

SUMMARY OF CONCERNS

- The conduct of the Chief Justice (CJ) and Grand Court judge, Mr Justice Henderson, in improperly seeking to get access to information they believed was held at the offices of the editor of Cayman Net News (CNN);
- The attempt by the CJ and Mr Justice Henderson to frustrate the Operation Tempura investigation;
- The evident bias and conduct of Sir Peter Cresswell led to findings intended to ensure that the investigation went no further;
- The subsequent conduct of Sir Peter Cresswell following his appointment to the Financial Services Division of the Grand Court of Cayman
- The conduct of the Attorney General, in particular his arbitrary conclusion in relation to the offence of misconduct in public office not being an arrestable offence under Cayman law when in fact he had earlier held the view, and advised the investigation, that the offence was an arrestable offence under Cayman law. Based on that advice, two officers had been arrested and charged. However, that view changed when a judge was arrested and no rationale for this obvious change was provided to the court at the second judicial review or been made public since;
- The inappropriate actions by the FCO Law Enforcement Adviser for the Caribbean, Larry Covington.

BACKGROUND

Operation Tempura, an anti-corruption investigation, began in September 2007, following a request from Stuart Kernohan (the then Commissioner of the Royal Cayman Islands Police Service (RCIPS)), via Larry Covington (FCO Law Enforcement Adviser), to the then Commissioner of the Metropolitan Police Service (MPS).

The request asked for MPS assistance in investigating allegations that one of the two Deputy Commissioners of Police, Anthony Ennis, was passing sensitive police information to Desmond Seales, Editor-in Chief of Cayman Net News (CNN), one of the two Cayman newspapers.

The Commissioner acceded to the request and two senior Scotland Yard officers, Detective Chief Superintendent Martin Bridger QPM (since retired) and Detective Inspector Simon Ashwin travelled to the Cayman Islands on 10 September 2007. From the result of the enquiries (see below) conducted by both officers, a full criminal investigation was launched (Operation Tempura) and, until March 2008, the investigation was covert.

Operation Tempura was led by Senior Investigating Officer (SIO) Martin Bridger QPM (since retired) and initially reported to the Commissioner of RCIPS, Stuart Kernohan (a former UK police officer). However, following Kernohan's suspension (see below), he reported to H.E. The Governor Stuart Jack CVO and to a Strategic Oversight Group

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(comprised of senior civil servants) that was established for the purposes of the investigation. In addition, at the request of the Governor, Assistant Commissioner John Yates was appointed as the 'Reviewing Officer' of the investigation, on behalf of Association of Chief Police Officers (ACPO).

It should be noted that a second investigation, Operation Cealt, grew out of Operation Tempura. Operation Cealt was concerned with allegations of corruption and misconduct that were made by approximately 70 residents of Cayman (including RCIPS officers) and in respect of which there was detailed, tape-recorded, 'debriefing' carried out by debriefing specialists who were former MPS officers. It generated over 10,000 pages of taped interview transcripts which had to be analysed and evaluated for action. The allegations were originally made to Bridger and his team. Many of those who came forward said that they had been waiting for years to have sufficient confidence in a team who seemed serious about tackling corruption. Those allegations remain to be investigated, with the present Commissioner of RCIPS currently seeking to recruit an anti-corruption team, drawn from a number of jurisdictions, to carry out those enquiries.

THE INVESTIGATION

Bridger and Ashwin quickly established that there was no evidence of a corrupt relationship between Ennis and Seales. However, evidence did emerge to show that there had been an attempt to enter unlawfully the offices of Seales¹.

The facts that emerged were (*everything stated in the summary below is evidenced in witness statements*):

- On 11 August 2007 Lyndon Martin, a former politician and an employee of CNN, met with Deputy Commissioner Rudolph Dixon and made a number of serious allegations against Deputy Commissioner Anthony Ennis. He alleged that Deputy Commissioner Ennis, over a period of two years, had systematically leaked sensitive and confidential police information to the Editor in Chief of Cayman Net News, Desmond Seales, potentially compromising ongoing police operations and thereby endangering officers' lives.
- It should be noted that Martin was put in place at CNN by McKeeva Bush (at material times, the Leader of the Opposition, but now the Premier of Cayman). Bush played a part in the allegations against Ennis coming to the attention of RCIPS and was interviewed by Tempura as a potential witness.
- It appeared that in the days following 13 August 2007, Commissioner Kernohan took both strategic and tactical control of the operation (through Covington, he also referred the allegations for independent investigation on 28th August 2007).

¹ There had been an earlier attempt by Martin to break into the office of Mr Seales at the end of August 2007.

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- Kernohan played a central role in the entry onto the premises of CNN, which initially resulted in a charge of burglary against Lyndon Martin. His role was, in summary, as follows:
 - (i) On 13 August Commissioner Kernohan directed Deputy Commissioner Dixon to establish from Martin whether he could provide any intelligence or supportive information or evidence of his allegation and whether he was prepared to come forward as a witness and provide evidence.
 - (ii) On 14 August 2007 Deputy Commissioner Dixon informed Commissioner 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.
 - (iii) On 23 August 2007 Commissioner Kernohan personally met with John Evans, a journalist from Cayman Net News (CNN). Lyndon Martin suggested that he was a person able to corroborate his allegations. The meeting took place as a result of Mr. Evans telephoning Commissioner Kernohan.
 - (iv) John Evans, at the tasking of Kernohan and Chief Supt Jones, entered the editor's office at CNN on the night of 3 September 2007, but nothing was recovered. He was purportedly trying to find material in a box file which would support the contention that Ennis and Seales were in a corrupt relationship. Kernohan and Jones were aware of the circumstances of the entry, and Evans was in touch with Jones throughout that evening, reporting on his progress.
 - (v) When Evans entered the premises it was late at night and the office was closed. He was not a keyholder. He had to bypass the alarm, which he did with the assistance of Lyndon Martin. Once in the general office area he entered the separate private office of Desmond Seales and looked through all his drawers and cabinets for the documents. Evans was not allowed to freely enter this room in the daytime when working, let alone during the night.

- Evans was treated as a witness by Operation Tempura, and provided a series of witness statements in relation to his involvement and his knowledge of events leading up to, and including, the unlawful entry to CNN. He confirmed that Desmond Seales is the 'publisher, editor in chief and owner of the newspaper and that Lyndon Martin had joined the newspaper after his arrival. He went on to mention that he had received two separate 'requests' to retrieve documents, one in relation to possible communication between the owner of CNN, Desmond Seales, and Deputy Commissioner of Police Ennis, the other a request made by a Grand Court judge, Mr Justice Alex Henderson.

- The tasking by Henderson was in order to identify the true authors of five letters that had been published by CNN over a period of time criticising the judiciary and the administration of justice in the Cayman Island on aspects of sentencing, transparency

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in appointments, court administration, and the reporting of Privy Council judgments² and implications thereof. The purpose of recovering the originals was to identify the author(s) of the letters. Evans stated that he *'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, specifically the Chief Justice'*. He further states that Justice Henderson had asked him to identify the source of the letters and their authenticity, although he acknowledges that Henderson was not aware of the precise circumstances by which he sought to obtain them. According to Evans, Henderson was not aware of the 3 September entry; however, a copy of a reference provided by Henderson to Evans is in the possession of the investigation. That reference is dated 3 September 2007.

- Later, in a witness statement, Evans also stated that Henderson asked him to *'look for some letters that had been published by Net News attacking the judiciary, specifically 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 circumstance of me trying to obtain those letters. I am a good friend socially of Judge Alex Henderson, one of the Grand Court Judges....Mr Henderson told me he was considering if the letters were contempt, and if there were sufficient grounds to take legal action against the newspaper...I did not have any concerns that I was asked to make enquiries on behalf of Judge Henderson unofficially....'*
- Detective Chief Superintendent John Jones also made a statement with regard to his knowledge of the events and his interaction with Evans, and stated *'He (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.'*
- In relation to the RCIPS tasking of Evans by Kernohan and Jones, there should have been an appropriate level of authority in place, as would be the case in the U.K., where the Regulation of Investigative Powers Act, 2000, governs intrusive police activity, warrantless searches, etc. It was accepted by Mr Kernohan that RCIPS worked within the "spirit of RIPA". This would be correct as the European

² The Privy Council (PC) judgment related to the quashing of the conviction of Barry Randall in relation to offences of dishonesty in 1997. The PC, in its advice was very critical of the trial judge and the prosecution counsel (the current Attorney General, Sam Bulgin was part of the prosecution team in the original trial) and concluded that the trial was unfair. The PC invites Cayman to increase its contribution to Randall's costs. CJ Smellie refused to do so. CNN then carries articles critical of the Attorney General and Chief Justice in their handling of the Randall case. Barry Randall is a business associate of Desmond Seales. By December 2006, the press reports seem to indicate that dispute had escalated from Randall and judiciary to Seales and the Cayman Government. In 2007 a number of letters in CNN, from various correspondents, were published and each of them was critical of justice system/judiciary in Cayman. A letter dated 3 July 2007 singles out the Chief Justice for criticism which prompted an internal memo from Justice Alex Henderson to the Chief Justice.

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Convention on Human Rights had been extended by the U.K. to all its Overseas Territories.

The investigation team later discovered that Ennis and Seales had, in fact, a somewhat acrimonious relationship. Ennis had attempted to sue Seales, as publisher of Cayman Net News, for defamation less than a year before these events, and Ennis had previously asked former Commissioner Kernohan if he would approve his legal bills for the lawsuit. This fact was known to Kernohan, but he failed to inform either Bridger or DI Ashwin.

Both Bridger and DI Ashwin were uneasy about what had transpired and when Kernohan was informed of this, he denied he had any previous knowledge of the lawsuit or indeed the request for expenses.

The investigation team established that the second Deputy Commissioner Dixon had a poor relationship with Ennis, and was the original complainant of the corruption allegation against Ennis (see above). The investigation team remained puzzled as to the lack of investigation by Kernohan into the relationship between the parties Ennis, Dixon, Martin, and Opposition Leader McKeever Bush (who had made identical allegations to Kernohan two days after Dixon's initial report) prior to proposing the suspension of a Deputy Commissioner and search his home and office.

Furthermore, the Attorney General (AG) had advised on two separate occasions that there was no evidence of criminality against Ennis and accordingly he did not consider that an application for a search warrant could be properly made. Again, this information was not brought to the attention of Bridger or DI Ashwin.

The officers held a number of interviews (tape recorded and written) with Kernohan as he was considered a significant witness³ and a decision was made to conduct further investigations in relation to Ennis and Seales.

The Operation Tempura investigation team met with the AG, Sam Bulgin, and Solicitor General (SG), Cheryl Richards, on 1 October 2007, seeking legal advice in respect of the investigation. It was agreed that the SG or a senior legal officer would provide legal advice to the investigation team.

On 16 October 2007, the investigation team submitted a file to the SG for formal legal advice in respect of the 3 September entry at CNN. No advice was received by the team and on 14 November the SG informed Bridger that the AG had asked her to inform the investigation

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Significant Witness" is a technical term used by U.K. police forces that arises from guidance issued by the Association of Chief Police officers in 2002. Significant witnesses (sometimes referred to as "key" witnesses) are those who may have witnessed, visually or otherwise, an indictable offence or events closely connected with it and who stand in a particular relationship to the victim or have a central position in the investigation.

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team that neither he nor any other law officer would provide legal advice to what were regarded as police operational decisions.

On 15 November 2007, the officers were informed by the Chief Secretary McCarthy that Andre Mon Desir, a former Senior Crown Counsel in Cayman, had been appointed to provide legal advice to the team. The events of 3 September 2007 were then referred to Mon Desir for legal advice. By 22 November 2007 no advice had been received and Mon Desir cancelled three meetings with the investigation team. On 6 December 2007, Mon Desir requested further time and a legal advice was provided on 9 December 2007 requesting further information from Larry Covington and John Evans.

On 11 January 2008, Mon Desir handed to Bridger his legal advice addressing the events of 3 September 2007 and advised that a full investigation of the entry at CNN and the surrounding circumstances should be undertaken. On 21 January 2008, Mon Desir handed to the officers 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.

In the interim, several discussions were held between the SOG and Mon Desir regarding the position and possible suspension of Kernohan, Jones and Dixon. All were placed on 'required leave' on 27 March 2008. Kernohan left Cayman and returned to the UK.

On 14 February 2008 a decision was made in consultation with Mon Desir to apply for search warrants (in respect of Kernohan, Jones and Dixon) and the investigation team was informed that the applications would be made before the Chief Justice (CJ) on 22 February 2008. Mon Desir informed the team that he, Mon Desir, had informed the CJ personally that a brother judge had been named in the inquiry, but not as a suspect at that stage.

At the time of the application, Mon Desir told the CJ of the position regarding Henderson and stated that there was a line of enquiry that would likely necessitate police speaking to Henderson in relation to remarks made by John Evans in his statement. The CJ was guided to the relevant paragraphs in the statements of John Evans and John Jones.

On 22 February 2008 an initial application for search warrants was made before the Chief Justice. After the application was made, the CJ retired to consider the application. During that adjournment, and without seeking any representations from the investigation team or Mon Desir, he raised with Justice Henderson outside of court, the evidence of Evans and sought Justice Henderson's comments on that. **(Comment: It was improper for CJ to have out of court discussions with Justice Henderson, who was not co-presiding over the application for the search warrant, about a witness on whose information reliance was being placed to support the application and in particular Justice Henderson's relationship with the witness).**

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When he returned to Court, later that same day, to give his ruling, the CJ began by stating that he wished to declare that as a result of the morning's application and discussion, he had had a conversation with Judge Henderson during the recess and Judge Henderson had told him that he had had a conversation with John Evans but would not have described as a good social friend.

He said that Justice Henderson might have mentioned to Evans that they, the judiciary, were a little concerned about the source of the letters but had in no way said anything to him that could be construed as a tasking.

The CJ ruled against issuing search warrants. The grounds for refusal were somewhat unusual namely (1) that neither Martin nor Evans had exceeded their permission to be on the premises, (2) there was no unlawful entry (3) there was no breach of the penal code and (4) the retrieval of material by the police was a proper course of action.

The officers expressed concern about the grounds for refusal, as they appeared to be an attempt to close down an independent police investigation, particularly as Mon Desir, the AG and the SG had earlier come to the view that there was a prima facie case against Kernohan and Jones.

The reasons for the refusal were not provided until 27 February, when Mon Desir was asked to provide legal advice on the ruling. Mon Desir opined that the CJ had erred in law and a second application should be made before the CJ and provided written legal advice. This was provided on 3 March 2008 and set out what he believed to be errors in the CJ's ruling. He also purported to withdraw from the case on the basis that he now found himself at odds with the CJ and AG (the latter had advised that the matter must now be drawn to an end, notwithstanding his earlier advice that there was a prima facie case!).

On 18 March 2008 a second application for search warrants was made by Mon Desir (remaining, for the time being, as counsel to the investigation) before the CJ. The hearing lasted 3 days. During the course of the application the CJ made it clear that he thought the actions of those under suspicion were, in fact, in the interests of national security. This was considered to be a strange remark given that no material, other than the statements of Evans and Jones, was before him. As the suspects had not been interviewed, there was no evidence to show that national security was a consideration in the minds of those involved in the events of 3 September 2007.

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- The CJ declined the application on 22 March 2008, but no written ruling was provided until 4 April 2008 when he gave a 51 page ruling. **(Comment: This is most unusual as most search warrant applications, even in most sensitive and complex cases, would not normally result in an attempt to give such a detailed ruling and rehearse the evidence).**

The reasoning in the ruling is flawed in both logic and the law. It looks like an attempt to close down the investigation. However, the CJ did grant the search warrant in respect of Dixon, but declined them in respect of both Kernohan and Jones, even though the information laid in support of the three individuals was identical. **(Comment: the 20 March 2008 decision to grant search warrant for the office premises of Dixon is a very odd decision particularly as, unlike Kernohan and Jones, he was not, in fact, a suspect. The question must be asked: Was there some sort of 'protection' going on here, and was there, in fact, a more explicit link between police and judicial taskings of Evans? In addition, and despite the reasoning of the CJ in the search warrant applications, it is very difficult to see how the entry of 3 September 2007, in the absence of a warrant, was lawful)**

Following the CJ's ruling, the AG advised the Governor that there should be no further action. However, Mon Desir disagreed with that advice and raised it with the AG. The AG then reconsidered his advice and concluded that it was an operational decision for the investigation.

A decision was made to continue with the investigation (without the search warrants) in respect of Kernohan, Jones, Dixon (in respect of other corruption matters, not connected with 3 September 2007 events), and Lyndon Martin.

Justice Henderson

Given the information by John Evans about his 'tasking' by Justice Henderson, the investigation team contacted Justice Henderson by telephone on 20 May 2008 to seek an appointment to speak with him. Henderson sought confirmation that the Chief Justice had been informed and stated that he would telephone DI Ashwin in due course.

Operation Tempura had, meanwhile, obtained further evidence. Jones had been asked to consider, by Kernohan, whether an investigation was appropriate, following a Memo from the Chief Justice. He concluded that the letters, whilst critical of the judiciary did not constitute a criminal offence.

In addition:

- An email was sent on 3 July 2007 from Henderson to the CJ in respect of a published letter;
- The CJ made repeated requests that the police launch an investigation into the published letters.

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On 21 May, the SG informed DI Ashwin that the request to interview the judge should be made in writing and should be submitted through her. Accordingly, a letter was hand delivered to the offices of the SG.

The investigation team received a written response from the CJ and Justice Henderson as to their recollection of events. Annexed to that letter was the written response of Henderson J. A meeting was declined. The investigation team submitted repeated requests for a meeting (19 June, 30 June, 7 August, and 26 August). In response both Justice Henderson and CJ refused a meeting, but Henderson provided a short-written note stating that he had not encouraged John Evans to search the office of Seales. **(Comment: Justice Henderson as an experienced judge and former prosecutor would have known that compiling a statement from a potentially crucial witness by written question and answer is just about impossible. The effect of the refusals was to stall the investigation).**

Although at the time of making the first application for the search warrants, it could not be said that there was a specific tasking by Justice Henderson in relation to the 3 September, the investigation came into possession (in October 2008) of a reference provided by Justice Henderson for John Evans which was dated 3 September 2007, the very day of the break-in into the offices of Seales. Had the investigation been able to continue, Justice Henderson would have been re-interviewed in relation to events of 3 September and the contact he had with Evans on and around that date.

Following our appointment as independent legal advisers to Operation Tempura on 5 August 2008, the investigation team sought our advice on a number of issues including whether there was sufficient evidence to found a charge against Justice Henderson on the basis of further evidence and material that had come to light. The team wanted a legal opinion on whether Henderson had now moved, evidentially, from witness to suspect.

On 18 September 2008 we advised that there was a prima facie case against Justice Henderson of misconduct in public office (contrary to common law) and an offence of abuse of office (contrary to section 95 of the Penal Code) in relation both to the entry into the premises of Cayman Net News (CNN) by John Evans on 3 September 2007 and to the events leading up to that incident. However, we confirmed that we were not able to say at that stage that there was a realistic prospect of conviction. **(Comment: the two tests are quite distinct and for the purposes of the arrest an officer does not have to be satisfied that there is a realistic prospect of conviction as that would have been for the AG to determine once he had received all the evidence from the investigation).** We also considered the position of the CJ and advised that he was a suspect, although there was not enough material against him to provide grounds for arrest.

On 24 September 2008, Justice Henderson was arrested at his home address and his consent was sought to search his home address. This was refused and later that morning an

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application was made before a Justice of the Peace (Carson Ebanks) for a search warrant in respect of both his home and chambers address.

Justice Henderson was then taken to Georgetown Police Station and upon arrival he asked to make a telephone call to CJ. Shortly thereafter, the CJ arrived at the police station and without notifying the arresting officers, he and Justice Henderson went into a private room where they remained for some 10 minutes. From an exchange of words thereafter between Henderson and one of the officers, it is suspected that the conversation between Henderson and the CJ was not in respect of court management/workload in the light of the arrest. **(Comment: it was improper and incorrect for CJ to have come to the police station without notifying the officers of his arrival.)**

When the officers arrived at his chambers, the CJ said to the officers "You don't want me to challenge the legality of the warrant" in a manner that the officers construed as a threat. Thereafter a series of improper actions followed, namely:

- CJ released the *ex parte* judgment of 20 March 2008 to Justice Henderson's lawyers within 24 hours of his arrest prior to putting it into the public domain **(Comment: when an application is made ex parte in circumstances where the CJ was aware, by his own admission, that the investigation (at that stage) was a sensitive, undercover one, the ruling should not be released without consultation with those who made the application. In a serious and sensitive case such as this one, CJ should have checked with the officers prior to releasing the judgment as the ruling by CJ included sensitive and confidential information about the case (including the role of McKeeva Bush as a potential witness) and certain suspects).**
- When challenged, CJ said he was perfectly entitled to release an *ex parte* ruling.
- The Chief Court Clerk was informally 'engaged' as one of the defence team and he assisted in drafting the grounds for the judicial review application **(Comment: a Court clerk or administrator must at all times remain neutral, this was not the case).**

Judicial Review

Following his arrest, Justice Henderson lodged an application for Judicial Review, challenging the granting of the search warrants. On 7 October 2008 leave was granted by Mr Justice Campbell (brought in from Jamaica to assist Cayman Court because of lack of judges following Justice Henderson's arrest and Mrs Justice Priya Lever's suspension). In his Order of that date, Mr Justice Campbell set down the *inter partes* hearing of the application for judicial review for a date not earlier than 14 October 2008 and not later than 17 October 2008, and ordered that the application and accompanying evidence be served by 8 October. He further ordered that any evidence to be filed by the Respondent and Additional Parties be filed by 13 October, and that skeletons be cross-served not later than 24 hours before the hearing. In the event, the Applicant's application and documents were served on 7 October,

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and the matter was administratively listed for Thursday 16 October. The parties were given to understand that the court would hear the full application on that date.

However, the position under the Grand Court Rules 1995 Ord 53 r. 5(2), (4) and (5) is that ordinarily:

- a) the applicant must serve on the defendant and other directly affected persons copies of the notice of motion, supporting affidavits, order for leave and Form 53 application within 7 days [Ord 53, r. 5(2)]
- b) the first hearing of the notice of motion is treated as a *directions hearing* [Ord 53, r. 5(4)]
- c) unless the court otherwise directs, there must be *at least 14 days* between the service of the notice of motion and the first hearing.

The hearing of a full judicial review within a week or so of the grant of leave would be exceptional other than in relation to, for instance, an urgent extradition, asylum, child protection or press matter. Indeed, a copy of the transcript of the *ex parte* hearing before Hon Justice Campbell on 7 October (disclosed on 10 October) revealed that counsel for the Applicant in fact envisaged that the first hearing would be for the purposes of directions.

In the event, the parties agreed, by way of a draft consent order, that the hearing date be vacated until the first open day after 19 November and the date for the service of the Respondent and interested party's evidence be varied to 31 October, with any evidence in response to be served by 7 November. The Applicant thereby implicitly acknowledged that the other parties required further time to prepare.

The grounds for the application also included 'bad faith' on the part of the investigating team in the following terms:

- (i) that the officer who applied for the search warrant failed to inform the Justice of Peace (JP) of the decisions of the Chief Justice of 22 February and 20 March 2008 in relation to the earlier applications for search warrants in Operation Tempura and this amounted to a breach of the 'duty of candour'.
- (ii) that the Senior Investigating Office, Martin Bridger, and/or his legal counsel failed to explain the basis for the search warrants sufficiently and properly to the JP
- (iii) that the application was a 'fishing exercise', and was motivated by malice on the part of the SIO as Justice Henderson had refused the requests for a face to face meeting.
- (iv) that the ulterior motive of the arrest was to obtain an interview with a sitting judge.

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(v) that the searches were also merely a fishing expedition and there was nothing to suggest that the investigation team was looking for any evidence.

In the course of submissions before Mr Justice Campbell on 2 October 2008, counsel for Justice Henderson described the failure to bring the attention of Carson Ebanks JP to the judgments of the Chief Justice as 'suppression' and as being 'improper'.

The application for judicial review of the search warrants alleged bad faith on behalf of the investigation team and those advising it.

Sir Peter Cresswell

Cresswell was hostile from the moment he sat on the directions hearing on 17 October. His intention was to have the full hearing take place on the following Monday, 20 October, even though he was told that there were a number of affidavits to obtain (including from the officer who swore the information for the search warrant, who was trekking in Canada, 100 miles from the nearest town) and counsel would need to be brought over from the UK.

Cresswell totally mismanaged an attempt by the investigation to make an application to withhold material relating to the suspicions around the CJ from those representing Henderson. Indeed, Cresswell succeeded, by attrition, in getting the public interest immunity (PII) application abandoned. At one point, he urged that the sensitive material be disclosed on a counsel to counsel basis. The effect would have been to give the material to Henderson himself (his lawyers would have had to have shared it with their client or be professionally embarrassed). **(Comment: It is hard to escape concluding that this was an attempt to damage the investigation's case in the JR hearing. See transcript.)**

Cresswell's ruling is extreme and is largely unsupported by the evidence before him. It was bound to bring crucial parts of the investigation to an end. It:

- Does not address or recognise that Cayman law allows application for search warrants to be made to JPs, magistrates and judges, and it does not provide for particular search warrant applications to be made to only, eg, judges (see earlier advice from AG to this effect).
- Does not refer to affidavits from RCIPS officers addressing crucial aspects of procedure and practice.
- Makes findings that are not supported by the weight of the evidence (incl in respect of the evidential case against Justice Henderson).
- Finds bad faith without supporting evidence to support such a draconian finding.
- Flies in the face of the evidence by attributing nefarious motives.

(Comment: Had the ruling been given in a UK court it would have had the effect of rendering the officers attacked in it unusable as witnesses or as line managers thereafter, and would probably have precluded Martin Polaine from acting as a

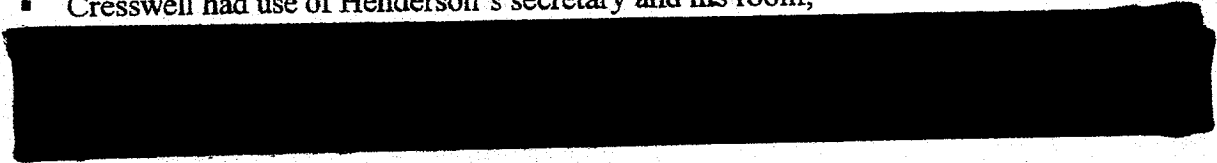
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prosecutor again. That is a measure of how extreme it was, notwithstanding that the evidence did not support such findings).

As an aside, two days before the JR hearing, I received a request from Mrs Justice Priya Levers to meet with her on a lawyer to lawyer basis. Justice Levers was herself suspended at the time and had had profound disagreements with the CJ over a number of matters. I am not able to set out the conversation we had; however, as a result of what I was told, I was in no doubt that my career and reputation would be at real risk if I persisted in fighting the JR.

It has been brought to our attention by those lawyers who acted for RCIPS and the investigation at the JR, and who continue to act in relation to the sensitive material retained by the court, that Cresswell is currently attempting to have destroyed/disclosed the withdrawn PII material. His efforts in that regard (including the setting down of a new hearing) is improper. He was appointed as a judge to the Financial Services Division of the Grand Court of Cayman after he gave this ruling. His attempts to order destruction/disclosure began 2 days after that appointment. **(Comment: We do not have firsthand knowledge of this aspect. However, Michael O'Kane of Peters & Peters, Nick Purnell QC and Hugo Keith QC are able to assist. They are very concerned and troubled by the current actions of Cresswell.)**

In addition to the above, the investigation had reliable information (capable of being further evidenced) that:

- Cresswell had lengthy meeting with CJ (2 or 3 hours) when he arrived on island;
 - Cresswell had use of Henderson's secretary and his room;
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There is also financial intelligence to indicate financial transfers between the AG and Dixon (and suggestion that CJ involved as well). Although Dixon acquitted re criminal matters unrelated to 3 September, there is reliable intelligence to show that he is corrupt and has committed criminality.

The Offence of Misconduct in Public Office

During the early stages of Operation Tempura, the investigation team sought legal advice from the AG and Mon Desir as to the appropriate offence in respect of the events of 3 September 2007 (entry into the offices of Mr Seales) against Kernohan and Jones. One of the offences considered by both the AG and Mon Desir was an offence of 'abuse of public office' contrary to section 95 the Penal Code, in addition to an offence of burglary. Mon Desir then sought the views of a senior lawyer at the Crown Prosecution Service Headquarters in respect of the offence of misconduct in public office.

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Misconduct in a public office is a common law offence committed when the holder of that public office acts, or omits to act, in a way which is contrary to his duty. The elements of the offence of misconduct in a public office are: i) A public officer acting as such; ii) Wilfully neglects to perform his duty and/or wilfully misconducts himself; iii) To such a degree as to amount to abuse of the public's trust in the office holder; iv) Without reasonable excuse or justification.⁴

On the basis of the discussion between Mon Desir and the Crown Prosecution Service, consideration was given to the offence of misconduct in public office, and it was accepted by the AG that the position under Cayman law is similar to that in the UK, namely that it is a common law offence and is therefore an arrestable offence

The Attorney General's Chambers were clearly of the same view up to May 2008, as they advised in relation to the Operation Tempura arrests of two police officers (Dixon and Berman Scott) for the offence of misconduct in public office.

When we were asked to advise on the offence of misconduct in public office, a detailed advice note was provided to the investigation team and we concluded that the offence was a common law offence under Caymanian law and was therefore an arrestable offence. Our rationale for reaching that conclusion was as follows:

The First Schedule to the Criminal Procedure Code (entitled 'Mode of Trial and Arrestable Offences') provides for a list of offences under the Penal Code that are arrestable without a warrant. Under English law, the offence of misconduct in public office is, however, a common law offence. It is also a common law offence for the purposes of Cayman law and, therefore, falls outside the Penal Code. This is made clear by section 2(a) of the Penal Code which provides: "Nothing in this Law shall affect – (a) the liability, trial or punishment of a person for an offence against the common law or any other law in force in the Islands".

As a common law offence, the punishment for misconduct in public office is at large and carries a maximum sentence of life imprisonment:

The last page (page 80) of the First Schedule to the Criminal Procedure Code, states "Offences against Other Laws where power of arrest is not prescribed: If the Offence is punishable more severely than with six years; imprisonment then such offence is arrestable".

It was our view that the phrase 'other laws' includes the common law (see the wording of the section 2(a) Penal Code provision, above); on that basis, misconduct in public office would be an arrestable offence.

As to section 38(1) of the Penal Code, which provides "When, in this Law, no punishment is especially provided for any offence it is punishable with imprisonment for four years and a

⁴ Attorney General's Ref No 3 of 2003 (2004) 3WLR 451, per Pill LJ at p467

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fine". it must be the case that section 38(1) refers only to such offences as are contained in the Penal Code itself, and does not refer to common law offences. Were it to be otherwise, section 2(a) of the Penal Code would be otiose.

This reasoning and conclusions have been considered by two London silks, albeit informally, Hugo Keith QC and James Lewis QC. Each concurred with our reasoning and conclusions, as had the AG until the second judicial review proceeding when he adopted a view contrary to his earlier advice.

A second application for judicial review was made on behalf of Justice Henderson. It challenged the lawfulness of the arrest itself, on the basis that the offence of misconduct in public office is not arrestable in Cayman. At the JR hearing, a concession was made on behalf of the AG that the offence was not arrestable, but the AG did not make his reasons public for this fundamental shift in his approach. The details given to the Court (December 2008) at the second JR, are nothing short of disingenuous.

[REDACTED] As a result of the AG's concession that the arrest was unlawful, the amount of compensation paid to Henderson was greatly increased. He received over £1,000,000.

Larry Covington, FCO Law Enforcement Adviser for the Caribbean

A few words are needed as to the role and behaviour of Larry Covington. He was, and remains, the overseas policing adviser for the Caribbean States on behalf of the FCO. He is expected to advise individual country police services on a range of strategic and tactical issues.

Documentation demonstrates that Covington was actively involved in advising Kernohan as to what he should do about the allegations made against Ennis. Covington denied knowledge of the entry on the 3rd of September, although available evidence does not support this position (he received an email shortly after the entry had taken place advising him that the 'operation' had been 'abandoned'). He was asked to provide a witness statement as to the nature of the advice given by him to Kernohan and others, and, in particular, as to his level of knowledge of the entry on the 3rd. A large number of documented requests were made to him and his line manager to provide such a statement. However, he persistently refused.

[REDACTED] Covington eventually made a witness statement, but only after the judicial review had fatally damaged

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the investigation. The witness statement was not taken by the Operation Tempura team and failed to address a range of crucial issues.

ROLE OF LAWYERS

At the request of SIO Bridger, the investigation team engaged and retained Andre Mon Desir as Special Counsel until May 2008⁵, after which Senior Crown Counsel Trevor Ward acted as legal adviser to Operation Tempura. As the investigation progressed, SIO Bridger suggested to the then Governor General, H.E. Stuart Jack CVO, that a UK lawyer be engaged and I was put forward on the recommendation of Assistant Commissioner John Yates. Yates contacted me around mid- June 2008 asking if I would consider acting as legal adviser to Operation Tempura and gave me a brief background of the case. In March 2008, I had started my own consultancy⁶ with a colleague (Miss Arvinder Sambei) and given my previous experience in the UK and abroad on anti-corruption cases (my CV is attached), I agreed to meet SIO Bridger in London for a briefing.

Following our discussions, we agreed to act as independent legal advisers to Operation Tempura and were appointed as legal advisers on 5 August 2008. We acted as legal advisers from 5 August 2008 to November 2008. The circumstances that led to the termination of our contract arose from the findings by Sir Peter Creswell at the judicial review hearing (see above for details) in relation to the arrest of Justice Alex Henderson and a search at his home address and chambers. The effect of the ruling was to wholly discredit the investigation and led to its closure.

The decision to arrest a High Court ^{Bridge} was not taken lightly by SIO Bridger and involved detailed discussions with key stakeholders in Cayman Islands and the UK. Of course, we accept that the decision was made based on the legal advice we had given.

As a consequence of the findings by Sir Peter Creswell coupled with a decision not to appeal, led to a complaint being made against me to the Bar Council of England & Wales by Justice Henderson on 23 March 2009. The basis of the complaint was, in brief, professional misconduct on my part. As the judicial review decision by Sir Peter Creswell had not been the subject of an appeal, I had no choice but to accept the adverse findings at my disciplinary tribunal hearing on 9 December 2009, which led to my disbarment. This decision has had an extremely devastating effect on my personal and professional life, and has sadly led not to just the loss of my professional reputation, but also my ability to work. why?

⁵ Mr Mon Desir stepped down as Special Counsel as he was appointed to the Bench in Trinidad & Tobago.

⁶ Amicus Legal Consultants Ltd

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My personal background

I was called to the Bar in 1988 and, until my recent disbarment, I had led a successful career at the private bar, as a senior prosecutor with the Crown Prosecution Service, Senior Lawyer at the Independent Police Complaints Commission (IPCC), and as a consultant at the Commonwealth Secretariat.

I am presently one of two directors of Amicus Legal Consultants Ltd. I have included a full CV of my career, but thought it may be helpful to highlight my experience in the field of anti-corruption, in particular, both nationally and internationally.

As a senior lawyer at the Crown Prosecution Service (UK), I set up a specialist team (the Visa Team) in 1998 to advise upon, and prosecute, serious and complex corruption investigations. In so doing, I devised a new method for corruption cases, particularly covert investigations and co-operating defendants. This model has been replicated in a number of European and Asian countries.

When the decision was made to set up the Independent Police Complaints Commission (IPCC) for the UK, I was one of the senior lawyers engaged to assist in its setting-up and early stages in 2004.

At the international level, I was a member of the OECD Working Group on Bribery and have been a 'lead examiner' for its peer review process (from 2000 – 2005). I have also undertaken country evaluations, capacity building and training on behalf of many international and regional bodies, and advised widely on law, procedure and legislative drafting in the fields of anti-corruption, economic crime, organised crime, counter-terrorism, and international co-operation (please see CV for details).

I am the co-author of the standard practitioner's texts, 'Corruption & Misuse of Public Office' (Oxford University Press, 2006), and 'Counter-Terrorism Law & Practice: An International Handbook' (Oxford University Press, 2009).

I have given expert evidence in matters within my areas of specialisation and in 2003 I gave evidence to the Joint Parliamentary Committee on the 2003 draft Corruption Bill (in a private session).

Professional background of Martin Bridger QPM

Martin Bridger QPM (now retired) was, until 20 May 2008, a serving police officer with the Metropolitan Police Service ("the MPS") in London, England. He served for some 31 years and at his retirement he held the rank of Chief Superintendent.

Throughout his career he served in specialist units, including Child Protection Teams, the Flying Squad, and the National Crime Squad. He was involved in the establishment, and worked for several years on, the Metropolitan Police Service Anti-corruption Command and

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the establishment of the Police Ombudsman Office in Northern Ireland, the first totally independent police oversight organisation in the world. Whilst at the Ombudsman Office he re-investigated matters concerning the Omagh bombing in which 29 people lost their lives.

In the last 5 years of his service he was a Borough Commander in Lambeth Borough. Whilst in that post, he oversaw and managed the community impact of the attempted terrorist attack at the Oval tube station on 21st July 2005, and the shooting of Jean Charles de Menezes, a Brazilian national who was killed by the police at Stockwell tube station on 22nd July 2005.

In recognition of his commitment and service, he was awarded the Queen's Police Medal (QPM).

In September 2007 he was asked to head up the anti-corruption investigation, Operation Tempura, in Cayman Islands

Work of Amicus Legal Consultants Ltd

We are a legal consultancy set up in March 2008 with the aim of providing a range of technical assistance and capacity building for States as well as advising and handling cases. At the time of setting up, we each have over 20 years experience as legal practitioners (barristers) in the UK and spent some two and a half years at the Commonwealth Secretariat, developing and delivering capacity building programmes for Commonwealth States as well as technical assistance as well as providing legal advice.

One of the main aims of the consultancy is to assist in the development of prosecutorial and law enforcement capacity on behalf of international and regional organisations and States. As part of our aim, we undertake work at public sector rates and our professional fees reflect this thinking. This was also the case with Operation Tempura. We attempted to keep the costs for the Cayman government to a minimum by ensuring that visits to Cayman Islands were those that were essential (in total only 3 trips were undertaken over 4 months) and only one of us travelled. The professional fees were at a daily rate of £500 for days spent on site and any advice work was charged at £150 per hour. Officers of Operation Tempura were of course free to contact us by telephone and unless the telephone conference was lengthy, it was not billed.

-----End of report-----