2. BACKGROUND

i) The General Setting

2.1 As the reason for the Commission deciding to report in two stages was the public interest balance against undue delay which would be caused by waiting for the conclusion of the litigation referred to above, that litigation should be the starting point in explaining the background.

2.2 The litigation was initiated by Mount Murray Country Club Limited, Conrad Hotels Limited and Mount Murray Homes Limited, referred to in this section as the appellants. It was brought against all three members of the Commission and against the Assessor of Income Tax (the Assessor), Mr Ian Kelly. The legal proceedings brought by these litigating companies were dismissed by the courts. The proceedings had started in the Chancery Division of the High Court of the Isle of Man, then proceeded to the Island's appeal court, the Staff of Government Division of the High Court of the Isle of Man, and then to the Judicial Committee of Her Majesty's Privy Council. The Privy Council delivered its reasons for dismissal on 7th July 2003,[1] but had given its decision of dismissal on 7th May 2003.

2.3 The Privy Council, in delivering its reasons, set out in comparatively brief form an explanation of the litigation. As the Privy Council's decision and reasons were given after considering the submitted documents and arguments of all the parties to the litigation, generally following and utilising the decision and reasons of the Privy Council is a particularly convenient way to start the setting out of background, and so we do this. The following paragraphs 2.4 to 2.18 set out the circumstances facing the Commission as it took up its duties, and the general

[1] Library Document "Commission of Inquiry into Mount Murray": "Reasons for Report of the Lords of the Judicial Committee of the Privy Council of the 7th May 2003, delivered the 7th July 2003" Privy Council Appeal No 14 of 2003.

background to the litigation very much as found and expressed, and to a great extent in the words used by the Privy Council, although these are not generally set out in quotation form. The detailed investigations of the Commission show some slight factual differences, and the Commission has commented on Professor Crow's report in Part One, but this does not affect the value of the background setting which follows.

2.4 The appellants are three associated companies in a group which has been engaged, since about 1991, in obtaining planning permission for the development, and more recently in the actual development and management, of a substantial area of land at Mount Murray, Santon, Isle of Man. The most active of the three seems to have been Mount Murray Country Club Limited, which was incorporated in 1990 as Conrad Hotel (IoM) Limited; it changed its name in 1991 to Radcon Village Resorts Limited and again in 1993 to its present name. Information as to the beneficial ownership of each of the appellant's share capital has not been disclosed, but they have been accepted as eligible for group relief for the purposes of Isle of Man income tax. They have the same managing director, Mr Peter Willers.

2.5 The first three respondents are the members of a commission of inquiry ("the Commission") appointed by the Lieutenant Governor under the Inquiries (Evidence) Act 1950 ("the 1950 Act") following resolutions of Tynwald made on 19 February and 19 March 2002. The fourth respondent is (and has at all material times been) the Assessor of Income Tax, a senior official in the Isle of Man public service, who is the head of the Income Tax Division of the Isle of Man Treasury Department.

2.6 The background to the litigation is complicated but can be summarised fairly briefly, since much of it is covered in detail in the Report of an Inquiry into Planning and Development and other matters at Mount Murray (30 December 2000) by Professor Stephen Crow (the "Crow Report") mentioned below. During the 1980s the rapid expansion in cheap overseas holidays, especially in Mediterranean resorts, adversely affected tourism in the Isle of Man and other "cold water" destinations. During that decade the number of bedrooms available

for visitors in the Isle of Man almost halved, from almost 13,000 to just under 7,000. The policy of the Isle of Man Government was to encourage tourism and to give the island a more up-market image. In 1982 a site of about 7.2 ha (18 acres) at Santon was zoned for "tourist development in parkland". By 1990 the persons controlling the appellants had become interested in undertaking this development.

2.7 The planning history of the development was protracted and controversial. Planning control in the Isle of Man is the responsibility of the Department of Local Government and the Environment. Promotion of tourism is the responsibility of the Department of Tourism. The Department of Tourism has throughout strongly supported the appellants' proposals, and their efforts to have the terms and conditions of the original planning permission altered so as to make the development more profitable for the appellants.

2.8 The initial decision of the Planning Committee (on 22 February 1991) was for the construction of a resort village on 16.8 ha (42 acres), but with the buildings limited to the 7.2 ha (18 acres) originally designated in 1982. The application included 150 houses, and was accompanied by various supporting documents including a "Buyer's Guide" about which the Crow Report had a good deal to say. There were various conditions, including a standard condition limiting the duration of the approval to four years, and a requirement that the accommodation should be only for bona fide tourists and permanent occupation of the buildings was not permitted. However by stages the concept of the development grew and changed so that it ended up as what the Crow Report described, at paragraph 1.2, as

> "a commitment until April 2003 to a development of 175 dwellings for permanent residents spread over a site of 16.8 ha (42 acres) (which also includes an hotel, parkland and one "hole" of a golf course)."

2.9 The Crow Report subjected the planning history to close and critical scrutiny. Two paragraphs from the report's "Overview" give an indication of what went wrong. After stating that there was no evidence to substantiate any charge of

corruption against any of the officials concerned, the report continued, at paragraphs 1.42 and 1.43:

"So what was it that made officials act as they did? It is clear that in the first instance nobody in DoLGE [the Department of Local Government and the Environment] had read the documentation of the application in principle (PA90/1842) fully, and that everyone had been taken in by the assertion of the tourism value of the whole project. So far as the residential development was concerned, it was a tourist accommodation scheme.

For this original lapse the officials concerned may (in my opinion) be forgiven if not excused. The Buyer's Guide in its original typescript (as it was in the material applications) ran to 49 pages, including such anodyne material as the Isle of Man occupying 'a central position not only in the Irish Sea but in the British Isles' and also many pages about the 'philosophy' of the holiday development. Even if any of those concerned had taken the trouble to read the document from one end to the other, which nobody appears to have done, the one page on which permanent residential occupancy was far from directly stated could easily be missed. Of course this now looms large as a consideration but it must be remembered that at the time the proposal was being 'sold' to the Island as wholly a tourist enterprise, and this now apparent fiction did not loom large as an issue at the time."

2.10 The appellants and those who controlled them also wished to make the development more profitable by securing more generous tax reliefs than were previously available in the Isle of Man. One source of information about the appellants' successful efforts to obtain tax incentives is files maintained and supplied (both to Professor Crow and to the Commission) by the Department of Tourism. The other source is a statement, enlarged on in a supplementary statement, which Mr Ian Kelly, the Assessor of Income Tax, provided to the Commission. His statement identified three measures which gave new reliefs:

(1) the Income Tax (Capital Relief) Order 1991 (Circular No 110/91), approved by Tynwald on 16 April 1991, increasing first-year allowances on qualifying premises (including tourist premises) to 100% in respect of expenditure after 5 April 1991;

(2) the Income Tax (Capital Relief) (Tourist Business Incentive Allowance) Order 1991 (Circular No 337/91), approved by Tynwald on 15 October 1991, which granted additional relief at the rate of 50% for a further three years after the first-year allowance, in respect of expenditure after 5 April 1991; and

(3) the Income Tax (Capital Relief) (Tourist Business Incentive Allowance) (Amendment) Order 1992 (Circular No 510/92), approved by Tynwald on 20 January 1993, which extended the definition of qualifying capital expenditure to include the installation of sports and associated recreational facilities for use solely or mainly in connection with tourist business (compliance with that condition to be certified by the Department of Tourism).

2.11 In his supplementary statement[2] the Assessor said that proposals for the creation of new "taxation structures" aimed at encouraging investment in tourism had first been put to the Treasury by the Department of Tourism in November 1990. The Assessor also described extensive contacts and discussions between himself and his Deputy, Mr Robbie Kennaugh, officers of the Department of Tourism (especially its Chief Executive, Mr Terry Toohey, and Mr Stuart Mitchell) and persons acting for the appellants, especially Mr Gary Spence and Mr John Nugent of Pannell Kerr Forster, chartered accountants of Douglas, Isle of Man. The Income Tax Division first became involved in discussions about the appellants' development in May 1992, and it became apparent from documents supplied to the Income Tax Division that the appellants had already been discussing tax matters with the Department of Tourism. There were meetings with the Assessor or his Deputy on 18 May, 30 July and 27 August 1992. Certificates of compliance under the 1992 Order were issued by the Department of Tourism on 22 December 1992 (when it was still in draft), on 2 March 1993 and on 26 September 1994. The Assessor stated that he was concerned about the latter certificate, and raised the matter with Mr Toohey. This led to a surprisingly strongly worded letter dated 19 October 1994 from Mr Spence to the Chief Minister, complaining of what Mr Spence called "unauthorised interference by the Treasury". The letter ended with a threat of litigation. Threats to withdraw from the development, and threats of litigation, seem to have been a weapon

[2] Mr Kelly Document Q18 Appendix 6

frequently used by the appellants' representatives and advisors in their dealings with the public service in the Isle of Man.

2.12 The planning side of the history was also punctuated with similar threats. These are set out in detail in Annex 3 to the Crow Report. The origins of that report were that by 2000 there was serious public disquiet in the Isle of Man as to the Mount Murray development. On 18 August 2000 the Council of Ministers commissioned Professor Crow, a distinguished planning expert, to inquire into the history of the development. He undertook that task with great promptitude and (although assisted only by a single secretary) delivered his written report on 30 December 2000. It consists of five chapters and six annexes. All the chapters, and four of the annexes, have been published; two of the annexes have been kept confidential. [The government has now released them into public availability.] Parts of the report have already been referred to. Professor Crow concluded that although there was no evidence of corruption of any officials, it was a "sad history". He made various recommendations for administrative improvements, set out in the last chapter of his report.

2.13 However the publication of the Crow Report (almost in its entirety) did not allay all public concern. The matter came to a head when Mr Peter Karran, the Member of the House of Keys for Onchan, put down a resolution in Tynwald for the appointment of a commission of inquiry under the 1950 Act. This resolution was moved by Mr Karran and debated on 19 February 2002. After debate it was carried unanimously by the House of Keys and the Legislative Council. On 19 March 2002 there was a further debate (mainly about the costs of the Commission). On this occasion an amendment to the resolution about the Commission's costs was proposed and carried unanimously; the resolution as amended was then carried by a majority.

2.14 The Privy Council Reasons then continued by setting out the relevant resolutions to which they referred in the preceding paragraph (2.13) and which are to be seen in Annex 3 of this Report, and then went on to say that in a letter dated 14 March 2002 to Mr Nigel Macleod QC, the Lieutenant Governor His Excellency Air Marshal Ian MacFadyen set out the terms of the main resolution with the

insertion in paragraph (d) of the words “save for any matters of commercial confidentiality" but they do not appear in the official report of the proceedings in Tynwald.

2.15 The Privy Council continued as follows in setting out the background.

2.16 Mr Macleod accepted the Lieutenant Governor’s invitation to chair the Commission, and Mr Mark Solly and Mr Martin Bradshaw agreed to serve as the other members of the Commission. They set to work with little delay and completed the first stage of their work (intended to clarify the matters to be investigated) in May 2002. During the first stage the Commission took evidence on oath from a number of witnesses including Mr Karran. Both Mr Willers and the Assessor were summoned to give evidence to the Commission during the investigative stage, the Assessor being asked to furnish it with documents from his files. The Assessor supplied these documents on 27 June 2002.

2.17 The second, investigative phase began on 1 July 2002, when Mr Willers gave evidence on oath before the Commission. Mr Willers answered some questions put to him, but he met many questions with a blunt and uncompromising refusal to answer. He did not rely on any privilege against self-incrimination. He simply asserted that the questions were outside the Commission’s remit.

2.18 Shortly after he had given his evidence to the Commission (so far as he was prepared to answer questions) Mr Willers learned that the Assessor had passed documents to the Commission. The appellants promptly applied to the Chancery Division of the High Court of the Isle of Man, by petition dated 8 July 2002, seeking interlocutory injunctive relief against the Commission (prohibiting them from using any information on the appellants’ tax affairs and requiring them to identify anyone to whom such information had been passed) and against the Assessor (prohibiting him from answering any questions about the appellants’ tax affairs). The appellants’ basic complaint appears from an affidavit sworn by Mr Willers on 8 July 2002 (para 17):

“Even if the Crow Inquiry was legitimate and even if this Commission of Inquiry is legitimate there is no part of the remit to Mr Crow or to this Commission which

could lead to the legal disclosure by the Treasury of the tax affairs of any person. Even confidential disclosure is governed by section 106 of the Income Tax Act 1970, and a Commission of Inquiry set up by Tynwald does not fall within any of the categories there listed where disclosure is permitted."

2.19 After examining statutory provisions the Privy Council summarised the proceedings in the first instance court and in the appeal court. The relevant passages from the Privy Council's reasons for dismissal of the litigation are set out in paragraphs 2.20 to 2.32 next following.

2.20 The appellants' application for injunctive relief was heard by Acting Deemster King QC who gave judgement on 23 July 2002. He had before him an affidavit of Mr Macleod from which he quoted para 75:

"The Commission has read, but has not yet fully considered, the documents which are the subject of this application. In general, the documents fall into two categories. The first category is correspondence and memos between government officials and the developers and their various agents as the development was planned and taken forward and those documents deal with tax and town and country planning. The second category is the tax assessments of the companies involved in the Mount Murray development. These require further study, but they identify the companies involved in the Mount Murray development and the other companies within the same group for tax purposes. They provide the final step of the audit trail which will enable the Commission to dispel or confirm the suspicions that are held by a Member of Tynwald about the tax aspects of Mount Murray. There would be no need to make the details of the tax affairs of the developers public unless the Commission is satisfied that the public interest requires it."

2.21 The Acting Deemster attached importance to the distinction between the documents connected with the development, and the granting of tax reliefs in order to make the development more financially advantageous ("the lobbying documents") and the tax returns and associated material ("the tax return documents"). He held that section 106 of the 1970 Act could not apply to the lobbying documents, since they did not fall within the description of "returns,

assessment lists and copies of such lists". But he thought it "highly arguable" that not only were the tax return documents within section 106 (a point that has never really been in dispute), but also that section 106 (2) (j) did not make an exception for documents covered by a summons issued under the 1950 Act.

2.22 The Acting Deemster also addressed arguments that the lobbying documents had not been validly requisitioned either because they were not relevant to the inquiry being conducted by the Commission, or because they were covered by public interest immunity. He rejected those arguments. On the subject of public interest immunity he said:

"Again, assuming for the moment section 106 does not apply, it seems to me that on any balancing exercise, so long as the documentation is patently relevant to the issues which I have raised in short form in this judgment – that is, the linkage between the planning permission and the development of the amended legislation in relation to tax reliefs – and the seeking out of tax relief on tourist business grounds (not the detail of quantum as such, but the linkage of the general development of the two issues), there really is no sensible argument that the public interest demands, on a balancing exercise, that it be withheld from the Commission."

2.23 Accordingly the Acting Deemster granted an injunction restraining the documents falling within the description in section 106(1), but not other documents. The parties' representatives failed to agree as to the practical effect of this order (in terms of which documents should be allocated to each category) but that controversy was overtaken by the appellants' appeal and the respondents' cross-appeal. The parties agreed to treat the outcome of the appeal to the Staff of Government Division as the final disposal of the proceedings (subject, no doubt, to any appeal to the Board [the Privy Council]).

2.24 The Staff of Government Division (Judge of Appeal Mr Geoffrey Tattersall QC and Acting Deemster Mr Roger Kaye QC) gave judgement on the appeal on 1 November 2002. The judgement identified four issues as follows:

(1) The documents issue: how should the documents supplied by the Assessor be categorised?

(2) The gateway issue: could the documents be lawfully disclosed, in the light of section 106 of the 1970 Act and principles of public interest immunity?

(3) The relevance issue: were the documents (however categorised) relevant to the inquiry which the Commission was conducting?

(4) The conditions issue: could and should the Court impose on the Commission any conditions as to the use which it made of documents disclosed to it?

2.25 On the first issue, the Staff of Government Division followed the Acting Deemster in distinguishing in principle between the tax return documents and the lobbying documents. Only the former fell within section 106, although the latter were confidential material which the Assessor should not disclose without good reason and for a proper purpose. But on the second issue it differed from the Acting Deemster in accepting the respondents' submission that section 106 (2) (j) did provide a gateway to disclosure. The summons issued by the Commission was merely machinery for giving effect to disclosure authorised by an enactment (that is, the 1950 Act).

2.26 On the third issue, relevance, the Staff of Government Division rejected the argument that the test of relevance was akin to that applied to discovery of documents in civil proceedings (para 66):

"Such an investigation is not a form of civil proceedings; there is no *lis* or action between identifiable parties. The functions of the Commission are primarily to conduct an investigation and make recommendations, which, or at least the first of which, is essentially a fact finding matter, not the resolution of a dispute."

On the fourth issue it declined to impose conditions which might fetter the Commission's discretion. Accordingly it dismissed the appellants' appeal and allowed the cross appeal.

2.27 Special leave to appeal was granted by Her Majesty in Council on 17 December 2002. The respondents agreed to the continuation of the injunctions until the giving of judgment by the Board.

2.28 The Privy Council turned then to consider relevance saying that "Before their Lordships the issues have been much the same, but relevance has emerged as the most controversial issue, and it was best to deal with it first. As the Staff of Government Division observed, the task of the Commission is not to determine an issue, defined by pleadings, between two parties. It is to inquire into a matter of public interest and concern defined only by the terms of the two resolutions of Tynwald. The terms of the resolutions referred to the government's "handling of the irregularities occurring at Mount Murray" and referred to the Crow Report. That Report had been limited to planning matters, and Mr Karran's allegations of corruption had been made in that context (although he seems to have expanded his allegations when he gave evidence on 23 May 2002 during the first stage of the Commission's work). But in their Lordships' view it cannot have been Tynwald's intention, in the light of Mr Karran's allegations, to limit the Commission's inquiry in any way which might invite its being criticised as a cover-up. No government (and especially no government in a community as small as the Isle of Man) works in watertight compartments. The appellants' representatives appear to have raised issues as to tax reliefs with the Department of Tourism before they were raised with the Treasury. The Department of Tourism was closely involved in the planning process (although the department responsible was DoLGE). In these circumstances it would not have been right for the Acting Deemster or the Staff of Government Division, with much less knowledge of the facts than the Commission, to intervene in order to impose on the scope of the inquiry restrictions which might prove arbitrary, or unworkable, or against the public interest." After considering various legal authorities the reasoning on this issue concluded that "Their Lordships see no reason to suppose that the Commission under the chairmanship of Mr Macleod is embarking on some unauthorised diversion into matters which could not be relevant. The two affidavits of Mr Willers provide no evidential basis for that supposition, and the affidavits of Mr Macleod indicate that the Commission is approaching its task in a responsible and focussed manner."

2.29 The Privy Council reasoning next agreed with both the lower courts that the documents fall to be dealt with in two categories (described by Acting Deemster King as "the tax return documents" and "the lobbying documents"). Legal

argument and authority was then considered and the reasoning concluded that "Their Lordships agree with the Staff of Government Division that section 106 (2) (j) does permit the Assessor to disclose the tax return documents, despite their confidential nature, in obedience to the summons issued by the Commission. Disclosure is in that way authorised by an enactment, that is the 1950 Act, section 1 (1) (a) of which confers on the Commission power to require the production of documents. In the context of the 1950 Act that power would be nullified if confidential documents were impliedly excluded."

2.30 The next two following paragraphs in the Privy Council's reasoning are material and are next set out.

2.31 "The lobbying documents are on the Assessor's files not because the appellants were under a statutory duty to submit them, but because they chose to do so for their own purposes. They are no doubt entitled to some limited degree of confidentiality simply in the sense that the Assessor as a responsible public servant would not, without good reason, reveal any of the contents of his files to any casual inquirer. But the Commission is not in the position of a casual inquirer. Their Lordships agree with both courts below that there was no possible reason why the lobbying material should not be produced to the Commission, in case it proves to be relevant. There is much to be said for transparency in any attempt by private interests to obtain special tax reliefs for their own financial advantage. Their Lordships are in general agreement with the observations of the Acting Deemster quoted at paragraph 21 above, but would substitute 'potentially' for 'patently'". (This paragraph 21 is set out at paragraph 2.22 above.)

2.32 "Their Lordships also agree with the Staff of Government Division that it would not be appropriate to impose any conditions on the Commission as to the use of material which the Commission has not yet fully evaluated. In these circumstances the Commission is the guardian of the public interest. It has been given extraordinary powers in order to investigate what Tynwald must have seen as an extraordinary situation. The Chairman of the Commission has already indicated that the use which the Commission will make of any material will

depend on the course and outcome of its investigations. The Commission, having been granted extraordinary powers, must be relied on to exercise them responsibly in the public interest. It would not therefore be right to impose any conditions on the use which the Commission makes of material disclosed to it. The Commission will of course respect the confidentiality of documents produced to it so far as is consistent with its public duty to report. Still less would it be appropriate to consider imposing any conditions on the Lieutenant-Governor, to whom the Commission's report is to be given in the first instance."

ii) <u>The More Detailed Setting</u>

2.33 Against the above summary overall background it is appropriate to explain in more detail, although still for background purposes, how the Commission came to the view that it was necessary to examine taxation issues to ensure that it could report on the matters with which it had been charged, and with the confidence that the investigations had been thorough and comprehensive on all matters which might be regarded as relevant. The next following paragraphs provide such explanation.

2.34 In written evidence to the Commission in June 2002[3] attention was drawn to legislation concerning tourism grants and tax reliefs which were put forward or came into effect at about the same time as the Mount Murray development was seeking and obtaining its early planning permission approvals. This legislation provided a radical change in the taxation laws to the significant benefit of developers of tourism projects. Attention was also drawn to a press cutting[4] containing a statement attributable to Mr Gary Spence, the active representative of the developer, in which it was said that "The availability of tax relief for some of the properties [at Mount Murray] is a key feature of the scheme and follows the Manx Government's introduction of allowances for tourist development in 1990". It appeared that substantial sums of public money might be involved. Concern was expressed that in addition to subversion of the planning process, substantial sums of taxpayers' money may have been provided to the developer.

[3] Mr Karran Document P1 Part II

2.35 Furthermore as part of its researches the Commission had access to and examined files (the Tourism files) from the Department of Tourism.

2.36 These files show that the Douglas office of Pannell Kerr Forster contacted Mr Kelly, the Assessor, in January 1992 with general enquiries about tax capital allowances for tourist premises. A dialogue developed which, by the middle of March 1992, had admittedly become specific to the Mount Murray development. By April 1992 taxation issues were being described as "fundamental to the development" and steadily increasing levels of pressure were being applied directly by the developers themselves and indirectly through Pannell Kerr Forster acting on behalf of the developer. Mr Kennaugh, Deputy Assessor of Income Tax, also became involved. This was in the context of the files showing, from February 1992, detailed discussions between the Department of Tourism and the developer with regard to tax concessions. The correspondence stated that certain matters which would favour the developer had been agreed between the two parties; there were references to legislative action to favour the developer interspersed with references to the developer withdrawing the proposed development if its requirements were not met. The Department of Tourism was of course the government department which strongly and actively supported the development as a tourist proposal of high importance.

2.37 By September 1992 Pannell Kerr Forster was writing to the Assessor seeking, with an understanding that this had already been agreed, an extension of income tax relief by new or revised legislation to reflect the position which they said had been advised to Radcon Village Resorts Limited (who obtained the planning permission in principle for Mount Murray) by the Department of Tourism when reviewing the feasibility of the project. The Tourism files suggested that tourism related Income Tax/Capital Relief Orders which were made between 1991 and 1992 may have been specifically promoted in the Treasury (and advised upon by the Attorney General's Chambers) for the Mount Murray development at the

[4] Mr Karran Document P1 Part II Appendix 2

instigation of the developers. Whether they were, or were not, are matters we cover in detail later.

2.38 The Tourism files also appeared to show that when Orders were in the process of being drafted, there was a direct liaison on the detail of the drafting with Pannell Kerr Forster.

2.39 Subsequently, when the Orders were in operation, the Tourism files indicated that there was very considerable pressure exerted by the developers and those acting on their behalf to obtain certificates of compliance required under those Orders in order to obtain tax relief in respect of the hotel, the hotel extension, and the housing development.

2.40 However, it was apparent from the Tourism files that by themselves they did not provide the full picture so far as taxation matters were concerned, and did not establish with clarity the details of the reasoning, consultations and processes which led to the 1991/1992 Orders and did not establish whether tax reliefs were, or were not, ultimately allowed to the Mount Murray developers.

2.41 Letters on behalf of the Commission were written to the Treasury in May and June 2002 asking for documents relating to taxation matters.

2.42 After detailed correspondence and explanation of the Commission's reasoning (which is covered fully in this Report), and the issue of a summons, the Assessor provided certain files on the 27th June 2002 and subsequently.

2.43 Documents concerning promotion of the material Orders relating to tourism tax relief have also been provided by the Attorney General.

2.44 When these documents were received the Commission indicated in a letter dated 28th June 2002 to the Treasury that the Commission would respect the confidentiality of the tax assessments of the companies and would only make details of these affairs public to the extent that this was necessary, and subject to further consultations with the Treasury.

2.45 Following consideration of this initial evidence the Commission's view was that taxation matters were part of the planning and development history of Mount Murray which was the subject of the Crow Report, that they related to the irregularities reported therein and were linked to the allegations of corruption made in Tynwald. They therefore fell within the scope of the Commission's Inquiry, for reasons which follow.

2.46 The Commission was required by its terms of reference to examine and report on the irregularities referred to by Professor Crow regarding Mount Murray. These irregularities focussed in particular on the granting of a planning permission on the 4th October 1991 following events of May 1991 which, as then seen by the Commission, may have committed the Department of Local Government and the Environment to grant that permission. In order to report fully on the handling by government of these matters it was necessary to look at the irregularities themselves. The Commission had not yet reached firm conclusions, but it did see very considerable pressure on and in the government which appear to have led to two things: (1) the granting of a planning permission, and correspondence and Planning Committee decisions which were not logical in planning terms and procedures, and (2) a contemporaneous legislative process which may have led to financial benefits arising for the Mount Murray developers and the group of companies to which they were associated. In both these aspects the Department of Tourism was a common link, applying pressure to the Department of Local Government and the Environment and to the Treasury, in support of the developer which for its part was threatening to withdraw the whole development if its demands on both issues were not met. The Commission perceived the group of companies behind this and the benefit which appeared to accrue, or at least was sought, as being linked to the dual use (tourism or residential) which was permitted under the 4th October 1991 planning permission, and which has turned out to be residential as opposed to tourism, the latter being the use argument relied on to obtain both the planning permission and tax reliefs. The Commission believed, and believes, it had a responsibility to report (with recommendations) on how this was allowed to happen.

2.47 The negotiation and grant of tax relief is part of the planning and development history which fell within the terms of reference of the Crow Inquiry (although the Crow Report does not make findings in relation to those matters), and therefore, the Commission explained to the courts, fell within the remit of the Commission.

2.48 The Commission recognised that the irregularities identified by Professor Crow were irregularities in the town and country planning system on the Isle of Man. Professor Crow could have, but did not, save as mentioned below, deal with taxation. Yet in order fully to understand those irregularities and make recommendations about them, the Commission needed to understand the reasons for them and the circumstances and context in which they occurred, in particular the full extent of the developers' aspirations for the development in terms of tax relief as well as planning permissions. The two are inextricably linked. The developer seemed to have deliberately sought a planning permission for houses which permitted either tourist or permanent residential use, and one advantage of this was that it contained the possibility (at least) of tax relief being available in relation to all or some of the houses which were not to be in permanent residential use. The decision makers within government seemed unaware of the effects and significance of their decisions during 1991/1992 and did not appreciate the full significance until 1997 or later.

2.49 Following the presentation of our Part One Report the government published Professor Crow's confidential Annex 5. The Commission had not published this Annex because Professor Crow had reiterated to us, with his reasons, that he did not wish for it to be published.[5] We found no loss to the public interest in complying with Professor Crow's wishes because the matters it contained were dealt with in a much more detailed way in our Report.[6] However now that the Report is in the public domain we feel it relevant to draw to attention that there is one sentence which does deal with taxation. In a paragraph[7] which appears designed to allow appreciation of the situation as faced by the Planning Office and its Chief Officers, Professor Crow states that an understanding of Mr

[5] Part One Report para 3.4
[6] Part One Report para 3.4
[7] Crow Report Annex 5 paragraph A5.67

Spence's modus operandi was necessary. In this context, Professor Crow then states in this paragraph "At least as late as February 1993 the issue of the investment allowance for a tourism development was still being discussed, though inconclusively." This statement is incorrect, and therefore the significance of the issue was not appreciated by Professor Crow. This is not intended as any criticism of Professor Crow who would not have had the detailed extent of information which we have had before us.

2.50 The true position was that the developer had by February 1993 succeeded in getting into legislation a very significant widening of tourist tax allowances so that he was later able to say that its overall quantum was significant.[8] It was in fact 50% of the qualifying development costs as widened by Tynwald with the especial objective of assisting the Mount Murray development and following very considerable pressure by the Mount Murray developer that there should be such extension of qualifying costs, including very considerable pressure that certificates, a necessary precondition of this tax relief, be issued in respect of the full housing development. The Order, which was the last in the series to complete the production of this result, was approved by Tynwald in January 1993. Had Professor Crow identified the true position it is reasonable to assume that he would have taken greater account of taxation matters.

2.51 Furthermore if it was the case (and it may or may not have been, the Commission having then reached no firm conclusions) that the planning irregularities were part of a scheme which included as one of its objectives the obtaining of tourism tax reliefs to be used, not by companies trading in tourism (which might not become profitable for some years if at all), but by other companies within the same taxation group which were profitable but not engaged in tourism (e.g. banks) then this would be part of the planning and development history which the Commission was called upon by its terms of reference to review.

[8] Appellants' Case to Privy Council para 113.

2.52 The manner in which these matters were taken forward, the pressures applied to and by civil servants and ministers, the negotiating tactics and the ability, or otherwise, of the government and its civil servants to withstand them, were, and are matters within the remit of this Commission.

2.53 For example, if it should have emerged from the Commission's consideration of taxation matters that the obtaining of taxation reliefs was not an objective of the developers, that no tax relief legislation was promoted with Mount Murray in mind, and that any taxation reliefs obtained were no more than would have applied in the ordinary way, then it was likely, according to the information which the Commission then had, that any recommendations which the Commission might make would be confined to changes within the Department of Local Government and Environment. If it should emerge from the Commission's consideration of taxation matters, that the obtaining of taxation reliefs was an objective of the developers, that this objective was furthered by the planning permission, that tax relief legislation was promoted with Mount Murray specifically in mind at the instigation of the developer, and that tourist tax relief was obtained on property, whether ultimately used for tourism or not, and those tax reliefs were transferred to other companies of the same group not involved in tourism, then it may have been that the Commission's findings and recommendations would be more widely expressed so as to impinge not only on the Department of Local Government and the Environment but also the Department of Tourism, and perhaps the Treasury. These are examples only.

2.54 As indicated earlier (paragraph 2.20) the Commission did consider that the documents provided by the Assessor would provide the final step of the audit trail which would enable the Commission to dispel or confirm the concerns about the tax aspects of Mount Murray. The Commission would, and does, respect commercial confidentiality and would not publish private or confidential information unless the public interest makes that course necessary. However, the Commission did have correspondence which claimed that tax issues were crucial in determining whether the project proceeded, that the developers were exerting pressure and that there was manipulation of government departments.

2.55 The Commission summarised its case to the High Court[9] that taxation matters fell within the terms of reference of the Commission for reasons which are in two categories. The court accepted this case.

a) Taxation matters are part of "the planning and development history of the Mount Murray site" and fell within the terms of reference of the Crow Inquiry and are inextricably linked with the town and country planning irregularities identified in the Crow Report; in order to understand fully those irregularities and make recommendations about them the Commission needed to understand the reasons for them and the circumstances and context in which they occurred, in particular the full extent of the developers' aspirations for the development in terms of tax relief as well as planning permissions.

b) Taxation matters were part of the allegations of corruption to the extent (at least) that it was alleged that the various systems of government became corrupted and failed to provide sufficient resistance to the manipulations and pressures of the developers, their agents and associates.

2.56 As stated above, the appeal court expressly found[10] that the material sought by the Commission relating to tax matters was relevant or might be relevant on the basis explained to it by the Chairman of the Commission in the following terms.

"To examine and report on the irregularities identified in the Crow report and the Government's handling of them necessarily involves, in the view of the Commission, an examination and understanding of the circumstances surrounding and leading up to the irregularities, and why they came about. Any examination of the Government's handling of them cannot conceivably be achieved without such an understanding. It is clear to the Commission that those circumstances have included and involved negotiations to achieve taxation benefits based on presumed tourist uses at Mount Murray. For the reasons explained later, there is no doubt in the Commission's mind that any reference to the planning and development history of Mount Murray must include the history of the planning applications and approvals and the interlinked details of the negotiations for and the grant of tax reliefs that supported the development. In taking that view, the Commission is not stepping outside its terms of reference.

[9] Chairman's Affidavit to the High Court 16.7.2002 paras 70 & 88 (2)

The fact that in his report Professor Crow chose to make no reference to tax matters does not alter the fact that they bear upon, and form part of, the planning and development of this site."

2.57 The Privy Council expressly found that the affidavits of the Chairman of the Commission indicate that the Commission was approaching its task in a responsible and focussed manner.

2.58 So it is the position that the approach of the Commission as summarised here is accepted by the High Court of the Isle of Man (although that court found that it was highly arguable that certain specific documents were, on grounds of statutory interpretation, not subject to production to the Commission), the appeal court of the Isle of Man, and the Judicial Committee of the Privy Council. The latter two courts found fully in favour of the Commission. Thus eight judges have endorsed the Commission's approach to tax matters.

2.59 Notwithstanding this endorsement, the fact is that the litigation has caused serious delays to the Commission's work which for the most part was suspended, in terms of taking and progressing evidence, in September 2002, and if the Commission had not taken the decision to divide its work into two parts, there would have been a really serious delay in presenting what the Commission sees as highly important conclusions and recommendations, especially in relation to planning matters and to the proposed Audit Commission where considerations of reform were already under way. In the event we were able to produce the first Part of our Report at a time when its contents could be taken fully into account without detriment to the public interest. The matters relating to tax did not have quite this urgency and we are of the opinion that the delay which this issue has sustained has not caused any significant public interest harm in not becoming available much earlier had there not been this unsuccessful litigation.

2.60 The Commission has not only been fully vindicated by the courts in its approach, but is satisfied that in its examination of taxation matters it has been able to make

[10] Appeal Court judgement paras 68 and 23

a very thorough investigation of the evidence and all material issues relating to them, and to have clear understanding of the links between taxation and planning matters surrounding the planning and development history of Mount Murray, and to reach clear conclusions on these matters.

2.61 It is pertinent in this background introduction to draw attention to two further matters arising from the proceedings in the courts. First, in their Case to the Privy Council, the Mount Murray Country Club Limited and its associated companies stated that they "fully accept the following: the obtaining of capital allowances by [Mount Murray Country Club Limited] in respect of the parts of the development which did not consist of housing, i.e. the hotel and sports facilities, was a consideration in its decision to proceed with it and that the development might well not have taken place otherwise, [and that] [Mount Murray Country Club Limited] did in fact obtain capital allowances, the quantum of which was "significant and not trivial", in respect of capital expenditure on the hotel and sports facilities, which allowances gave rise to trading losses; these trading losses were to a large extent surrendered by way of group relief to other companies in the same corporate group, thus decreasing their own liability to Manx income tax."

2.62 Second, the Commission in its Case to the Privy Council stated that "It is apparent that the references to corruption include corruptions of the system of government on the Isle of Man in the sense that these systems did not operate as they should have, and in particular whether they failed to resist the manipulations and pressures to which they were subjected by the developers and their various agents and associates." The contrary was argued[11] by Mount Murray Country Club Limited and associated companies in its Case to the Privy Council but the Privy Council gave no indication of disagreement with the Commission's view, and by inference accepted it.[12]

2.63 The reference to corruption as so stated is relevant to the Part Two Report and its consideration of tax matters. The Commission has explained fully in its Part

[11] Case for appellants to Privy Council pages 11 - 16 (including para 56)

One Report[13] its use of the term. Given those reasons the Commission remains of the view that it is entirely appropriate and relevant that it continues to use the term corruption as explained in the Part One Report. The Commission does not agree with those who would wish the term to be restricted to a meaning involving criminal dishonesty nor did the Privy Council.

2.64 Our use of the term "corruption" has been neither unfair nor incorrect. Every person, politician or civil servant, who was in any way connected with relevant events and whom it was possible for the Commission to interview, was interviewed. There was no person with any relevant knowledge of matters and available for interview by the Commission who was not interviewed. The facts, we found, go way beyond simply accidental or inadvertent maladministration. There was, as we have found and reported, a serious and persistent effort by the developer to undermine the planning system of the Isle of Man particularly through the Department of Tourism to the extent that this system was compromised, and those efforts succeeded when they culminated in the planning decision of 4th October 1991.

2.65 It is difficult to find a more accurate statement of what happened than to say that the system was corrupted by those efforts which produced that result. The words have every relevance to what we have found, as fact, after very careful investigation as to what happened. It is important to stress that a report should be read carefully before being commented upon or before conclusions are drawn. One does not have to read the Part One Report very carefully to notice that there is a whole section of the report, as well as a sub-section, which explains the Commission's approach to corruption.

2.66 Furthermore we do not agree that we should avoid reporting what we have found for the reason that the report might not be read very carefully, nor for the reason that our conclusions may be unhelpful or harmful to the image or reputation of the Isle of Man. We would be failing in our duty if we fudged reporting what we found because to do otherwise might harm the image or reputation of the Island.

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[12] Privy Council Reasoning para 27

It might be thought by reasonable, objective bystanders that little harm would actually be done to the Island if the causes of the facts found in the report were tackled with true determination rather than attempt to avoid the reality of the issue by a different, and factually incorrect, approach of regarding the affair as a minor planning matter which is all water under the bridge. It was not, nor is it, a minor planning matter. The Privy Council concluded that Tynwald must have seen the matter as an extraordinary situation.[14] It is the latter approach which might do real harm to the reputation and image of the Isle of Man.

END OF SECTION 2

[13] Ss 4 (ii) and 6
[14] See para 2.32 above