COMPLAINT MADE BY MARTIN BRIDGER

CONCERNING OPERATION TEMPURA

WRITTEN REASONS

HIS EXCELLENCY DUNCAN TAYLOR CBE

GOVERNOR OF THE CAYMAN ISLANDS

7TH MARCH 2011

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CHAPTER 1

INTRODUCTION

1. In August 1997 Barry Victor Randall, the business partner of Desmond Seales, and Editor of the Caribbean Net News was convicted of offences of dishonesty in the Grand Court of the Cayman Islands. In April 2002, the Privy Council (PC) quashed the convictions and invited the Cayman Islands Government to increase its contribution to Randall's costs. This was never done.

2. In November 2003, the CNN (Editor: Seales) carried articles critical of the Attorney General (AG) and Chief Justice (CJ) in their handling of the Randall case. By November 2005, CNN press releases also attacked Kernohan the Commissioner of Police. By December 2006 there was also a breakdown in the relationship between the Cayman Islands Government and Seales/Randall.

3. Between July 2007 and August 2007, letters were published by CNN which were extremely critical of the judiciary, and especially the CJ. The CJ formally asked the police to investigate the campaign in CNN against the judiciary. The police had discussions with the AG and the Solicitor General (SG). Both indicated that there may be a potential offence in relation to undermining the judiciary. However, the police were reluctant to pursue this potential offence.

4. On 31 August 2007 and 3 September 2007, Kernohan and Detective Superintendent Jones tasked Mr. Lyndon Martin and Mr. John Evans (journalists employed by CNN at the time) to enter the offices of Seales at CNN after the offices were closed. The purpose was ostensibly to look for confidential police documents which had been allegedly passed by Deputy Commissioner Ennis to Seales in the course of a corrupt relationship. Kernohan had been advised by the AG that there was insufficient evidence for search warrants to be obtained.

5. When Evans entered the office of Seales on 3 September 2007, he stated he had a second purpose. His close friend, Mr.Justice Henderson had mentioned that both he and the CJ were concerned about the offending press letters and had asked him, **in the course of his employment,** to see if he could discover who the true authors of the letters were.

6. The unofficial search of Seales' office revealed no incriminating evidence and no information about the authorship of the offending letters. By February 2008, Kernohan and Jones were under investigation for the entry into the offices of CNN on 3rd September 2007, without search warrants. The investigation was called Operation Tempura (Tempura) led by Mr. Martin Bridger. In February and March 2008 the CJ refused to grant applications for warrants to search the premises of Kernohan and Jones in respect of the 3rd September entry.

7. On 24 September 2008, on the advice of a non-practising UK barrister, Mr. Martin Polaine, Henderson J was arrested by the Tempura team for misconduct in a public office, for his alleged part in the 3 September 2008 'unofficial' entry into CNN. The CJ visited Henderson J while he was in custody at the police station. On the same date search warrants were obtained from a JP to search Henderson J's home and his office in the Grand Court. The CJ was present during the search of the office.

8. On 25 September 2008 the CJ released his written judgments in respect of the February and March 2008 ex parte search warrant applications, to the lawyers acting on behalf of Henderson J. He then released the ex parte judgments into the public domain without giving advance notification to the Tempura team.

9. In October 2008, Henderson J brought judicial review proceedings in respect of his arrest and the issue of the search warrants. In November 2008 Mr.Justice Cresswell (Cresswell J) set aside the search warrants on the basis that they had been obtained in circumstances of grave non-disclosure by the investigating officers which amounted to bad faith on the part of Bridger. The judge also indicated that there was no evidence at all to justify Henderson J's arrest and was critical of the involvement of Polaine.

10. In November 2008, the AG conceded during further judicial review proceedings, that the arrest of Henderson J had been unlawful and approximately £1.2 million was paid in damages to Henderson J in January 2009.

11. On 23 March 2009 Henderson J (having received his damages) made a complaint against Polaine for professional misconduct, to the Bar Council of England and Wales. The complaint was heard on 9 December 2009 when Polaine admitted seven charges of professional misconduct and was disbarred as a barrister.

12. The Cayman Islands is the fifth largest financial centre in the world. It is clear from the overview of the above events that between 2007 and 2009 a number of serious and unusual events occurred in the Islands which had the potential of damaging the international reputation of the Islands. These were:

(a) a campaign in the CNN press in 2007 against the judiciary and the CJ which was aimed at seriously undermining the judiciary of the Islands;

(b) a police sponsored entry into the offices of the editor of a leading national newspaper without a search warrant, in circumstances where the AG had advised that there was no basis in law for warrants to be obtained;

(c) the unlawful arrest of a Grand Court Judge, coupled with the unlawful search of his home and office located within the court building .

13. It is against this background that in June 2010, Polaine (Amicus Legal Consultants Ltd) in an undated document headed "Operation Tempura Report" (the report) made a number of complaints to the Foreign and

Commonwealth Office (FCO) in London. His complaints were about the treatment he received from the Caymanian judicial and senior Government Legal Officers between August 2008 and 17 November 2008, when he was the legal adviser to the former Governor of the Cayman Islands, Mr. Stuart Jack, CVO (Governor Jack), in respect of Operation Tempura.

14. On 3 September 2010, by way of e-mail, Bridger also wrote to the head of the Governor's office, Mr. Steve Moore, informing him that he had drafted parts of the report and that he wished to be considered as a complainant. Bridger's status as a joint complainant was accepted in an e-mail written to Bridger in early September 2010.

15. By e-mail dated 11 November 2010, Polaine withdrew himself as a complainant. By e-mail dated 14 November 2010 Bridger took sole ownership of the complaint.

16. The complaints set out in the report can be summarised as follows:

(1) The conduct of the CJ and Henderson J in improperly seeking to gain access to information they believed was held at the offices of the editor of CNN.

(2) The attempt by the CJ and Henderson J to illegitimately prevent the Tempura team from investigating allegations of corruption by

(a) the CJ refusing to grant legitimate search warrants;

(b) Henderson J refusing to submit to formal police questioning;

(c) the CJ supporting Henderson J's refusal to submit to formal police questioning;

(d) the CJ visiting Henderson J at the police station, threatening police officers during the search of Henderson J's court office, and releasing an ex parte judgment containing sensitive information, without giving the Tempura team the opportunity to make representations.

(3) The conduct of Cresswell J, when sitting as a judge of the Grand Court, in making adverse comments and improper judicial rulings during the Henderson J judicial review proceedings. In essence, the report implies there was a judicial conspiracy between Cresswell J, Henderson J and the CJ to protect the position of the CJ in respect of his involvement in the Tempura investigation; and to protect the position of Henderson J in respect of his involvement in the 3 September 2008 events.

(4) The conduct of the AG in concluding that the offence of misconduct in public office was not an arrestable offence under Cayman law (when a judge was arrested) contrary to his previously expressed view which had led to two police officers being arrested and charged for this offence without a warrant. The conduct of the AG in failing to explain his apparent change of opinion to Polaine/Bridger when requested to do so; and the failure of the AG to explain to Cresswell J during the Henderson Judicial Review proceedings, the difficulties in interpreting

the law, when Cresswell J was making criticism on this subject in respect of the roles of Polaine and Bridger in the arrest of Henderson J.

(5) The conduct and involvement of Larry Covington (the FCO Law Enforcement Adviser for the Caribbean) in the events of the 3 September 2007 entry. Bridger made further complaints about Covington in a video satellite conference meeting held with Steve Moore, the Governor's Head of Office, on 17th December 2010.

The Role of the Governor

17. Section 31 (1) of the Cayman Islands Constitution Order 2009 states: "the Governor shall have such functions as are prescribed by this Constitution and any other law, and such other functions as Her Majesty may from time to time be pleased to assign to him or her in exercise of the Royal prerogative". Section 31 (2) provides that "the Governor shall exercise his or her functions in accordance with this Constitution and any other law..."

18. Section 31 (3) provides: that "in the exercise of his or her functions under subsection (2) the Governor shall endeavour to promote good governance and to act in the best interests of the Cayman Islands so far as such interests are consistent with the interests of the United Kingdom.

19. The Governor therefore when receiving complaints from any source has as his central function the promotion of good governance and to act in the best interests of the Cayman Islands. However where complaints are made against

the judiciary, the Governor's powers are limited by sections 96 (2) to 96 (4) of the Constitution. These provisions state that a "judge of the Grand Court may be removed from office **only** for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour". If the Governor considers that the question of removing a judge of the Grand Court from office ought to be investigated then the Governor must refer the matter to the Judicial and Legal Services Commission (the Commission). Similar constitutional provisions apply to complaints made against the Attorney General: see section 106 (7).

20. If a complaint is made to the Governor about a judge or the Attorney General, the Governor must first be satisfied that the complaint has prima facie basis in fact, and must be sufficiently serious to warrant representation to the Commission. These provisions are the equivalent of impeachment proceedings and should only be considered if there are serious allegations: see Rees v. Crane [1994] 2 A.C. 173. The Governor when he receives complaints against the judiciary acts in a quasi judicial function in deciding whether they have any merit for further consideration by the Commission. He must preserve his "judicial" independence from any interference from any source, whether the complainant or those complained against, whilst he completes this task: see Re: Madam Justice Levers [2010] UKPC 24, at para.31

21. If a Governor receives complaints against the judiciary or the Attorney General and he considers that such complaints do not warrant impeachment proceedings then he must dismiss such complaints summarily. The standard is

a very high one. A definition of misbehaviour was set out by the Privy Council in Lawrence v Attorney General of Grenada [2007] 1 WLR 1474:

(a) whether the conduct affects directly the judge's ability to carry out the duties and discharge the functions of the office of judge;

(b) whether the conduct may affect the perception of others as to the judge's ability to do so;

(c) whether to allow the judge to continue in office and continue to perform those duties would be perceived as inimical to the interests of the proper functioning of the judiciary;

(d) whether the office of judge would be brought into disrepute as a result of the conduct.

22. A further limitation on the power of the Governor to consider complaints made against the judiciary is the rule of law and separation of powers. In order to avoid any interference with the independence of the judiciary, when considering complaints about the behaviour of a judge during court proceedings, a clear distinction must always be drawn between judicial errors/decisions that are challengeable through the court process by way of appeal and the personal conduct of the judge, for example, rude and inappropriate remarks or behaviour that falls within the remit of personal misbehaviour. The Governor cannot interfere with, or make comment upon, judicial decisions that are challengeable through the court process.

23. However when the court process has concluded any concerns about the correctness of a judicial decision may be referred by the Governor to the AG

for his advice as to whether any future statutory intervention is required to cover the situation which may have arisen in any particular case.

24. The limitations expressed above in the Governor's power must be kept firmly in mind when considering the complaints which have been made against the judiciary and the Attorney General in this particular matter.

25. A decision has been made to summarily dismiss all the complaints which have been made. There is no legal obligation on the Governor to provide written reasons when a complaint is summarily dismissed at the preliminary stage before any investigation has taken place: Public Service Board of New South Wales v. Osmond (1986) 159 C.L.R 656; R v. Civil Service Appeal Board ex p. Cunningham [1992] I.C.R.816

26. However in Padfield v. Minister of Agriculture [1968] AC 997 the House of Lords had to consider the position where a Minister does not give reasons. Lord Reid stated: (page 1032:

"It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act".

Lord Hodson stated: (page 1049:

"It has been suggested that the reasons given by the Minister need not and should not be examined closely for he need give no reason at all in the exercise of his discretion. True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation. As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest."

- Lord Pearce stated (page 1053):

"It is quite clear from the Act in question that the Minister is intended to have some duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) 'I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation".... I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions"

- Lord Upjohn stated (page 1061)

"My Lords. I would only add this: that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to a conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly".

27. The statements by the House of Lords in the Padfield case have been followed in R v. Secretary of State For Trade & Industry (1989) 5 B.C.C 266 where Watkins LJ stated (page 281):

"In my judgment the minister has as I have already said provided us with no reasons. He has not allowed us to look into his mind so as to enable us to know why it is that he did not send this matter off to the MCC, that expert body, in order that he should receive from the member of it the advice following investigation which they are peculiarly in a position to give; they, as I have said being particularly qualified in that respect not only to investigate but to advise in the public interest. In the absence of a reason, I am prepared to assume that the minister did not have a reason which could be called in any way acceptable for not referring this matter to the MMC. **In the absence of reasons**, his decision not to do so is, I consider, irrational...no reasonable minister could have reached the decision which he did"

28. In e-mails dated 24, 27 January and 3, 11 February, 2011Bridger has requested written reasons so that he can consider his legal position.. In the circumstances of this matter the complainant is entitled to some explanation as to why his complaints have been dismissed summarily; and why none of his complaints made against the judiciary and the Attorney General, are to be referred for further investigation by the Judicial and Legal Services

Commission. In R v. Lancashire County Council ex parte Hudleston [1986] 2 All E.R. 941 Parker LJ stated (p947):

" It can be left to the Divisional Court to decide in each case whether the respondent's answer is or is not adequate and, if not, what should be done. It has power to order discovery or interrogatories or cross examination under RSC Ord 53 r8. Any shortcomings in the authority's answer might be dealt with by the exercise o such power. Alternatively, the court might simply decide that the applicant has made out a prima facie case and that, the authority having produced no sufficient answer, relief should be granted. In the vast majority of cases authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. **I agree, therefore, that when challenged they should set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge**". [emphasis added]

29. In R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 said (at page 560):

"Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or that after it is taken, with a view to procuring its modification or both".

The Privy Council expressed this principle in Kanda v. Government of Malaya [1962] AC 322 at page 337; and it was adopted by Turner J in R v. The Criminal Injuries Compensation Authority & others 2000 WL 989494 where he stated (page 31 transcript):

"It is an elementary principle of procedural fairness, as was made clear in both Kandala and Doody, any person who may be adversely affected by a decision should be in a position effectively to prepare their own case as well as to meet the case presented by the opposing party. The opposing party here is the Authority itself....One of the consequences of the failure of the Board/Authority to provide reasons for its decision, together with access to the evidence, or at least a gist of it, is that a claimant may be persuaded that he should continue to prosecute his claim for the purpose of discovering the basis upon which his claim has been rejected. A reasoned decision may well persuade a claimant that he has no reasonable prospect of success and therefore will not pursue his claim. In such a case, not only the claimant, but also the Board/Authority will have been put to inconvenience and expense which could have been avoided. This is an example of bad administration.".

30. The complaints made in this matter are serious, complex and have had some limited exposure in the Cayman and United Kingdom press. In the circumstances of this case it is consistent with the Governor's primary duty to

promote good governance of the Cayman Islands to provide written reasons for limited circulation to the complainant, the CJ (as head of the judiciary), and the AG (as custodian of the Constitution and legal adviser to the Governor in Cabinet). In Padfield v. Minister of Agriculture [1968] AC 997 Lord Denning MR, in the Court of Appeal, put the matter this way: (page 1066F:

"It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied....it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrieved...".

For purposes of this report, for convenience and without disrespect, individuals are referred to by their surname.

CHAPTER 2

BACKGROUND

Events between August 1997 and August 2007

31. On 8 August 1997, Randall, Editor of the Caribbean Net News, and the business partner of Desmond Seales (editor of Cayman Net News: CNN), was convicted of four counts of theft and one of obtaining a valuable security by deception. He was sentenced to 4 ½ years imprisonment and ordered to pay $500,000 in compensation. He was prosecuted by Richard Small, who led Samuel Bulgin (current AG). The trial was presided over by Mr. Justice Williams.

32. On 16 April 2002 the PC quashed the convictions of Randall. The main ground of appeal was that the trial was conducted in a manner which was grossly and fundamentally unfair. The source of the unfairness was the conduct of prosecution counsel, Richard Small, and the failure of the trial judge, Williams J, from restraining the conduct of prosecution counsel. The PC criticised the trial judge and prosecution counsel, and invited the Cayman Islands Government to increase its contribution to Randall's costs. This was never done.

33. In November 2003 CNN carried articles critical of the AG and CJ in their handling of the Randall case. The articles concerned the failure of Samuel Bulgin to intervene when his leading trial barrister was behaving in a way which the PC criticised; the failure of the Cayman Islands Government to reimburse Randall all his costs incurred in appealing successfully to the PC;

and the refusal to grant Randall legal aid so that he could bring civil proceedings for compensation arising out of his wrongful conviction. These articles were responded to by the AG and it is clear from the articles that there was a breakdown in the relationship between the AG and CNN in November 2003: **Core Bundle D, Tab 21, pages 2-6.**

34. By November 2005, CNN was also attacking Kernohan, for having an inappropriate relationship with a protected witness in a murder trial which took place in England before he became Commissioner of Police in the Cayman Islands. **Core Bundle D, Tab 21, pages** 7-8. By 26 July 2007 Kernohan referring to the CNN press reports about his involvement in the purchase of a police helicopter was writing to Simon Tonge (Head of the Governor's Office) about CNN: "This is just the type of rubbish that is sapping the life out of me": **Core Bundle D, Tab 21, page** 20.

35. By December 2006 CNN, and Seales/Randall were also in a serious dispute with the Cayman Islands Government: **Core Bundle D, Tab 21, pages 8-11.**

36. It is clear from the above events that by 2007 CNN had printed several articles highly critical of the Government, the Commissioner of Police, the Attorney General, and the Chief Justice. Set against this background, between June 2007 and August 2007, letters were published by CNN which were specifically critical of the judiciary, and especially the CJ. The letters took issue with the appointment of judges from other jurisdictions, the unwillingness of the Cayman Islands' Judiciary to be robust when faced with

allegations of misuse of power by the executive; and the appointment of a member of the court staff seeming to be in the gift of the CJ, without transparency in the selection process. There were also complaints about the availability of legal aid in Cayman. A summary of the more offensive parts of the letters is for convenience set out below:

DATE	AUTHOR	ASSERTION
3 July 2007	Thelma Turpin	Visiting judges are selected out of favouritism and behave in an 'injudicious manner' Favouritism and breach of law in hiring of Legal Analyst Judiciary lacks leadership and administration
12 July 2007	Hoyt T C. Williams	Behaviour of visiting judges is questionable
22 July 2007	W. Scott Jeffers	People in judicial system should be investigated for misconduct or asked to step down
23 July 2007	H. Irvin Jackson	Suspicious circumstances in hiring CJ committed abuse of power & breach of natural justice, causing loss of confidence in justice system; "people" may have to be removed from office
29 July 2007	Leticia Barton	Judiciary is now a laughingstock; public has lost confidence Injudicious behaviour of visiting judges; inquiry needed into abuse of power & CJ using courts as his "private domain" etc
13 August 2007	Helena Leslie	CJ a "mediocrity"; investigation into justice system needed.

37. On 23 July 2007, the PC handed down a judgment allowing the appeal of Dr.Astely McLaughlin and ordered the Cayman Islands Government to pay arrears of salary and pension contributions from April 1999, following what had earlier been held to be his unfair dismissal from government service in 1998. The PC's decision was critical of the CJ and the CICA. The decision sparked animosity between CNN and Ramon Alberga QC: **Core Bundle D, Tab 21, pages 17-19, 21-23, 28-30.**

38. The CNN letter dated 3 July 2007, singled out the CJ for criticism which prompted an internal memo from Henderson J to the CJ on 3 July 2007 by way of e-mail. As a result between 3 July and 5 July 2007 the CJ made requests to the police to launch an investigation into the published letters

39. On 5 July 2007 Ennis wrote to Kernohan in relation to the Thelma Turpin letter dated 3 July 2007 in the following terms:

"Commissioner,

FYI:

Discussed at today's Gold Command meeting by MN (Michael Needham) who was asked to conduct a 'discrete' enquiry into this, which [we] may discuss due to the expectations of the 'requesting party' and the implications to pursue/not to pursue-the latter is recommended option but if adopted will require sensitive notification"

40. On 30 July 2007, the CJ wrote a Memorandum to Kernohan, copied to the AG, the relevant part of which read: **Core Bundle D, Tab 21, page** 25-27.

"2. I must also raise with you the concern I raised with Supt.Needham in respect of a seeming campaign in the Cayman Net News against the judiciary. I have discussed the matter with the Hon. Attorney General who knows all the relevant background. I also enclose copies of the various editorials and articles published in the Net News over the past four weeks. My own suspicion is that these letters are fictitious; written by one person in particular whose agenda it is to discredit me and thus the judiciary as a whole. I ask that the investigation is progressed with a report to the Hon.Attorney General and myself. The officer assigned should speak to the Hon.Attorney General. I will be away from the islands until 13th August 2007...."

The memo is signed by the CJ and under his signature is a handwritten note from Kernohan to Ennis:

"please consider the context of such an enquiry. It may be the case that it could be considered under the category of 'National Security' in relation to undermining of the criminal process. I would be interested in your views please".

41. On 30 July 2007 Marilyn Burrell, an articled clerk for the SG, produced a memorandum which set out the offence of scandalising the judiciary and the case law supporting such an offence: **Core Bundle D, Tab 21, pages** 27-28.

42. On 9 August 2007, Kernohan informed Ennis.

"CJ enquiry"

The AG telephoned me this afternoon re the CJ's letter and request. We had a brief discussion during which, amongst other things, we discussed potential

offences involved in the circumstances. He indicated that there may be a potential offence in relation to undermining the judiciary. Are you aware of such an offence?"

43. On 14 August 2007, Kernohan's personal assistant sent Jones a copy of CJ's memorandum of 30 July for his comments: **Core Bundle D, Tab 21, page** 30-31.

44. On 15 August 2007, Jones wrote to Kernohan stating that the letters whilst critical of the judiciary did not constitute any criminal offence under the penal code and were not a threat to National Security as suggested by the CJ. Jones suggested that the AG should be asked to give advice in writing. Kernohan replied on the same date stating that he was going to arrange a meeting with the AG to discuss the matter further

45. On 19 August 2007, Acting DS Julian Lewis wrote a report stating:"The articles do not suggest any threat against the CJ or the judiciary and as such I do not recommend any action be taken against the parties or altering the CJ's or any other member of the judiciary's security conditions"

Core Bundle D, Tab 21, page 33. This observation by Lewis did not address the CJ's concern about the authorship of the letters, the fact that there was a campaign in the press personally directed at the CJ and the judiciary on a small island, and the potential offence of scandalising the judiciary.

46. On 27 August 2007, Kernohan wrote a memo to Jones stating: "Re: Chief Justice's memo- I refer to the above subject and meeting with the Acting Attorney General, Ms Cheryl Richards on Friday 24 August 2007. Following our discussion it is clear that the acting AG is of the opinion that there has been a potential infringement of the law and you will have noted that she is going to provide an opinion on that. We should progress the investigation covertly at this stage and then following the result of those enquires consider our next steps. Please keep me updated on progress, thank you".

47. On 19 September 2007 Jones sent an e-mail to Kernohan's PA (Faye Kulcheski) stating: "Re Cayman Net News articles - Faye, The CoP and myself met with the Sol Gen to discuss this. She promised to detail alleged offences disclosed but I haven't heard anything since. Both the CoP and myself doubt whether this warrants investigation. I have previously responded to this effect. Regards JJ".

48. On 24 September and 8 October 2007, Faye Kulcheski sent e-mails to the SG chasing the legal opinion she had promised to give in respect of the letters criticising the judiciary: **Core Bundle D, Tab 21, page** 42

49. On 11 October 2007 the police had a telephone call with the CJ in which he said he had made an official complaint in writing and in his opinion the letters in question constituted an offence under the Penal Code. He alluded to the fact that the offence may be difficult to prove, but the least he expected, was a response from the police whereby he would be assured that there was

something on record in the event there was a future recurrence: **Core Bundle D, Tab 21, pages** 42-43.

50. On 12 October 2007 the SG sent an e-mail to Faye stating:

"Re: Contempt of Court. Dear Faye, I mentioned during the meeting that we had already done some initial research on the matter which though not definitive did provide some assistance. I attach copies of the material obtained. Kind regards": **Core Bundle D, Tab 21, page** 44

51. It is not clear what material the SG provided the police with. However if it was the material contained in the Memorandum of the Articled Clerk Burrell dated 30 July 2007, then the police had a legal basis to carry out an investigation as requested by the CJ.

52. On 24 October 2007, Kernohan wrote to Jones stating

"Further to our meeting on 18th October 2007 with the Chief Justice, I would ask that this matter be held in abeyance pending publication of any further articles respecting the Judiciary"

53. In a witness statement dated 24 October 2007 Jones stated:

"I was aware that the Chief Justice had sought a police investigation following a series of articles and letters in the CNN that were critical of him. It was the Chief Justice's view that these articles and letters potentially undermined the confidence in the judicial system which constituted an offence. Following discussions with the Solicitor General between the Commissioner and myself an investigation was not launched but we were made aware that the Chief Justice and the Attorney General both felt an investigation was warranted... "

54. On 5 November 2007 an internal report was made by Jones to Acting Detective Sergeant Lewis, in relation to the authorship of the offending letters. The contents of the report supported the CJ's contention that the authors of the offending letters might be fictitious. There is no evidence that this report was given to the AG or the CJ.

[redacted]

56. In January 2008 the AG during the Grand Court opening made comments about punishing those who criticised the judiciary. This led to a letter appearing in CNN on 29 January 2008, attacking the AG for his comments: see: **Core Bundle D, Tab 21, page** 50.

57. When Seales was asked on 24 September 2008, about the offending letters and a potential link with the Randall case, he accepted that there had been some hostility between Randall and the CJ, but he made the point that that was some time ago. He also denied that he or Randall was in any way involved in orchestrating the campaign in the press with the letters: **Core Bundle D, Tab 21, page 80**. Randall in a memorandum handed to Bridger on 25 September 2008 also denied being involved in orchestrating the campaign in the press with the letters.

Scandalising the Judiciary

58. In R v. Gray [1900] 2 Q.B. 36 at 40 Lord Russell stated:

"Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke L.C. characterised as 'scandalising a court or a judge' (*In re Read and Huggonson* (1742) 2 Atk 469). That description of that class of contempt is to be taken subject to one and an important qualification. Judges and court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as a contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen".

59. In Badry v DPP [1983] 2 AC 297 at 304C the PC stated of Lord Russell's qualification in Gray:

"This qualification must be considered to have been amplified and emphasised, though not altered, by the famous passage in Lord Atkin's opinion when he gave the advice of the Board in *Ambard v Attorney-General for Trinidad and Tobago* [1936] A.C. 322, 335:

'But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from **imputing improper motives** to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and **not acting in malice or attempting to impair the administration of justice**, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

(Emphasis added).

60. In Ahnee v DPP [1999] 2 AC 294 at 305H the PC stated:

"Their Lordships have already concluded the offence of scandalising the court exists in principle to protect the administration of justice. That leaves the question whether the offence is reasonably justifiable in a democratic society. In England such proceedings are rare and none has been successfully brought for more than 60 years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. **The need for the offence of scandalising the court on a small island is greater**: *see Feldman, Civil Liberties & Human Rights in England and Wales (1993, pp746-747; Barendt, Freedom of Speech (1985), pp218-219.* Moreover it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge

unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. **There must be a real risk of undermining public confidence in the administration of justice**. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of criticising, in good faith, in private or public, the public act done in the seat of justice".

(Emphasis added).

Summary

61. By July 2007 there was legitimate concern by the Cayman Islands judiciary as to the propriety of letters criticising the judiciary appearing in CNN. The CJ had formally drawn this concern to the attention of the police and asked them to investigate and report back to the AG and himself. The AG and the SG indicated that the letters might constitute the offence of scandalising the judiciary. Having considered the background evidence and in particular the investigation report of Jones dated 5 November 2007 into the authorship of the letters there was sufficient evidence for the RCIPS to fully investigate the authorship of the letters with CNN and Seales. Such an investigation would have been sensitive, maybe even unpopular, since it involved a leading national paper and a vocal editor. Proving such an offence might have been difficult as acknowledged by the CJ. However the contents of the letters were damaging and did potentially constitute a campaign to undermine the confidence of the public in the judiciary **if** they were indeed fictitious. The

RCIPS also had the tacit support of the CJ, the AG, and the SG. The police in their deliberations appeared to overlook the fact that the Cayman Islands is a small island, has significant importance in the financial world, and its small judiciary is less able to withstand a campaign of potentially fictitious criticism, than a much larger judiciary such as exists in the UK.

The Lyndon Martin allegations: August 2007

62. By the end of August 2007 the police had not investigated the potential offence and had not reported back to the CJ. Therefore by the end of August 2007 the judiciary, Kernohan, and the Cayman Islands Government had been the subject of the press reports of CNN which may have given an incentive for animosity against the newspaper and its editor. One other party who also had an incentive for animosity during this period was Evans. On 26 July 2007, Evans claimed that his story regarding a police helicopter had been re-written to the detriment of Kernohan suggesting that the Commissioner would himself be flying it. Evans expressed himself in these terms:

"The story was re-jigged without my knowledge and without me being consulted. The result is that I have just told CNN that I will not be renewing my work permit in September-I am livid!!!": see: **Core Bundle D, Tab 21, page** 20

63. Against this background of potential animosity against CNN and its editor, on 11 August 2007 Martin, a former member of the Legislative Assembly and a senior journalist employed by CNN met with Dixon and alleged that Ennis, over a period of two years (since October 2005), had systematically leaked

sensitive and confidential police information to Seales, potentially compromising ongoing police operations, and thereby endangering the lives of police officers. The leaked information was said to be highly confidential minutes of meetings of the highest level of the RCIPS Command; and classified police information by way of e-mails. Seales, it was alleged, had been using that information for the economic advantage of his publication or even worse, for dissemination to certain criminal associations whom he wished to inform about confidential police operations. For example, Martin stated that Seales had many criminal contacts and conversed regularly with Sheldon Brown a convicted and notorious criminal who was at the time serving a prison sentence for attempted murder: statement of Dixon dated 21.9.07.

64. Martin was of the opinion that Ennis was attempting to undermine the credibility of Kernohan and Dixon in order that Ennis could take over the position of Commissioner of Police. Martin met with Dixon because they were personal friends.

65. On 13 August 2007, Kernohan directed Dixon to establish from Martin whether he could provide any intelligence or supportive evidence of his allegation, and whether he was prepared to come forward as a witness. On 14 August 2007 Dixon informed Kernohan that Martin was prepared to provide documentary evidence of his allegations and also a statement, but would not provide open testimony and wished to remain anonymous.

66. On 15 August 2007, Kernohan received a telephone call from the leader of the opposition, McKeeva Bush (Bush), wishing to inform him of a "leak in the senior ranks of the RCIPS", who was allegedly providing sensitive information to the media. Kernohan met Bush at the Ritz Carlton Hotel that day and Bush advised him that his understanding was that the leak was Ennis and this information he said was third hand from an associate.

67. On 16 August 2007, Kernohan met with Jones and updated him of the emerging allegations and advised him that he (Jones) may be required to undertake an initial investigation into the matter. Kernohan also informed him that corroboration in the form of documentary evidence was being sought prior to any decisions being made as to what action to take. Later that day Kernohan was introduced to Martin by Dixon and over a period of 1 ½ hours outlined the information he had about the activities of Ennis in passing RCIPS confidential and sensitive information to Seales. Kernohan told Martin that documentary proof would be necessary to corroborate his allegations. Martin replied that there may be some isolated examples of e-mails but that most items are routinely destroyed to protect the sources of CNN. He said he would be able to make a copy of the information if it could be found. Martin indicated he would produce a detailed written statement. Martin stated that there was a second person who could provide corroboration of some of the details of the relationship between Ennis and Seales. That person was Evans, a journalist at CNN.

68. On 17 August 2007, Kernohan provided Covington with a confidential memorandum outlining therein, the allegations, options and the need to obtain corroboration and sought Covington's advice. At that time Covington agreed to take on a primary role in order to give an independent oversight.

69. On 23 August 2007, Kernohan met with Evans and received a two paged witness statement from Martin dated 22 August 2007. The salient part of the statement was that the information provided by Ennis was primarily an orchestrated slander campaign against Kernohan and Dixon and contained personal information relating to both, as well as information about their handling of certain cases and operational issues. Martin provided examples of the information provided by Ennis as follows:

(a) Information on the procurement of a helicopter for RCIPS and the personal involvement of Kernohan;

(b) Cases were being removed from investigating officers by Dixon to interfere with the investigation;

(c) Dixon was not complying with a maintenance order from the court for a child;

(d) Details of an operation to be conducted in West Bay by the Drug Task Force;

(e) Details of the meeting between the Auditor General and the Commissioner on the Turtle Farm investigation;

(f) Dates and times of certain operations;

(g) Minutes of the Commissioner of Police meeting with inspectors [Command Team] with emphasis put on certain items.

70. The witness statement did not contain the same detail as verbally communicated in the 16 August meeting and was not supported by any corroborative documents.

71. Evans also provided a one page witness statement on 23 August 2007 which corroborated Ennis' involvement in providing information to the CNN, particularly in relation to the procurement of the helicopter and Ennis' attempts to discredit its purchase and requirement for it in the Cayman Islands.

72. On 27 August 2008, Dixon informed Kernohan that Martin had told him that he (Martin) had seen a three inch box file containing Ennis/Seales e-mail traffic in the desk of Seales. Kernohan states that he also received a call from Martin in which he (Martin) told him "Ennis providing this type of information was going to result in an officer being hurt or killed". That same day Kernohan stated that he met with Governor Jack and the AG and told them both of the existence of the box file. They discussed obtaining documentary proof by copying part of the file or by a warrant to seize it.

73. On the same date, Covington wrote to Governor Jack informing him he was privy to the Martin/Evans disclosures and recommended an urgent conference to take place between Governor Jack, the AG, and Kernohan to:

(a) commence a criminal investigation against Ennis and Seales;

(b) the obtaining of warrants to seize potential evidence by searching the premises of Ennis and Seales;

(c) the use of Martin and Evans as witnesses;

(d) the appointment of an outside police force to carry out the investigation (Metropolitan Police Service recommended)

74. On 28 August 2007, Martin provided a further three page letter addressed to Governor Jack, in which he repeated the earlier allegations and goes on to submit "from memory", detailed accounts of at least ten incidents in which he claimed to have seen actual High Level Police Command minutes of meetings and several occasions in which he described "we were made aware of particular live operations" by the RCIPS "before they even took place". He ends by stating "I have provided a recount of instances that I recall. Hard copy can be obtained to substantiate these claims **but at a risk. I will more than certainly lose my employ over what has already transpired, and I am reluctant to take any further risks.** I am happy to discuss any of these matters in person with you". [Emphasis added].

75. On the same day, 28 August 2007, Kernohan met with Governor Jack and the AG. The AG advised that there was insufficient 'legal basis to justify an application for and the issue of a search warrant': Kernohan wrote a letter to Covington setting out the reasons why he thought the AG might be wrong in his preliminary opinion.

76. On 29 August 2007, a further meeting took place between Kernohan, Governor Jack, and the AG. The AG provided further written advice. Having been told that information relating to planned police drugs raids had been

passed by Ennis to CNN the AG advised that "there may be a basis for an application for a search warrant" directed at premises associated with Ennis, but ultimately this was a matter for the professional judgment of an experienced Senior Officer who would have seen all relevant material and would be able to give evidence on oath. The AG advised that "although the application may be made to a Justice of the Peace, given the seriousness of this matter it is preferable that the application be made to a Magistrate or Judge"

77. The AG confirmed that as far as CNN was concerned no criminal offences appeared to him to be made out and therefore there did not appear to be any basis for a search warrant. However the question of whether there was a basis for applying for a search warrant was ultimately an operational matter for an experienced senior police officer. The AG warned that to conduct a search on the premises of a 'media entity requires extreme caution':

78. Kernohan wrote to Covington on 29 August 2007 updating him on his meeting with the AG and stating that he wished to take a step back from the matter and asked whether Covington would consider stepping in until the arrival of the investigation team.

79. Following the AG's advice Kernohan met with Jones on 29 August 2007. They discussed that an important element was the lack of any documentary proof at that stage to corroborate the allegations and concluded that such documentary proof was "vital" to prove or disprove the allegations".

Kernohan directed Jones to begin an investigation and appointed him as the operational head. Jones formed the view that the information provided by Martin contained insufficient detail to make an informed decision in respect of a search warrant: **Core Bundle D, Tab 21, page 35**

80. On 30 August 2007, Kernohan met with Martin and Jones. In the presence of Kernohan, Jones asked Martin if he could get access to the box file of documents allegedly kept by Seales in his desk. Martin said he could get copies the following day when Seales was in Cayman Brac. A detailed witness statement was drafted from information obtained from Martin on 31 August 2007 by Jones. The statement remains unsigned but includes the following:

"I am able to confirm that the CNN receives proprietary (sic) from Deputy Commissioner Ennis. I know this information to be true as a result of being copied in on e-mails and information given to me by Mr.Seales who has told me that this source is Mr.Ennis. This information can be confirmed by Mr.John Evans who is a journalist employed by CNN. I have seen e-mails from Mr.Ennis that have shown his name in the address bar and I think there is a combination of the number "456" in his e-mail address which is with the Yahoo service provider. On many occasions I have seen documents which have been scanned and attached to the e-mail. These documents have often contained hand written comments alongside typed text, alerting Mr.Seales to issues of interest for exploitation. Mr.Seales normally deletes all e-mail communications at the earliest opportunity after use. However, I know he retained a file of hard copy of documents received from Mr.Ennis. I have personally seen this file which is kept in Mr.Seales' office. I can provide the following details of information provided by Mr.Ennis. The "Gold Command" minutes detailing confidential discussions had by the Commissioner and his commanding officers were received on a regular basis. They were formatted in a grid fashion with actions allocated to individuals identified by initials. These document were obviously scanned and often contained handwritten annotations, I presume by the person who sent them"

81. The statement went on to recount some of the details of the actual contents of Gold Command Minutes which Martin claimed to have seen. Many of these details were in fact details which could only have been obtained from sight of Gold Command Minutes. These details could have been obtained by Martin from sight of a set of Gold Command Minutes which had been inadvertently released to the media by Deborah Denis, the Public Relations Officer of the RCIPS, on 16 July 2007.

The Entry into the office of Seales

82. On Friday 31st August 2007, Kernohan wrote to Covington stating:

"We have been standing by today (Friday) waiting to hear from the source with respect to providing the documentary evidence. It is clear that he is reticent to provide the documents. His position is that he is 'conflicted' with regard to removing the documents from his employer's office". Kernohan goes on to state that Jones was dealing with the matter and "I am effectively out of the loop other than acting as an initial contact by phone for the source and John Jones".

83. Kernohan agreed to this 'unofficial' search even though he must have known at the time it was unlikely Ennis was in a corrupt relationship with Seales, because Ennis was in a legal dispute with Seales and had asked Kernohan for legal funding to pursue that dispute.

84. According to Jones, Martin appeared very confident that copies of the relevant documentation could be obtained on 31 August 2007. However it would appear that any attempt to enter the offices of CNN on 31 August 2007 for

these purposes was unsuccessful. Martin later reported to Kernohan that he was unable to obtain copies and Jones' statement summarises Martin's position as follows:

"On Monday 3rd September 2007, I enquired of the Commissioner as to whether Mr.Martin had provided copies of documents promised. Mr. Kernohan told me that no further contact had been made but he intended to ask Mr.Dixon to make enquires. I was subsequently informed that Mr.Martin had been unable to secure copies of the documents contained within the box file"

85. On 3 September 2007 Martin met with Evans and asked Evans if he would search Seales' office. Evans agreed knowing that it was not an official police request but doing it because it "would negate the need for the police to obtain and execute a search warrant at the offices of a national newspaper". Evans did the planning with Jones, but discussed what was to be done with Kernohan as well. On the night of the 3rd September 2007 Evans discussed with Martin the alarm and point of entry. Martin told him to go in through the back door. The plan was for Evans to go in at 2am. Evans changed this because he did not know what was going on and he did not know what Martin's involvement was. Evans stated that he did not trust Martin and if anything went wrong he could be in a lot of trouble. Evans decided to go in earlier. He waited until the accounts people went home. He did not know that the back door was hard wired to the alarm system and cannot be cancelled by the tapping in of the alarm code. Evans made two attempts to try and cancel the alarm but was unsuccessful. He then left and drove off. Evans states that he was somewhat amazed at Martin's lack of knowledge around the alarm system and that Martin had not informed him that the rear door was hard wired.

86. Thereafter Evans called Martin, who arrived very quickly as if he was nearby. Martin had been drinking. They both went back in and Martin deactivated the alarm and then left. Once in the office area Evans entered the separate private office of Seales and looked through all his drawers and cabinets. Evans was not allowed to freely enter this room in the daytime when he was working. He did not find anything. He then phoned Jones to update him.

87. Kernohan states that having been told that Evans had found no trace of the box file, he continued to see Covington's role as to ensure an independent aspect to the initial enquiry. Therefore on 3rd September 2007 he requested assistance from Covington that he should make arrangements for an outside investigation team to ensure "that an investigation could thoroughly and independently identify the truth behind these serious allegations". It is plain from at least one e-mail that Kernohan had remained in communication with Covington about the "covert operation" and in which he told him on 3rd September 2007, 21:59

"Larry

Update. Operation was abandoned for this evening. Further

Update tomorrow"

88. Evans states that he had another reason for entering the office of Seales on 3rd September 2007 which related to an informal request made by a friend, Henderson J: (Evans statement: 8.10.07)

"I also had another brief for being in the building. Judge Henderson had asked me to look for some letters that had been published by Net News attacking the judiciary, especially the Chief

Justice. Judge Henderson had asked me to identify the source of the letters and their authenticity. Judge Henderson was not aware of the circumstances of me trying to obtain those letters. I am a good friend socially of Judge Alex Henderson, one of the Grand Court Judges."

CHAPTER 3

THE JUDICIARY & THE CNN ENTRY

89. The report complains of the conduct of the CJ and Henderson J in improperly seeking to gain access to information they believed was held at the offices of the editor of CNN.

The Chief Justice

90. The CJ was appointed under Section 49I (1) of the Cayman Islands (Constitution) Order 1972 as the senior judge in the Grand Court. Furthermore section 4 of the Grand Court Law (2008 revision) states that the CJ has "responsibility for and management of all matters arising in judicature":

> "The Court shall continue to be named "The Grand Court of the Cayman Islands" and shall consist of the Chief Justice and one or more other Judges who shall exercise all the jurisdiction of the Court and who shall have seniority, following the Chief Justice, in an order to be determined by the Governor, the Chief Justice having responsibility for and management of all matters arising in judicature".

91. Section 95 (7) of the new Constitution is quite specific on the CJ's responsibility:

"The Chief Justice shall have responsibility for and management of all matters arising in judicature, including responsibility:

(a) for representing the views of the judiciary to the Government and the Legislative Assembly, including where appropriate, through the Attorney General ;

(b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary within available resources;

(c) subject to paragraph (d), for the maintenance of appropriate arrangements for the deployment of the judiciary and the allocation of work within courts;

(d) after consultation with the President of the Court of Appeal who shall be responsible for the allocation of work within the Court of Appeal, for maintenance of appropriate arrangements for the work of that court."

92. The CJ having statutory responsibility for all matters in the Judicature, cannot be criticised for having an active interest in discovering by legitimate means whether the campaign of scathing attacks on the judiciary was genuinely from members of the public or was from an individual who was seeking to undermine the judiciary. The legitimate means he employed was by formally asking the police to investigate the matter in July 2007.

93. In his witness statement dated 1 November 2007 Evans states:

"I have not had any contact with the Chief Justice but learned through Judge Henderson that they had discussed it between themselves. I believe that Judge Henderson asking me to find the source of the letters was a request he received through the Chief Justice. The request was to check where the information was coming from.

One of the allegations circulating in the office was that three of the letters were written by the same person. If the source was identified I think we may have been tempted to push the Chief Justice in the right direction without actually revealing who the source was....

sure at some stage Judge Henderson mentioned that the Chief Justice was looking at whether the newspaper had exceeded 'fair comment' and was heading towards contempt.

If I had identified the source by searching Mr.Seales' office by finding the box file, this would not have been revealed to Judge Henderson or the Chief Justice. The documents as I have previously stated would have been handed to the police.

I have not seen Judge Alex Henderson for several weeks, and I am now aware that there is a separate police investigation. One of my roles now at Cayman Net News is to keep an eye out

to see if any more letters materialise, although I think the judiciary may have already identified the source. I have a hunch that the letter writer has been identified.
I did not have any concerns that I was asked to make enquires on behalf of Judge Henderson unofficially....
I think the Chief Justice and Judge Henderson realised that they had a problem, and one that needed dealing with very carefully. Alex made a decision and I can understand why he did it. On an Island this size taking on Desmond Seales whoever you are isn't a good idea, he is just going to cash in to the hilt, and I think that was what the concern of Judge Henderson and the Chief Justice. More damage was likely to be created if it was not dealt with professionally..."

94. The beliefs of Evans are based upon hearsay statements allegedly made by Henderson J. Such hearsay statements could never be evidence against the CJ, particularly when Evans states that he had no direct contact with the CJ. There is no evidence that the CJ had anything to do with the 3rd September 2007 search. There is no evidence that he knew or was aware of the activities of Evans or Martin on 31 August or 3 September 2007. Indeed neither person states that he had any knowledge of their covert entries into the office of Seales. At its highest, there is evidence that he was keen to learn who was responsible for the letters attacking the judiciary; and he was keen that there should be a police investigation into the matter. At all times he pursued proper and appropriate channels so far as the offending letters were concerned. There is no evidence justifying the complaint that the CJ sought improperly to gain access to information he believed was held at the offices of the editor of CNN. Accordingly the complaint made against the CJ is summarily dismissed.

Henderson J

95. Henderson J was also keen to learn who was responsible for the letters attacking the judiciary. In his witness statement dated 21 May 2008 (emphasis added) Henderson J states:

"In 2007 I became aware that the Cayman Net News was publishing a series of letters to the editor containing untrue and scandalous statements about the judiciary. I began to suspect that not all of the letters were written by the people whose names were attached to them. I discussed my suspicions with John Evans, whom I knew because of my wife's friendship with his girlfriend. He voiced similar suspicions. I was aware that, as a journalist employed by the Net News, Mr.Evans is entitled to be in its offices and to examine letters to the editor received by it. I asked Mr.Evans to advise me of anything he learned in the ordinary course of his employment confirming the true identity of the letter writers. He said he would, but has never advised me of any.

In making this request, I knew that the oft-stated policy of the Net News was to publish the true name of the author of a letter which, in any event, is intended to be a public document.

96. Evans states in his statement dated 8 October 2007 : "I also had another brief for being in the building. Judge Henderson had asked me to look for some letters that had been published by Net News attacking the judiciary, especially the Chief Justice. Judge Henderson had asked me to identify the source of the letters and their authenticity...

Judge Henderson asked me to talk to someone in the office, and ask if they could be a little more careful about the letters. More letters were published and Mr.Henderson phoned me and asked if I could speak to someone to ask them to back off a bit"

97. In a further statement dated 1 November 2007 Evans states:

"I have been asked to clarify a further point in relation to the letters that were attacking the Lord Chief Justice, when he asked me to try and find the source of the documents and speak to someone at Cayman Net News and ask them to back off.

The first letter was allegedly signed by Teresa Turpin, she is related to Barry Randall through a previous marriage. Barry Randall controls the Cayman Net News publication in Miami. Teresa Turpin has always denied any involvement in the letter writing....
Judge Henderson contacted me shortly afterwards and said you, meaning Cayman Net News, have to be careful because it is heading towards areas of contempt. Judge Henderson contacted me again by phone in the office around the 25th July 2007 after two more letters appeared on the 20th July 2007 [produces letters as exhibits]. He just pointed out two more letters had been published and asked if we could be more careful about the sources of the letters. He politely asked me to talk to the newspaper and also requested if I could find out where the letters had come from....

I did not have any concerns that I was asked to make enquires on behalf of Judge Henderson unofficially...."

98. In his statement dated 24 October 2007 Jones states that Evans: "also advised me that he had been tasked to search for information relevant to the Chief Justice but was unwilling to provide me with details of the person who had tasked. I gained the impression that it had not been a police tasking."

99. The report complains about the conduct of Henderson J in improperly seeking to gain access to information he believed was held at the offices of the editor of CNN. The evidence can be summarised as follows:

99.1 First, Henderson J asked Evans informally to try and ascertain the true authorship of the letters in the ordinary course of his employment;

99.2 Secondly, on 2 September 2008 there was telephone contact between a phone attributed to Henderson J and Evans.

99.3 Thirdly, on 3 September 2007 (the day of the entry to Seales' CNN office by John Evans) Henderson J wrote a personal reference for John Evans giving his court house address in the following terms:

"I have known John Evans socially for approximately 2 years. I have had a good opportunity to observe his character and work habits. He is honest, personable, and loyal to his employer. He has a good work ethic and will always place the demands of his job ahead of other interests and commitments. He would be a useful acquisition for any organisation"

Evans used this reference to apply for a job with RCIPS special constabulary on 9 January 2008: **Core Bundle D, Tab 21, page** 50.

99.4 On 22nd February 2008 during the first search warrant application the CJ stated he had spoken to Henderson J about the Evans statement which ended with the words "I am a good friend socially of Judge Alex Henderson...". The CJ then stated this in his judgement: "I have raised this aspect of my concern with Judge Henderson....he does recall having mentioned **in confidence** our collective concern as judges over the sort of letter being published in the Newspaper. And while he does not regard Evans as 'a friend socially', Judge Henderson did have various conversations with him..."

100. Henderson J in a response dated 11th January 2011 states: "when the CJ asked me about my involvement with John Evans, he directed my attention to the part of [Evans' statement]dated Oct 8 07 which asserts that I was 'a good friend socially'. I replied that we were not 'good' friends socially although we had socialized on a number of occasions and were on friendly terms. I said we had always socialized on occasions when my wife, Esther, and his girlfriend, Valerie Dypuy, were together with us....When the CJ reconvened the hearing he told the investigating officers that I had said I "would not describe him as a good social friend

This quote is recorded in contemporaneous notes taken by DS Ali. These contemporaneous notes are the best evidence of what the Chief Justice said to the investigators and of what I said to him....The CJ's oral ruling was typed up subsequently. The typed version quotes me as saying that I did not regard Evans as "a friend socially"; the word "good" is omitted, probably through inadvertence."

101. Usually if there is a conflict between the record of a police officer and the written judgment of a Chief Justice as to what has taken place in court, it would be natural to assume the written judgment accurately records what took place, and the police officer has made a mistake. However Henderson J's explanation is accepted three years after the event.

102. The complaint has raised the question whether any of the above circumstances could form the basis of any criminal allegation against Henderson J. This matter was ruled upon by Mr.Justice Cresswell during the Henderson judicial review proceedings; and the Attorney General, on behalf of the Cayman Islands Government made concessions to the effect that Henderson J had committed no criminal offence. There was no appeal against Mr.Justice Cresswell's decision. In the circumstances, it is unfortunate that the complaint report raises this issue again so long after the event.

103. The short answer is that the Governor has no jurisdiction to consider this aspect of the complaint and it is dismissed summarily. However lest there be any lingering doubt about the correctness of Mr.Justice Cresswell's ruling and the concession of the AG, it should once again be made clear that there never could have been a prosecution against Henderson J for any criminal offence. The evidence of Evans, who would have to be the only prosecution witness in any prosecution, states that "Judge Henderson was not aware of the circumstances of me trying to obtain those letters". Henderson J himself states:

"I did not expect that Mr.Evans would infringe any legitimate privacy interest by complying with my request. I did not encourage Mr.Evans to commit any unlawful act. I did not suggest that he carry out any sort of search in the Net News offices"

104. Henderson J's telephone contact with Evans on 2 September 2007 could easily have been in relation to the character reference which the judge wrote and dated the following day; or it could have been a social enquiry. It would be wrong to assume that the only plausible explanation is that the contact was connected to the entry into CNN the next day.

105. The evidence of Evans and Henderson J taken together provide no evidence linking Henderson J to the specific events of 3 September 2007. At its highest, Henderson J was asking a friend to find out information which he believed the friend would be entitled to discover within the ordinary course of his employment. That did not amount to any criminal offence: there was no mens rea or guilty mind. There is no basis, and never was any basis, for the inference contained in the report that there was a proper basis for concluding that Henderson J had committed any criminal offence arising out of the activities of 3 September 2007.

Judicial Standards of Conduct

106. Judges holding public office are expected to act with integrity, sound judgment, and in an appropriate manner both inside and outside of the court room to avoid bringing themselves, and thereby the judiciary as a whole into disrepute: Bangalore Principles. In particular rule 4.9 of the Bangalore Principles states:

"a judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge..."

107. There are three aspects of Henderson J's actions which the report complains about. First, before the 3 September 2007 entry, Henderson J had an informal conversation with Evans, a journalist, and social friend about the personal and sensitive concerns both he and the CJ (his line manager) had about the authorship of the letters appearing in the press. It is suggested that Henderson J should not have been speaking in confidence about the personal concerns of himself or the CJ about the offending letters with Evans.

108. Secondly, Henderson J asked Evans informally to provide him with information as to the true identity of the letter writers. The report argues that this was information which, if it existed, was not in the public domain but was held by CNN. Henderson J's request of Evans was made when he must have been aware of the CJ's formal request for the police to conduct an investigation into the matter. At the time of the request the police had not given the CJ a formal report and one was not in fact given until October 2007. The report argues that Henderson J should not have been encouraging Evans in any way to discover information about the letters, even in the course of his employment. If Evans had been successful and the matter was to be taken forward Henderson J would inevitably have entered the arena as a potential witness, a matter which with hindsight he should have been anxious to avoid. Henderson J should have waited for the police to give a formal report to the CJ, his line manager.

109. Thirdly, on 26 July 2007, Evans sent an e-mail to Deborah Dennis claiming that his story regarding a police helicopter had been re-written to the detriment

of Kernohan suggesting that the Commissioner would himself be flying it. Evans expressed himself in these terms:

"The story was re-jigged without my knowledge and without me being consulted. The result is that I have just told CNN that I will not be renewing my work permit in September-I am livid!!!...know of any jobs going":

110. The implication behind the e-mail from Evans is that he intended to leave his job with CNN in September 2007. Henderson J wrote a personal character reference for Evans dated 3 September 2007. The report argues that the clear conclusion from this is that before 3 September 2007, Henderson J must have known that Evans was dissatisfied with his job at CNN and was looking to leave. Set against this background, before 3 September 2007, Henderson J asked Evans to provide him with information as to the true identity of the letter writers. Given that Henderson J suspected that the letters were not written by the names that appeared in the Net News, he was not asking for details appearing in a public document, but rather for Evans to provide him with other information which, if it existed, was not in the public domain, but was held by CNN. He was asking Evans to breach the trust of his employers by passing information obtained in the legitimate course of his employment to an unauthorised person, namely Henderson J. The report argues that Henderson J should not have been acting in this way. He should either have waited on the formal police report requested by the CJ; or he should have made his request to Seales by summoning him before the Grand Court under section 27 of the Grand Court Law, so that the Editor could give his explanation. There may have been legitimate reasons for the (entirely legal) use of a pseudonym by the editor.

111. Henderson J in his response states:

"I had a genuine and legitimate reason for asking about the letters which in my view amounted to a deliberate campaign to undermine the Court's authority. Sir Peter Cresswell has said as much at pp 118-9 of his judgment. I believed the letters were fraudulent in the sense that they were not written by the people whose names were appended to them, that they amounted to a contempt of the Court, and were defamatory; these views were shared by the Chief Justice. The real Thelma Turpin had already said in a letter published in the Cayman Net News that she did not write the letter attributed to her. I had a genuine concern about the adverse effect of the letters upon public perception of the Grand Court, a concern shared also by the Chief Justice. I also had a personal concern. Despite my concerns I did not consider that criminal proceedings for contempt of court or a civil action for defamation were realistic options. I was aware that the Chief Justice intended to make a complaint to the RCIPS but I do not recall being told he had done so until much later. I also believed that the police would not do anything more than take a cursory look at the Chief Justice's complaint due to the natural reluctance of a police force to launch a criminal investigation of a media outlet. I did not consider that a contempt of court charge was a viable proposition; it would cause public suspicion and resentment while converting Mr.Seales into a folk hero. A defamation action was not something I wanted to initiate. What I wanted to do was simply solve the problem. ie prevent such (fraudulent) letters from appearing in the future and, if it could be accomplished, obtain a public retraction of the letters already published. I hoped Mr. Evans could help, perhaps by confirming to me that the letters were forged (or genuine if that turned out to be the case) and perhaps by speaking to his Editor, the late Mr. Desmond Seales, about them. I felt that some sort of satisfactory solution might be found if Mr. Evans, my only contact at CNN, could convince the Editor to confirm the authenticity of similar letters before publication (if the Editor was not complicit in the letter writing) or to stop publishing them (if he was). An important aspect of my thinking was that CNN had repeatedly promised its readers that no anonymous letters would be published; all letters to the Editor had to bear the true name of the author....My conclusion was that no one writing a letter to the Editor could have a legitimate or reasonable expectation of privacy concerning his identity, and that the newspaper was claiming no privacy interest of its own in such information. The names actually attached to the published letters were, obviously, in the public domain. If Mr.Evans were to confirm to me that the letters had been written by the persons whose names were appended, no privacy issue could possibly arise. If he were to tell me that a certain letter had actually been written by 'X', he would be telling me no more than what I, as a newspaper reader, considered I was entitled to know by the newspaper's own policy-the true identity of the letter writer. It would be neither legitimate nor reasonable for the newspaper to trumpet a "no anonymous letters" public policy yet be heard to complain of a breach of its privacy when an author's name is revealed. Moreover, revealing the name of a letter writer cannot breach

the author's privacy either as he must be taken to have agreed to CNN's policy when he sent his letter. For these reasons, the fact that the information may turn out not to be in the public domain is beside the point; in substance, it was information to which the public was entitled once the letters were published. Mr.Evans would not be breaching his employer's trust by revealing it; rather, he would be acting in accordance with his employer's policy concerning letters to the Editor. When I spoke to Mr. Evans I felt I was in essence, speaking to the newspaper.....As someone affected adversely by what I considered a fraudulent journalistic practice, I felt entitled to complaint to an employee of CNN about it. The conversation was in confidence because if the letters (except for that of Thelma Turpin) turned out to be genuine, a formal or public complaint would have caused subsequent embarrassment to the Court. It may be that I should not have referred to the Chief Justice's opinion (which matched mine) without his prior authorisation. However he has never complained to me about it and is not a complainant in this matter.....I did of course know that Mr.Evans was looking for other employment. I did provide him with the letter of reference...I did not give him the letter of reference in exchange for any favour and he did not suggest any such thing...By the time I gave him the letter of reference several weeks had passed since our conversation about the CNN letters and I assumed that nothing had come of my approach to him...Mr.Evans' dissatisfaction with his employment at CNN was, to me, of little relevance as I considered that I was asking for information I was entitled to have..."

112. Henderson J cannot be criticised for becoming involved because, as he points out, he had a personal involvement in the matter, as the attack in the press was also an attack on him. There is nothing Henderson J did which comes anywhere near the threshold required for a matter to amount to judicial misbehaviour. Accordingly the complaint in respect of this matter is summarily dismissed.

CHAPTER 4

SEARCH WARRANTS: FEB & MARCH 08

The Background

113. Following the unsuccessful attempt to obtain the sensitive material from CNN on 3 September 2007, the Tempura team quickly established that there was no evidence of a corrupt relationship between Ennis and Seales. The investigation revealed that the allegations had been fabricated by Martin and he was arrested on 27 March 2008 for committing offences under the Penal Code in relation to making false allegations and burglary of Seales' office on 3 September 2007.

114. In fact, Ennis and Seales had a somewhat acrimonious relationship. In his statement Ennis denied the corruption allegations and questioned how it was that Kernohan and Dixon could ever have believed that he was in a corrupt relationship with Seales. Among the reasons he gave for his scepticism, is their certain knowledge that he had recently been contemplating a law suit for libel against Seales in respect of defamatory publications touching on Ennis' part in the dismissal or resignation of certain other police officers from the RCIPS. Ennis had asked Kernohan if he would approve his legal bills for the lawsuit. Ennis' view was that Kernohan had opportunistically seized upon Martin's unreliable allegations in the hope of finding something to discredit him. Ennis was the only person (according to Ennis) who Kernohan would see as a threat to taking over his position as Commissioner.

115. The view expressed by Ennis was adopted by the Tempura team and they became concerned with the legality of the entry into the offices of Seales on 3 September 2007. Furthermore, evidence emerged that Dixon had been the original complainant of the corruption allegation against Ennis along with McKeeva Bush who was then the Opposition Leader. He was elected Leader of Government Business in May 2009 and became Premier under the new Constitution introduced in November 2009.

116. As a consequence of this on 1 October 2007 the Tempura team met with the AG and SG seeking legal advice in respect of the allegations made against Ennis and information received in respect of Dixon's involvement in alleged corrupt activities: **AG's response page 2, under paragraph** [redacted] [redacted] it was initially agreed the SG or a senior legal officer would provide legal advice to the investigation team. However a decision was made in November 2007 that the AG's Chambers would not give advice or guidance to the Tempura team. The reasons for this were set out by the AG in his letter to the Governor dated 8 November 2007:

"As you are aware the role of the Chambers is to provide professional legal advice to the entire Government of the Cayman Islands including the Executive Branch headed by yourself. We also provide advice and prosecutorial functions for the various matters investigated which result in charges against accused persons...we are firmly of the view that our role as legal adviser and to whom we should be providing advice has become very blurred. We are required and expected to advise you at this stage and if there should be any disciplinary proceedings in the future as a result of these investigations. Additionally, the Chambers will be required and expected to have conduct of and to lead evidence in any such disciplinary proceedings. We are also required and expected to advise the investigators in the ongoing

inquiry. We will be required to make rulings on possible important charges. If criminal charges are eventually laid the Attorney General's Chambers will then be required to marshall the evidence ie have conduct as prosecutors of the case...Additionally, we are expected to advise on the continuing investigation and on the culpability if any of the Commissioner of Police and possibly a member of the Judiciary. If warrants are to be obtained from the Court, the Chambers will need to advise and accompany the Police to make this application....We cannot properly continue to provide legal advice to the investigators without causing the Chambers some professional difficulties. As a Chambers we have to be guided by our professional ethics. We ought not to be exposed to some of the current discussions and then thereafter be required to make independent judgment on the allegations. It would pose serious professional and ethical issues for us. We are therefore of the view that in order to avoid any potential conflicts in our role as legal adviser, that the better course is for the investigators to be allowed to retain independent counsel to advise them. This would enable the Chambers to be free to advise yourself and to carry out its constitutional role by dealing independently with any potential criminal or other proceedings which may result from these investigations".

117. Contact was made with former Senior Crown Counsel Mon Desir who was at that time working at the Cayman Islands Monetary Authority. Mon Desir agreed to assist and he met Bridger on 16th November 2007. On 19th November 2007 Bridger submitted a written request for legal advice directly to Mon Desir. On 27 November 2007, Mon Desir, was formally appointed, to provide legal advice to the Tempura team.

118. On 11 January 2008, Mon Desir advised in writing that there was insufficient evidence to establish that a burglary was committed by Evans, Kernohan, or Jones on 3 September 2007. However, there was a prima facie case against Kernohan and Jones of committing the offence of Abuse of Office contrary to section 95 of the Penal Code, and Disobedience of Lawful Duty contrary to

section 121 of the Penal Code. Having arrived at this evidential position, Mon Desir advised that it would *not* be in the public interest to prosecute either Evans, Jones or Kernohan, for any criminal offences arising out of the events of September 3, 2007 in which they were respectively involved.

119. On 21 January 2008, the Tempura team received a letter from the AG confirming that there was sufficient information to commence an investigation but that the decision to do so was one for the officers: On 25 January 2008, Governor Jack, having seen the advice of Mon Desir, and the AG's memo decided that there should be a full investigation into the events of 3 September 2007: Some of the reasons for this are set out in the SOG report of 3.3.08:

"In fairness to [Kernohan and Jones] the reputation of this Country and that of the RCIPS, it is our view that all available lines of enquiry should be pursued to a satisfactory conclusion, thereby ensuring that community confidence in the due Judicial process is maintained" **page 2**

"When it becomes public knowledge that the investigation was discontinued without being fully investigated, it may very well promote feelings of suspicion and of impropriety by the Governor's Office and the Judiciary. It is our belief that the potential impact of halting the investigation at this stage, based on the advice of one person, could be interpreted as capitulation by the Governor's Office and be subject to adverse criticism both nationally and internationally": **page 3**

"We believe that the circumstances of this case could lead to allegations of State interference of the freedom of the press" **page 10**

"Finally, if the events of the 3rd September are not proceeded with, the two (2) remaining suspects are both Caymanian and therefore such a decision will undoubtedly attract allegations of racism in that UK officers being investigated by officers from the UK have been allowed to walk free before a full examination has taken place. If this situation were reached it would be highly damaging for the reputation of the RCIPS both nationally and internationally"

120. On 14 February 2008, a decision was made by the investigating team in consultation with Mon Desir, to apply for search warrants in respect of Kernohan, Jones, and Dixon. The material the police were seeking was as follows:

(a) RCIPS issued mobile phones;

(b) Any day books containing relevant material;

(c) Personal computers;

(d) Any other relevant material;

121. In the search warrant applications DS Ali explains that:

"Kernohan refers extensively to his daybook in a statement provided to the investigation team citing the fact that he made notes in the daybook in relation to his meetings and phone calls with Mr.Lyndon Martin and Mr.John Evans. This material is clearly necessary to and of substantial value to the conduct of the instant investigation, as an exhibit and a document that may provide further insight into the events surrounding the 3rd of September. Kernohan's statement is a succinct document that does not detail all of the contacts. It is therefore hoped that the daybook will provide greater detail and clarification. Telephone records in possession of the investigation team indicate that Kernohan used his police issued mobile phone when contacting Mr.Lyndon Martin and Mr.John Evans. The mobile phone therefore is of substantial value as an exhibit linking Kernohan to the main parties and also because it may contain additional evidence by way of text messages and diary entries. The e-mail from Kernohan to Mr.Larry Covington was sent on the Commissioner's personal e-mail address at 9.59pm. This indicates that Kernohan sent the message from his home computer and as such it is of substantial value to the investigation in order that it may be forensically examined so that the aforementioned e-mail can be retrieved evidentially and to determine if any other pertinent messages were sent in or around the 3rd September 2007....

"Telephone records in possession of the investigative team indicate that Detective Superintendent Jones used his police issue mobile phone when contacting key individuals and suspects in relation to the events of the 3rd September 2007. The mobile phone therefore is of substantial value as an exhibit linking Detective Jones to the main parties and also because it may contain additional evidence by way of text messages and diary entries..."

"Telephone records in possession of the investigative team indicate that Deputy Commissioner Dixon used his police issue mobile phone when contacting key individuals and suspects in relation to the events of the 3rd September 2007. The mobile phone therefore is of substantial value as an exhibit linking Detective Jones to the main parties and also because it may contain additional evidence by way of text messages and diary entries. Deputy Commissioner Dixon refers in his statement to making contemporaneous notes of a meeting with Mr.Lyndon Martin in a diary..."

The decisions of the Chief Justice

122. The first search warrant application was made in front of the Chief Justice on 22 February 2008. Among the information placed before the CJ during the application was:

(a) the witness statements of Evans dated 8th October 2007 and 8th January 2008;

(b) the undated statement of Kernohan;

(c) the statement of Jones dated 24th October 2007; and

(d) advice of the AG dated 28th and 29th August 2007 advising that there was no proper legal basis for search warrants in respect of CNN.

123. After the search warrant application was made, he retired to consider the application. During that adjournment he raised with Henderson J outside court

the evidence of Evans and sought Henderson J's comments: see Para 1-4 of the CJ's ruling.

124. On 27 February the CJ made a provisional ruling against issuing the search warrants in respect of Kernohan, Jones, and Dixon on the following grounds:

124.1 There was no prima facie evidence that Kernohan or Jones had committed the section 95 Penal Code offence. The basis of this conclusion was two-fold. First, Martin and Evans were volunteers and employees who had lawful access to the CNN building and therefore were not trespassers. Secondly, as the documents they were looking for belonged to the police the proprietor could not himself have asserted any private right to the retention of them. The proprietor could not suffer any prejudice because he had no right in law to sensitive documents which belonged to the police.

124.2 There was no prima facie evidence that Kernohan or Jones had committed the section 121 Penal Code offence (disobedience of lawful duty). For the offence to be committed there had to be an unlawful entry and search of the offices of the newspaper. Here the entry was effected by employees who had access and therefore were not in breach of the law. In effect the CJ makes the same point that there could be no offences of burglary or theft because the subject matter of the break in (sensitive documents) belonged to the police and not to CNN/ Seales.

125. On 27 February 2008 the AG wrote to the Governor and told him that in view of the CJ's ruling "it would be unwise to take any action, disciplinary or

otherwise against any of the individuals". On 28 February 2008 the AG and Governor Jack met for discussions and following this the AG prepared further written advice dated 29 February 2008 for the Governor, in which he told him that in respect of his advice of 27 February 2008:

"Finally, the Learned Chief Justice did leave open the possibility of being asked or invited to have another Judge revisit the application. This is however a matter for the Applicants and their Legal Advisor to consider".

[redacted]

127. On 5 March 2008, DC Smith handed Governor Jack a sealed envelope containing a report relating to 'mens rea' in relation to the CJ's ruling regarding search warrants: **Core Bundle D, Tab 21, page** 61

[redacted]

[redacted]

130. On 18 March 2008, a second application for search warrants in respect of Kernohan, Jones, and Dixon was made before the CJ. Placed before the CJ were the following:

130.1 Undated statement from Seales confirming that none of his employees have permission to enter his private office and search his desk and office.

130.2 Written submissions dated 18 and 19 March 2008 from Mon Desir setting out aspects of the ruling of 22 February 2008 where he considered the CJ had erred in his ruling;

130.3 Mon Desir's advice dated 11 January 2008.

131. The purpose for the warrants was to search for material in substantially the same terms as had been presented to the court in the February application.

132. On 22 March 2008, the CJ ruled against issuing the search warrants in respect of Kernohan and Jones, but granted the warrant in respect of Dixon. The grounds for refusal concerning Kernohan and Jones were given on 4 April 2008.

133. In essence the CJ refused the search warrants for two reasons. First, there was no prima facie evidence that Kernohan or Jones had procured the commission of the offence of burglary or criminal trespass. Martin and Evans were volunteers and employees who had lawful access to the CNN building and therefore were not trespassers. The documents in question belonged to the police and potentially affected national security. As the police officers believed that they had the right to retrieve them they did not have any criminal intention to commit any offence and mens rea was crucial to the establishment of any criminal offence against them. Furthermore, as the documents they were looking for belonged to the police the proprietor could not himself have asserted any private right to the retention of them. The proprietor could not suffer any prejudice because he had no right in law to sensitive documents which belonged to the police. In the above circumstances the police officers could not be guilty of the section 95 or 121 Penal Code offences.

134. Secondly, the CJ ruled that a search warrant should only be granted if "according to reasonable suspicion, items or evidence for which the statute authorises a search are within the premises to be searched: here the homes and/or offices" of the police officers: **para.69 of his ruling.** The CJ took the view that as he had concluded there was no prima facie evidence of any criminal offence being committed the application for search warrants amounted to nothing more than a fishing expedition to obtain evidence so as to create a prima facie case, and that was not allowed by the law: **see para.95 of his ruling.** The CJ heard evidence from Bridger on this issue. He stated as follows:

"At the end of the day, Supt.Bridger's "quest for truth" in reality came down to this: The hope or expectation that within the items to be seized (that is: the day-books, cell phones and computers of the subjects) there might be found some inculpatory record of criminal intent to trespass" : **see para.142 of his ruling**.

The CJ concluded:

"The issuance of a search warrant, simply in the hope of finding something self-incriminatory against a subject already regarded as having committed an offence, but without any objective basis for thinking that it could exist, would be precisely that sort of oppressive "fishing expedition" so firmly discountenanced by the case law": **para.144 of his ruling**.

Challenges to the CJ decisions

135. The report makes complaint that the CJ deliberately and illegitimately attempted to prevent the Tempura team from investigating the allegations of impropriety by Evans, Kernohan, and Jones by refusing to grant the applications for what were legitimate search warrants. The complaint here is not simply that the CJ got the law wrong, but that he deliberately and maliciously got the law wrong for his own improper purposes, namely the protection of Henderson J who had improperly become involved in the events of 3rd September 2007.

136. In the United Kingdom the complaint made about the CJ's search warrant ruling would be dealt with by the appeal process. Thus, the decision of a Crown Court judge dealing with a search warrant application may be judicially reviewed in the High Court. However it does not appear that there is any power of appeal or judicial review of a Grand Court judge's decision on a search warrant application.

137. A Grand Court judge has a discretion to hear an application for a search warrant in chambers. Section 23 of the Grand Court Law (2008 Revision) provides:

Except in cases where it is otherwise expressly provided by any law, a Judge may sit in chambers at any time to hear and determine all matters brought before him on summons or motion, and may direct that any motion be heard in open court or adjourned into court, if in his discretion, he considers it expedient that any matter be heard in court.

Such an application is usually made ex parte and would be considered an interlocutory application, in the sense that it is ancillary to a projected matter, such as anticipated criminal charges. The procedure is itself one which leads to a final order by the judge.

138. Once a judge makes an ex parte order issuing a warrant, he has no power to review or rescind the order issuing the warrant. This was held to be the case in *Liverpool Crown Court, ex p. Wimpey plc* (1991) C.O.D. 370, D.C. where it was said that there was no power to review or rescind the order, even if it can be shown that it was made on an erroneous basis, having been given inaccurate or incomplete information.

139. Section 28 of the Grand Court Law (2008 Revision) provides:

Appeals shall lie from any judgment, decree or order of the Court to the Court of Appeal in accordance with the Court of Appeal Law (2006 Revision)

Section 7 of the Court of Appeal Law sets out the instances where there may be an appeal in a criminal matter. The relevant section states:

Subject to this Law, the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a ***convicted*** *person.*

The applicant for a warrant cannot on any interpretation be "a convicted person".

140. Section 5 of the Court of Appeal Law deals with the Court's appellate civil jurisdiction

"*Subject to this Law, the Court shall have jurisdiction to hear and determine appeals from any judgment of the Grand Court given or made in civil proceedings....*"

The application for a search warrant arises under section 26 Criminal Procedure Code 2006. This is a penal statute. It is difficult to see how an ex parte application for a search warrant under a penal statute can be described as a "judgment of the Grand Court given or made in civil proceedings". There is no plaintiff or defendant in civil proceedings neither is there likely to be. A successful application may however lead to a defendant in future criminal proceedings.

141. Section 28 of the Court of Appeal Law (2006 Revision) provides for an appeal, by the AG, on a point of law only, where an accused person tried on indictment has been discharged or acquitted or has been convicted of an offence other than the one with which he is charged. Section 29 gives a right of appeal to the AG if he is aggrieved by a decision of the Grand Court exercising its appellate or revisional jurisdiction from a court of summary jurisdiction, or any other court, board, committee, or authority exercising

judicial powers. Neither section 28 nor 29 would allow the AG to appeal against the CJ's ruling on a search warrant application as the proceedings do not arise from an indictment and are not appellate or revisional in nature.

142. Therefore it would seem that the Court of Appeal Law is not wide enough to allow an appeal against the decision of the Grand Court in respect of an application for a search warrant.

143. There also appears to be no provision which allows for a Grand Court judge's refusal on a search warrant application to be judicially reviewed. In the Cayman Islands, Order 53 of the Cayman Islands Grand Court Rules (1995 Revised) sets out the cases appropriate for an application for judicial review, none of which deals with search warrants, or any procedure that may be considered to be akin to an application for a search warrant. The very basis of judicial review is to allow a person aggrieved by the decision of an inferior court to apply to the Grand Court for an order setting aside the decision on the ground that the tribunal exceeded its powers or jurisdiction. For this reason, it is difficult to see how judicial review would be an appropriate procedure where the application was refused by a Grand Court judge.

144. It would therefore appear to be the position that the refusal of an application for a search warrant before a Grand Court judge does not constitute judicial proceedings which qualify to be appealed or judicially reviewed.

145. In giving his judgement during the Henderson judicial review proceedings Cresswell J made detailed reference to the CJ's two rulings on the search warrant applications in February and March 2008: **see pages 33-47 of his judgment.** He ruled that the Grand Court normally follows previous decisions as a matter of judicial comity and that the CJ had provided a fully reasoned decision as to the legal requirements for a search warrant under section 26 of the Police Law. He concluded that he agreed with the CJ's analysis of the conditions precedent to the grant of a warrant. : **pages 83-84.**

146. The question arises as to whether this aspect of Cresswell J's ruling could have been appealed to the Cayman Islands Court of Appeal. Cresswell J essentially set aside the search warrants on the basis that they had been obtained in circumstances of grave non-disclosure by the investigating officers which amounted to bad faith on the part of Bridger. The judge also ruled that there was no evidence at all to justify Henderson J's arrest. The learned judge's decisions were not dependent upon the analysis of the law carried out by the CJ into the offences of criminal trespass, abuse of office, and wilful disobedience of the law. Whatever the state of the law in respect of those offences, Cresswell J would have set the search warrants aside because of his factual findings of serious non-disclosure, and because there was no evidence of any offence having been committed by Henderson J. It is very difficult therefore to see how any appeal of the CJ's analysis of the law on criminal trespass, abuse of office, and wilful disobedience of the law could have been made to the Court of Appeal. In short, there was no right of appeal against Cresswell J's judgment on this point.

147. If there were a right of appeal or judicial review of the CJ's decisions, and the complainant had not exhausted the appeal process, then it would be wrong for the Governor to entertain any complaint. Every citizen must obey the law and follow any appeal process which is in existence, unless there are exceptional circumstances which have arisen. In the present case, the decisions of the CJ in respect of the search warrants were final orders and there appears to be no right of appeal.

148. Consideration has been given as to whether it would be an interference with the independence of the judiciary for the Governor to entertain a complaint in circumstances where there appears to be no right of appeal. The following extreme example illustrates the difficulty which may arise. An allegation of rape is made against a Prime Minister. The complainant states the rape took place in the Prime Minister's lounge on a fur rug. Before any charge is made, the police seek a search warrant to have the rug forensically examined for the victim's DNA, body fluids, and hair fibres. A judge refuses the search warrants. The police consider they are unable to charge the Prime Minister on the uncorroborated account of the complainant and the case is discontinued. The complainant subsequently makes a complaint to the Governor that the judge's decision was one which no reasonable judge could have made; and the reason why the judge made his decision is because the Prime Minister is his good friend. They meet regularly to play golf together. They have business interests together; and that following the rape the complainant heard them speaking together on the phone as to how the judge could protect the Prime Minister should a complaint be made. It seems clear that in such

circumstances the principle of independence of the judiciary would not prevent the Governor from considering the complaint made so as to make a decision as to whether the matter should be referred to the Commission for investigation. Ultimately, under section 31 (3) of the Cayman Islands Constitution 2009 the Governor when exercising his functions must "endeavour to promote good governance and to act in the best interests of the Cayman Islands...."

149. In the instant case the complaint made about the decision of the CJ is that, knowing his decision could not be appealed, and knowing he had a personal interest in the subject matter of the search warrant applications, the CJ deliberately conspired with Henderson J to frustrate a legitimate police investigation. Where such serious allegations are made, and are incapable of being considered by the judicial process on appeal, the Governor must have a power to consider the matter, and consider whether there is sufficient prima facie material for the matter to be considered by the Judicial and Legal Services Commission. That is part of his role in seeking "to promote good governance and to act in the best interests of the Cayman Islands...."

150. In relation to the search warrant issue, even if the complaint is to be summarily dismissed, there is also the wider public interest issue as to whether the Governor should ask the AG to consider any aspect of the CJ's final ruling, which he considers might require legislative intervention.

151. The purpose of the review of the CJ's decision is not therefore one of interfering with the independence of the judiciary; but rather to consider whether there is any aspect of his ruling, and the events surrounding his ruling, which would support on a prima facie basis the allegation that he has deliberately conspired with Henderson J to frustrate a legitimate police investigation. In particular, consideration has been given to the following of the Bangalore Principles:

Rule 1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently;

Rule 2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases;

Rule 2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

152. The CJ refused the search warrants for two reasons. First, there was no prima facie evidence that Kernohan or Jones had procured the commission of the offence of burglary or criminal trespass. Secondly, the CJ ruled that a search warrant should only be granted if "according to reasonable suspicion,

items or evidence for which the statute authorises a search are within the premises to be searched: here the homes and/or offices" of the police officers: **para.69 of his ruling.** The CJ took the view that as he had concluded there was no prima facie evidence of any criminal offence being committed the application for search warrants amounted to nothing more than a fishing expedition.

Burglary

153. The CJ was clearly correct in the decision he reached so far as the offence of burglary is concerned. Section 243 (1) of the Penal Code (2007 Revision) states:

"Whoever enters any building or part of a building as a trespasser and with intent to [steal]; or

having entered any building or part of a building as a trespasser steals or attempts to steal anything in the building or that part of it...is guilty of the offence of burglary"

154. Section 235 (1) states:"a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly".

155. Section 236 (1) (a) states: "a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person."

156. It is trite law that a person cannot steal confidential information: section 238 (1) Penal Code and Oxford v Moss 68 Cr.App.R. 183. Furthermore, the effect of section 240 (1) is that a borrowing or lending of property may amount to an intention to permanently deprive but only if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

157. When Evans entered the private office of Seales on 3 September 2007, his intention was to photocopy documents (the Gold Command Minutes) which belonged to the police; and to photocopy the e-mails allegedly passing between Seales and Ennis. He also intended to discover the true authorship of the letters criticising the judiciary. Photocopying information cannot amount to theft in law. Secondly, there was no intention on the part of Evans to permanently deprive Seales of any documents taken, which is an essential ingredient of the offence of theft. For these reasons, Evans could not be guilty of having an intention to steal and could not be guilty in law of burglary. It follows that neither Kernohan nor Jones could be guilty of procuring Evans to commit the offence of burglary. This aspect of the CJ's ruling cannot be impugned in any way.

Criminal Trespass

158. Section 277 (1) of the Penal Code provides:

"Whoever, without having lawful business thereon, enters upon the premises of any private residence or upon land belonging to any proprietor or occupier

which is enclosed or in any manner cultivated is guilty of the offence of criminal trespass".

159. The offence is listed as falling under Category C in the First Schedule of the Criminal Procedure Code (2007 Revision, effective 19th June 2007) and is therefore triable summarily only. It clearly applies to residential premises; and in practice, it is used in appropriate circumstances as an acceptable plea to a lesser offence when residential burglary has originally been charged.

Land belonging to any proprietor or occupier which is enclosed

160. The question arises however as to whether the offence applies to commercial or office premises. Enclosed land is not defined in the Penal Code. Section 3 (1) of the Interpretation Law (1995 Revision) states:

"In this Law and in all...Laws...relating to the Islands, now in force or hereafter to be made, the following words and expressions shall have the meanings hereby assigned to them respectively, **unless there is something in the subject or context inconsistent with such construction**, or unless it is therein otherwise expressly provided". Section 3 then gives the following definition:

"land" and "premises" includes all tenements or hereditaments, and also all messuages, **houses, buildings or other constructions**, whether the property of Her Majesty, her heirs or successors, or any **corporation or private individual**, except where there are words to exclude house and other buildings"

161. The Interpretation Law therefore gives a definition which means land in section 277 could include an office building. The question is whether the word "enclosed" and other language used in the section or act would give a different meaning so as to exclude an office building from the definition. Enclosed land appears in section 159 of the Penal Code which is the provision for 'deeming' a rogue and a vagabond where reference is made to *'any enclosed garden, yard or area'* In Talbot v Oxford City Magistrates Court [2000] 2 Cr.App.60 the English Divisional Court considered the English equivalent of section 159 Penal Code, namely section 4 Vagrancy Act 1824 and decided that the words *'any enclosed garden, yard or area'* should be given a narrow definition. The court accepted that the words 'enclosed area' on their own could extend to an office room within a building, but that the words should be taken within the context of the section as a whole which read *"every person being found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any inclosed [* sic *] yard, garden, or area"*. as a matter of construction, an office in a building did not come within the description of an "inclosed area". Although the words taken on their own might be apt to describe an office, they had to be read in the context of the other words in the section, namely "inclosed yard, garden or area". Those words connoted an area which was in the open air.

162. Following the logic applied in Talbot land belonging to any proprietor or occupier which is enclosed at first consideration appears to relate to a private field or similar land within defined physical limits which is exposed to the open air. This interpretation is supported by the reference to the land being

"enclosed or in any manner cultivated". It is also supported by the reference in section 277 (2) to damage to any vegetation growing in any place; and the reference in section 277 (2) to the offence applying to "any pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling house. Section 279 applies to public or private land which is unenclosed and uncultivated. This again appears to be reference to a land without physical limits which is exposed to the open air, rather than to a building.

163. Where there is ambiguity in a penal statute, it should normally be interpreted strictly and narrowly, in favour of the citizen. In that sense, following the logic of Talbot a private office within a building cannot properly be described as "enclosed land" within the meaning of section 277. Therefore on one view, for these narrow reasons, the section 277 offence of Criminal Trespass may not apply to Seales' office. However there are strong public policy reasons why a different interpretation should be given to section 277 so that it applies to an office building. A statute should be interpreted so as to avoid absurdity. If section 277 did not apply to an office building the following difficult legal situations could arise: a barn or stables with horses, or a commercial office is situated in the middle of a field exposed to the open air, which is marked by a wooden fence. A man is found in the field without lawful business. He is guilty of criminal trespass. He is found in the stable or barn or commercial office and he is not guilty of criminal trespass. Another example: a man is found drunk sleeping at night in a tent which he has erected within a private office. Section 158 Penal Code does not apply as it applies to offences

committed in a public place; section 159 would not apply because of the reasoning in Talbot. The only offence which could apply would be section 277 (1) Penal Code, however a narrow interpretation would preclude its application.

164. The CJ was not addressed on the definition of enclosed land during the February and March search warrant applications. He proceeded on the basis that the offence was applicable but that there had been no trespass and no criminal intention or mens rea. In determining whether there is any merit in the complaint that the CJ came to the incorrect decision for nefarious purposes it is necessary to analyse the legal principles first on the basis that Criminal Trespass does apply to an office building; and then to consider the position in law if the offence does not apply to an office building.

Scenario 1: Criminal Trespass does apply to an office building

Trespass

165. The English definition of trespass comes from the law of tort, i.e. any intentional, reckless or negligent entry into a building will constitute a trespass if the building is in the possession of another person who does not consent to the entry: see Archbold 2011, para. 21-116. However, such an entry must be accompanied by mens rea: the defendant must know or be reckless as to the facts which make the entry a trespass: R. v. Collins [1973] 56 Cr.App.R. 554, CA. In R. v. Smith and Jones [1976] 63 Cr.App.R. 47, CA, James L.J. cited Collins and Hillen v. ICI (Alkali) Ltd [1936] A.C. 65, as authority for the proposition that: