim their entire fee to the end of the construction period.” I note at this point that the attorneys for CS&P disputed this fact and were in fact seeking full damages for future loss had the matter gone to full trial, and they clearly had an arguable position on this point.

Mr. Speaker,

In light of this opinion, Mr. Hall subsequently proceeded to enter into negotiations with CS&P's attorneys, and it is a fact that those negotiations nearly reached a settlement between the parties. I will return to this last point in due course.

Mr. Speaker,

In relation to the Honourable Member's bold statement that CS&P's claim contained a claim for approximately \$182,000 for anticipated change orders, which had never been incurred, and which was valid, I can advise this Honourable House that nowhere in the opinion provided by Conyers Dill & Pearman is there a mention of such a claim or any mention of anticipated change orders.

Mr. Speaker,

From this it is crystal clear that the opinion provided by Conyers Dill & Pearman to the previous Government did not reflect what the Honourable Member asserted. He stated on record in this Honourable House that this opinion directly contradicted my view that CS&P's case was valid, when it clearly did exactly the opposite. The fact is that the Honourable Member entirely misled this House and the Public of Bermuda by making statements about, and making alleged quotes from a document that were patently false and materially misleading. Whether this was intended or negligent as based on what he heard as opposed to what he saw matters not. In my view, it is he who must apologise unequivocally for this and make a retraction to the media and the People of Bermuda.

Mr. Speaker,

I now turn to certain statements made by the Honourable Member from Pembroke East Central, Mr. Michael Weeks. The Honourable Member asked:

“Did the Attorney-General, the Minister of Works and/ or the Cabinet consider the advice given to the previous Minister by his technical experts that we hired namely Conyers and Associates, Woodbourne Associates, Entech Limited and Spectrum.”

He further asked the supplementary question:

“Was the Attorney-General made advice, that the Government ammunition to file a counterclaim?”

Mr. Speaker,

These two questions imply that the Government's counterclaim was based on extensive reports by these various experts, and further that I was in possession of those reports but did not consider them. Let me address this issue. For reasons I have been unable to establish, other than that they did not advise on the initial contract, the previous administration's Attorney-General did not act for the Minister in relation to this case.

Mr. Speaker,

I cast no aspersions on the previous Attorney-General in this instance, but the fact is that section 6.1. of the Ministerial Code of Conduct requires that the Attorney-General be consulted in good time, particularly on matters that might come before Cabinet, and further, under section 6.2 of the Ministerial Codes of Conduct, convention requires that written opinions of the Attorney-General should generally be made available to succeeding administrations. I have nothing from the previous Attorney-General at all in relation to this case by way of opinion or advice or technical reports of experts or a Cabinet Conclusion on the Minister proceeding to instruct outside Counsel.

Mr. Speaker,

It is a fact, however, that the previous administration's Minister of Works and Engineering instructed a private law firm to act on the Government's behalf following Mr. Hall's passing at a cost of \$111,400 to the taxpayer. I hasten to say that this is no reflection on that law firm; following the instructions of the Minister and disregarding protocol for the hiring of outside counsel is certainly not their issue to address.

Mr. Speaker,

In a letter to that firm dated 20 May, 2013 I wrote the Governments lawyers retained by the former Administration:

"I would appreciate some indication as to what evidence the Defendant (The Government) has to support the counterclaim."

They responded:

"This analysis was carried out by Conyers and Associates, the final architects of record in respect of the Court House project for and on behalf of the Minister. Their analysis was also filed in the Supreme Court together with responses to the Plaintiffs request for further and better particulars, and is included in this letter for your consideration. It should be noted that this analysis forms the basis of the most recent attempt to negotiate a settlement between CS&P and the Minister."

Mr. Speaker,

There was no mention of any other form of technical report or advice. I say all of this to make the point that the legal pleadings filed on behalf of the previous administration only reference a single document, a mere spreadsheet entitled “technical analysis”. The contents of this document, in my considered legal opinion and others, would not have added anything to the case put forward by the Government. Additionally, it is significant to me that this “analysis” was prepared by the same architects that took over the contract from CS&P (at the direction of the Permanent Secretary and without tender) and were paid over \$5 million for their services. That firm also continued to use the drawings created by CS&P to finish the job. Consequently, the new architect's analysis, which cannot properly be described as a “report”, was not sufficiently independent or compelling to amount to “ammunition” as the Honourable Member suggested.

Mr. Speaker,

I am confident that had the attorneys instructed by the previous administration been provided with the numerous expert reports alleged by the Honourable Member to have existed they would have certainly brought them to my attention when I requested any expert evidence in May of this year. As a consequence, Mr. Speaker, the Honourable Member's statements are grossly misleading, and not a reflection of the true legal position taken by the Government in this matter. There simply were no written expert reports brought to our attention or contained in any Government file relating to this matter.

Mr. Speaker,

Finally, I turn to certain statements made by the Honourable Opposition Leader, Mr. Marc Bean. In a question put to me last week, the Honourable Member stated:

“Given the information that has come to light during question period today that the previous counsel had reduced the claim to less than \$200,000, does the Minister wish now to take this opportunity to admit that he has misled this Honourable House, the Cabinet and the People of Bermuda when he said this agreement largely reflects the position reached in previous negotiations with CS&P?”

Mr. Speaker,

I stand by my answer of “no”, and further raise the fact that no previous counsel for the Government of Bermuda had ever reduced the claim to less than \$200,000 in negotiation. It is also a fact that during initial negotiations between CS&P and the Government, which only contemplated CS&P's claim under the Courthouse contract and not the Marsh Folly debt, Mr. Hall, who represented the Government, immediately offered \$415,828 by way of settlement for the undisputed points in CS&P's claim. The only outstanding issue between the parties at that time was the amount to which CS&P were entitled for payment of their services under the Court project contract. The Government's initial offer was \$223,024 (which amounted to 6 months payment of the administration fee under the contract), bringing the total potential settlement to \$638,852 on Mr. Halls assessment. CS&P's counter offer amounted to \$798,852. Further agreement couldn't be reached.

Mr. Speaker,

I can only assume that the Honourable Leader of the Opposition is mistaken in his understanding of the initial negotiations. I hope that this provides some clarity to him and the other Honourable Members opposite as to why a settlement of \$700,000, which includes not just the claim under the Court House Contract, but also the debt claim under the Marsh Folly contract, is in fact a great savings to the taxpayer in the circumstances.

Mr. Speaker,

Given the facts now disclosed with regard to the Legal opinion and the lack of any formal technical reports as alleged by the Opposition they are clearly at fault for misleading this Honorable House and the Public in what can only be seen as an attempt to cloud the truth as it relates to their handling of the issues relating to the Court Building.

An apology, at least, is required.

Thank you, Mr. Speaker.