> "a person is a trespasser for the purpose of section 9(1)(b) **[burglary]** ... if he enters premises of another knowing that he is entering in excess of the permission that has been given to him, or being reckless as to whether he is entering in excess of the permission that has been given to him to enter, providing the facts are known to the accused which enable him to realise that he is acting in excess of the permission given or that he is acting recklessly as to whether he exceeds that permission, then that is sufficient for the jury to decide that he is in fact a trespasser" (at p. 52).

166. The English authorities cited above were followed by the CICA in Ebanks v. R 2000 CILR Note 8 (14th August 2000). The appellant was charged with aggravated burglary. He had formerly lived with the victim but was living elsewhere at the time of the offence. He retained a key to the house but had not, since leaving, attempted to use it. He had on one occasion forced entry when refused by the victim but thereafter had made arrangements by telephone to collect his belongings from her. He later came to the house in the victim's absence and, on discovering that the locks had been changed, entered through a window. Upon her return, he attacked her with a knife. He pleaded not guilty. The Grand Court rejected his submission of no case to answer. The Cayman Islands Court of Appeal held that the appellant had been a trespasser on the victim's premises notwithstanding that some of his personal possessions remained there. He had known that he had no permission from the occupier to enter, or had at least been reckless to whether he had such permission. This element of the offence was therefore made out and the court had properly rejected the appellant's no case submission.

167. A person who has the right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose: Taylor v. Jackson (1898) 78 L.T. 555; Hillen v. ICI (Alkali) Ltd [1936] A.C. 65; R v. Walkington [1979] 68 Cr.Ap.R. 427 and the Commonwealth authorities cited by the editors of Archbold 2011 at paragraph 21-117.

168. Applying the above principles it appears clear that Evans was a trespasser when he entered Seales' office on 3 September 2007; and Kernohan and Jones procured the trespass when they sent him into Seales' office.

Criminal Intent: "Without having lawful business"

169. In dealing with the mental element which the prosecution would have to prove when dealing with an offence, the general position at common law is that to make a man liable to imprisonment for an offence which he does not know that he is committing and is unable to prevent is repugnant to the ordinary man's concept of justice and brings the law into contempt.

170. In Sweet v. Parsley [1970] A.C. 132 Lord Reid stated at 149, HL

> "It is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been', because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted"

> After referring to a class of acts which "are not criminal in any real sense, but ... which in the public interest are prohibited under penalty", he said:

> "It does not in the least follow that, when one is dealing with a truly criminal act, it is sufficient merely to have regard to the subject-matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing

new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or disgraceful the offence, the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that, fortunately, the Press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and of its administration. But I regret to observe that, in some recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence" (at pp. 149-150).

171. In Gammon (Hong Kong) Ltd v. Attorney General of Hong Kong [1985] A.C. 1, PC, Lord Scarman summarised the common law principles relating to mens rea as follows: (i) there is a presumption of law that mens rea is required before a person can be convicted of a criminal offence; (ii) the presumption is particularly strong where the offence is "truly criminal" in character; (iii) the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute; (iv) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, e.g. public safety; (v) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

172. There is nothing to suggest that criminal trespass is an offence of strict liability. The offence uses the words *'without having lawful business thereon'*. It does not use the common statutory phrase *'without lawful excuse'*. The presence of a lawful excuse would remove the trespass itself.

173. There are two possibilities which exist as to the criminal intent required to prove the offence of criminal trespass:

(a) that the defendant knew that he had no lawful business on the premises, but nevertheless intentionally or recklessly entered them; or

(b) that a further underlying criminal purpose is required, namely that the defendant knows he is committing a criminal offence. This would appear to be the mens rea which the CJ ascribes to the offence in his ruling.

174. If the analysis in (b) were correct one would ask what might the further unlawful and underlying criminal purpose or intent be? Routinely, one might expect it to be stealing or causing criminal damage, but, if that were the case, the full offence of burglary would be committed and the section 277 offence would thus be redundant. In this respect note should also be made of the provisions of section 7 (3) which provide:

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility".

175. There is therefore an argument that the correct analysis is that contained in paragraph (a) above, namely "that the defendant knew that he had no lawful business on the premises, but nevertheless intentionally or recklessly entered them". In his April ruling the CJ considered briefly at paragraphs 77, 103 and 104 the offence of criminal trespass. He took the view that Kernohan and

Jones could not be guilty of that offence because police officers regularly enter premises as trespassers in order to further criminal investigations and they are never prosecuted. The matter is only dealt with as a civil matter. Therefore Kernohan and Jones would not have expected that they would be committing any criminal offence by their activities on 3 September 2007. The learned CJ quoted from a number of authorities emanating from the United Kingdom courts: Ghani v. Jones [1969] 3 All E.R. 1700; Sweet v.Parsley [1970]; A.C.132; Canadian Pacific Wine Company v. Tuley [1921] 2 A.C.417 PC; R v. Sang [1980] AC 402.

176. In the United Kingdom there is no general offence of criminal trespass as in the Cayman Islands. There is a specific obscure offence of criminal trespass contained in section 128 of the Serious Organised Crime and Police Act 2005. This makes it a criminal trespass to unlawfully enter any designated site which is defined as Crown land or land protected by the Secretary of State in the interests of national security.

177. However traditionally in the United Kingdom unauthorised entry into private land is only a civil trespass so no police officer would ever expect to be prosecuted for a criminal trespass where he has committed a trespass in the United Kingdom. Indeed no ordinary citizen in the United Kingdom would expect any action to be brought against him (whether civil or criminal) for trespass unless it was of a significant degree: for example gypsies deciding to camp on someone's land. The United Kingdom has always had a very liberal approach to civil liberties in this respect. Set against this background, the UK

courts have always taken the view that police officers are under a duty to obtain and preserve evidence. Such evidence at common law is admissible in a future criminal trial even if obtained unlawfully: see R v. Sang [1980] AC 402. If the police officer obtains evidence by entering land unlawfully, any damages for trespass would usually be nominal. The law relied upon and dealt with extensively by the learned CJ is correct so far as the United Kingdom is concerned.

178. However the Cayman Islands is unique in that it has the general offence of **Criminal Trespass,** an offence which on any view applies to residential premises, and an offence which is not in existence in the UK. Every police officer working in the Cayman Islands is presumed in law to know the law. Therefore police officers who commit a trespass on residential land (and perhaps commercial land depending on statutory interpretation) in the Cayman Islands know that **uniquely, they can be prosecuted**, unlike police officers in the United Kingdom, for the offence of criminal trespass. Ignorance of the law is no defence in the Cayman Islands: see section 5 Penal code. The effect of the learned CJ's ruling on criminal intent is that a police officer in the Cayman Islands can never be prosecuted for the offence of criminal trespass whilst committing an unlawful trespass in the execution of his duty, because his state of mind would always be that he was entitled to seek and preserve evidence and he would not need a search warrant to do so: his only risk of liability (following the CJ's ruling) would be for a civil trespass where damages would be nominal.

179. Normally a judge cannot prescribe that a statutory offence will not apply to a particular class of citizen (police officers acting in the execution of their duty) without specific and express statutory permission from the Legislature.

Abuse of Office

180. Section 95 (1) of the Penal Code provides:

"Whoever being employed in the public service does or directs to be done, in abuse of the authority of his office, any arbitrary act **prejudicial to the rights of another** is guilty of an offence...".

181. Section 5 of the Penal Code provides:

"Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence"

182. Taking the common law principles and applying them to section 95 of the Penal Code it is clear that mens rea is an essential element of the offence. The prosecution must prove not only that a public officer has directed an "arbitrary act **prejudicial to the rights of another"** but that when doing so the public officer either

(a) intended to direct such an act; or

(b) must have been aware they were directing such an act.

183. The definition of "arbitrary" given its ordinary English meaning includes "random, uninformed, illogical, and capricious". The Shorter Oxford

Dictionary describes the word as "unrestrained in the exercise of will or authority; despotic, tyrannical". Whichever adjective is used, if a person in public office intentionally directs another person to commit a potential criminal offence (such as criminal trespass), or directs another person to commit a potential criminal offence (such as criminal trespass) in circumstances where he must have been aware that he was directing that person to commit the said criminal offence, then that direction will be arbitrary within the meaning of section 95.

184. Prejudicial means to "adversely interfere" with the rights of another. A criminal trespass would be "prejudicial to the rights of another" in this sense: the adverse interference would be actionable as a civil tort. To support an action of trespass it is not necessary that there should have been any actual damage; the trifling nature of the trespass is no defence: **see Chapter 18: Clerk & Lindsell on Torts and Yelloly v. Morley (1910) 27 T.L.R.**

185. Kernohan and Jones were employed in the public service as police officers. They directed Evans to enter the private offices of Seales. On the facts, all three men knew they had no lawful business in his office, hence the reason search warrants were not applied for, and there was concern over the alarm at the premises. This **prima facie,** was capable of constituting the offence of criminal trespass contrary to section 277 of the Penal Code. The direction by the officers was prima facie arbitrary, and intentionally arbitrary; and was an arbitrary act (trespass) which prejudiced Seales' right to private enjoyment of his private office: a right actionable in Cayman civil law as a tort of trespass.

There is no **prima facie** evidence that Kernohan or Jones were acting under an honest and reasonable, albeit mistaken belief, that they were entitled to task and use Evans in the way they did on 3 September 2007: the section 8 defence. Quite to the contrary: they were aware they could not undertake the search within the confines of the law by way of a search warrant. There was therefore a respectable argument that the actions of Kernohan and Jones prima facie constituted the offence of Abuse of Office as prescribed by section 95 of the Penal Code. This view is predicated on the legal basis that the offence of criminal trespass exists in the Cayman Islands, unlike the UK, and is applicable to office buildings.

Wilful disobedience of the law

186. Section 121 Penal Code provides:

"Whoever wilfully disobeys any law by doing any act which such law forbids, or by omitting to do any act which such law requires to be done and which concerns the public or any part of the public is guilty of an offence..."

187. Both Kernohan and Jones disregarded the advice of the AG, wilfully disobeyed the relevant provisions of the Police Law (2006 Revision) relating to search warrants, and the Criminal Procedure Code (2007 Revision) relating to criminal trespass, and proceeded to engineer the commission of an act which section 277 potentially forbids (namely, the unlawful entry and search of the private offices of Desmond Seales). Conversely, it can be said that they omitted to do any act which such laws required to be done-namely, obtain the requisite search warrant before proceeding to authorize and engineer the entry

and search of the said premises. If Criminal Trespass applies to an office building, then their actions prima facie constituted the offence of Disobedience of Lawful Duty as prescribed by section 121 of the Penal Code.

188. In scenario 1, the offences of criminal trespass, abuse of office, and disobedience of lawful authority would arguably be made out on a prima facie basis. Under section 26 of the Criminal Procedure Code (2006 Revision) the police when applying for a search warrant only had to establish that there was a reasonable suspicion that an offence had been committed. They did not have to show that there was a prima facie case. In Scenario 1 it would have been properly arguable that there was a reasonable suspicion that the offences of Criminal Trespass, Abuse of Office, and Disobedience of Lawful Duty had been committed.

Scenario 2: Criminal Trespass does not apply to an office building

189. The CJ approached the facts in the search warrant application on the scenario 2 situation. If Criminal Trespass does not apply to an office building then the only criminal offence which Kernohan and Jones could have committed in respect of the 3 September 2007 events were the offences under sections 95 and 121 of the Penal Code. In his April rulings the CJ was of the views that 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.

National Security and the documents in question

190. Although the issue of national security appears in the judgment of the Chief Justice, he does not appear to have been addressed by counsel on the law relating to this topic as it applies in the United Kingdom, so that an analogy could be drawn as to whether such principles should apply in the Cayman Islands.

191. Article 8 of the European Convention on Human Rights states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law, and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

192. Article 8 of the European Convention on Human Rights has not been incorporated into the Cayman Islands law. However it is of persuasive authority and is treated as such by the Caymanian Courts. Article 8 recognises that the police authorities may interfere with a private individual's right of privacy in the interests of national security. However such interference must be "in accordance with the law": **see Archbold 2011 edition para. 16-109**. In the UK this means that entry without a search warrant can in principlebe justified in the interests of national security or for the prevention of crime. However the law must give an adequate indication of the circumstances in which, and the conditions under which, such entry can occur: Malone v. U.K. 7 E.H.R.R. 14. The rules must define with clarity the categories of citizens liable to be the subject of such warrantless entry, and the criminal offences which might give rise to such warrantless entry: Huvig v. France, 12 E.H.R.R. 528; Kruslin v. France, 12 E.H.R.R. 547. There must, in addition, be adequate and effective safeguards against abuse: Malone v. U.K. This case law led to the UK legislating and bringing into force the Regulatory and Investigatory Police Act 2000.

193. Whilst it is desirable that the machinery of supervision should be in the hands of a judge, this is not essential providing the supervisory body enjoys sufficient independence to give an objective ruling. In Khan v. United Kingdom (35394/97) (2001) 31 E.H.R.R. 45, the Court held that the use of a covert listening device prior to the coming into force of the Police Act 1997 was in breach of Article 8. The relevant Home Office guidelines were neither legally binding nor publicly accessible and the interference was therefore

inadequately regulated by law. Moreover, the Court held that there was no effective remedy for the violation, as required by Article 13 of the Convention. The discretion to exclude evidence under section 78 of the PACE Act 1984 was inadequate because, prior to the enactment of the Human Rights Act 1998, the national courts did not have jurisdiction under section 78 to determine the substance of the applicant's complaint under Article 8: see R. v. Khan (Sultan) [1997] A.C. 558, HL), nor did they have power to grant appropriate relief for the violation. The system for investigating complaints against the police established in Part IX of the 1984 Act failed to meet the requisite standards of independence necessary to constitute sufficient protection against abuse of authority, and thus to provide an effective remedy within the meaning of Article 13.

194. In 2007 there was no set of rules in the Cayman Islands supervised by an independent body which set out the procedures and the circumstances where a search could take place without a warrant in the interests of National Security. Furthermore the CJ in his ruling did not seek to set down any such rules, against which the actions of Kernohan and Jones and the actions of any police officers faced with a similar situation could be judged.

195. A further difficulty with the CJ's ruling is a factual one. It is clear from the sequence of events that by 3 September 2007, Kernohan and Jones had been told that:

196. Ennis had been passing highly confidential minutes of meetings of the highest level of the RCIPS command to Seales; and had been disclosing similar classified police information to him by way of e-mails;

197. That Seales had been using that information for the economic advantage of his publications and may have been disseminating the information to criminal associates whom he wished to inform about confidential police operations;

198. There was no evidence that, in relation to the documentation affecting the police, either officer believed that they were dealing with a matter of national security that gave them the legal right to override normal procedures. There was no sense of urgency for national security reasons to enter the premises of Seales. The factual knowledge that police information was stored in Seales' office first arose on 11 August 2007 however no attempt was made by the police to engineer the entry into the office until 31 August and then 3 September 2007.

199. The only potential issue of national security that arose in the mind of Kernohan and Jones was in respect of the offending letters criticising the judiciary: **paragraphs 36 of this Report**. Kernohan first raised this as a potential matter of national security; and it was Jones' understanding that the suggestion that the offending letters might be a matter of national security first came from the CJ: a view with which Jones profoundly disagreed. The offending letters was not a subject the CJ was dealing with in the search warrant applications.

Criminal intention to commit an offence

200. Section 8 of the Penal Code provides: a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of a state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The CJ stated in his ruling that Kernohan gave an exculpatory response to all matters which were set out in his undated statement at page 5:

"On 3rd September 2007 I spoke with Mr.Dixon and asked him to make contact with [Martin] to clarify the position with respect to documentary evidence. He later indicated that [Martin] was not able to obtain proof, however, [Martin] had spoken to John Evans who was an employee at the Net News and had lawful access to the documents and that Mr.Evans was willing to copy some of the documentary evidence. I contacted [DCS Jones] and updated him that nothing had been received from [Martin] with respect to documentary proof, however, that John Evans was willing to obtain copy documentary evidence. We discussed at that time **the importance of ensuring that no allegations of impropriety would be made against Evans, as an employee,** from copying some of these notes and certainly nothing that would be considered illegal. Mr.Jones agreed and he proceeded on that basis. That evening I contacted Mr.Jones who updated me that Mr.Evans had found no trace of the file in his work place".

201. Kernohan's exculpatory statement was not supported by the weight of other evidence. The evidence placed before the CJ, at the preliminary search warrant stage, revealed a reasonable argument that all three men knew that what they were doing in entering the office of Seales was legally wrong. It is worth repeating parts of the evidence to support this view.

201.1 There was no independent corroborative material they had seen to substantiate Martin's allegations and therefore the AG had advised that there was no basis

in law for obtaining search warrants to enter Seales' private office to search for the sensitive material believed to be in existence and kept in the office:

201.2 Jones as senior police officer, agreed with the AG's advice that there was need for corroborative material before a search warrant could be sought, and that such corroborative material was absent: **Core Bundle D, Tab 21, page 35**

201.3 The AG had advised that to conduct a search on the premises of a 'media entity requires extreme caution':

201.4 On 28 August 2007, Martin provided a three page letter addressed to Governor Jack. He ends by emphasising that he has no authority to seek to assist the police in the way they would require and to do so could lead to the loss of his job.

201.5 On Friday 31 August 2007, Kernohan wrote to Covington stating that he was waiting to hear from Martin "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"** [emphasis added].

201.6 Jones' statement reveals that he must have known the entry into CNN on 3rd September was unlawful. Jones sets out that Evans had

(a) tendered his resignation from CNN;

(b) was prepared to go into CNN out of hours;

(c) knew there were risks associated with doing this, but considered the risks were low.

(d) activated the alarm which he was unable to turn off.

(e) would not be able to go back into Seales' office during the next working morning because he worked in a different part of the office

The summary is taken from the following passages of Jones' statement: "On Monday 3rd September 2007, I... was ... informed that **John Evans had tendered his resignation** and was willing to go **back to the CNN office out of hours** to make copies... I was asked by the Commissioner to ring Mr.Evans after 6pm that evening. When I rang Mr.Evans, he informed me that he was willing and able to enter the CNN office and take copies of documents contained within the box file. **He confirmed that he had tendered his resignation** and would be working a further two weeks before leaving CNN's employment. **I asked him about the risks associated with compromise of his actions but he felt confident that they were low.** It was his preference that we would meet as soon as he left the premises. **I briefed him on the type of material of interest and agreed to await a further call....** At around 8.50pm same evening (Monday 3rd September) I received a call from Mr.Evans who said he had decided to enter the office earlier than planned **but had activated the alarm which he was unable to turn off.....** At around 10pm, same evening, I received a further call from Mr.Evans who reported a successful entry. He had been given the location of the file by Mr.Martin and had made a search of Mr.Seales' desk but no trace of the file had been found....**I asked him whether he would be in a position to confirm this the next morning when Seales started work but he informed me that he worked in a different part of the office and it would not be possible.**" [Emphasis added]

201.7 Evans' statement of 11 January 2008, also reveals that Jones must have known the entry was unlawful. He states: "After I spoke with Martin I had a phone conversation with John Jones... **John Jones was quite clearly trying to satisfy himself that I had a rough idea of what I was doing. He was quite concerned about something going**

wrong, as was I... We went over what I was planning to do, how I was going to do it. **He was checking that I knew how to get in...**

I have been asked who asked Martin and I, to obtain copies of the documents unofficially. I don't think we were asked to do this unofficially, I just don't think we were asked to do it officially. **I don't see how it could have been done officially.** We were not told this was an unofficial request. My own interpretation of the way this conducted, **I can't say in all honesty that this was an official request from the police to do it. It was more like if you can do it and you don't mind doing it. Nobody said go in and do it. So it wasn't an unofficial request it was more akin to being asked to do a favour for somebody"**

201.8 Evans' statement reveals that he must have known the entry into CNN on 3 September was unlawful:

"It was suggested to me by Mr. Kernohan, subsequently John Jones phoned and we went over the plan, that I might try and find the documents.... Lyndon and I were asked to do this unofficially as this would negate the need for the police to obtain and execute a search warrant at the offices of a national newspaper. The risks of this are obvious to me, obtaining or accessing journalistic material is a huge obstacle. The police in the first instance needed to be confident that the material was there. **If a police search of the premises took place and they did not find the material they would be severely criticised.** I actually set it up with Chief Inspector John Jones to go into the premises to look for the documents. Mr.Jones was my back up if anything went wrong, **my conversation with Jones was that he had natural concerns for my safety** but we were both pretty clear what the objective of the exercise was and the reasons for doing it." **Statement of Evans: 8.10.07, p7.**

201.9 The statement from Evans dated 11 January 2008 also suggests that while the operational details were left up to Jones, Kernohan at the very least was aware of the fact and purpose of entry into the office of Seales and acquiesced in it, **knowing** it was unlawful: "I have been asked about the conversation I had with Mr. Kernohan on the 3rd September 2007. This happened shortly after I agreed with Martin that I

would attempt to get the documents. The conversation took place not later than 1pm that day.... It was conducted outside the building of CNN at Mr. Kernohan's insistence. He wanted me to be somewhere **where I could not be overheard**. Lyndon was not present when I had the conversation. Mr. Kernohan asked me if I understood what they were looking for and why they were looking for it. I stated that I did. Mr. **Kernohan explained and I understood that they were in a very difficult position,** (these are my words and not Mr. Kernohan's) **it is very difficult for a Police force to get a warrant to search a newspaper office, particularly with Desmond Seales; he would have screamed and yelled.** I said to Mr. Kernohan I understood how sensitive it was and I understood that they needed to have something more than verbal evidence. I did not discuss the planning of how I was going to achieve getting the documents with Mr. Kernohan; I did all the planning with John Jones".

202. There is also evidence that Kernohan knew the entry was unlawful. At first sight, there appeared to be an enormous number of allegations which would require a major investigation to establish the truth. However, a number of very quick and easy inquires by Kernohan could have provided a very accurate assessment of the reliability of Martin as a source of information.

203. First, a comparison of the allegations made by Martin with archived Gold Command minutes would have quickly revealed that a number of the allegations he made emanated from the same set of minutes of the Gold Command meeting of 13 July 2007. Secondly, an interview with Debra Denis, the RCIPS Press Officer, would have revealed that those very same minutes were inadvertently e-mailed to CNN by Ms Denis. Thirdly, an interview with Evans would have revealed that Martin had had sight of the Gold Command minutes from 13 July 2007.

204. Fourthly, as Commissioner, Kernohan, had lawful access to billing data for all police issued phones. An examination of Ennis' phone billing would reveal whether there was any contact between Ennis and Seales. Fifthly, as Commissioner Kernohan had lawful authority to interrogate RCIPS computer systems. A systems administrator could have very easily and quickly searched the systems firewall to see whether any e-mails were sent to Seales from Ennis' e-mail account. Sixthly, Dixon was sufficiently acquainted with Martin to remark in his statement that everything that Martin says has to be halved in order to establish the truth. In other words Martin grossly exaggerates. Kernohan could and should, in the circumstances, have asked Dixon to provide him an assessment as to his opinion of Martin and his reliability.

205. Lastly, in 2006, Ennis was considering taking civil action against Seales for libel. Ennis had instructed a solicitor and had asked Kernohan for reimbursement of his legal fees. Therefore when Martin made the allegation of Ennis being in a corrupt relationship with Seales, Kernohan should have been -alerted to the unlikeliness of this occurring.

206. Many of the enquiries set out above had been completed by the Tempura team by 18 September 2007, that is, within **one** week of arriving in the Cayman Islands. The failure by Kernohan to carry out any of the abovementioned steps casts considerable doubt as to his credibility that the entry into Seales' office was because he genuinely hoped to discover material supporting a corrupt relationship between Ennis and Seales. His true motive for the entry is

unknown, but what is clear is that there was prima facie evidence that he must have known the entry was unlawful.

207. Kernohan stated in a discussion with Bridger, in the presence of Covington, on 11 September 2007, when Bridger had just arrived on the Island, that whilst RIPA is not legislation in the Cayman Islands, the RCIPS tries to mirror the principles of RIPA. This statement is confirmed in the statement of Chief Inspector Beersingh. Although RIPA would require Evans and Martin to be registered Covert Human Intelligence Sources (CHIS) if they were to be used by the police to enter the office of Seales covertly, Kernohan admitted that Martin and Evans were not so registered

208. It was therefore a proper and respectable argument on the material placed before the CJ that there was sufficient evidence, **at the search warrant stage,** to argue that all three men knew they were acting unlawfully in relation to the entry into Seales' office.

Abuse of Office: section 95 Penal Code

209. Taking the common law principles and applying them to section 95 of the Penal Code mens rea is an essential element of the offence. The prosecution must prove not only that a public officer has directed an "arbitrary act **prejudicial to the rights of another"** but that when doing so the public officer either

(a) intended to direct such an act; or

(b) must have been aware they were directing such an act.

210. Kernohan and Jones were employed in the public service as police officers. They directed Evans to enter the private offices of Seales. On the facts it was reasonably arguable all three men knew they had no lawful business in his office, hence the reason search warrants were not applied for, and there was concern over the alarm at the premises. Whichever adjective or definition is used at the search warrant stage it was properly arguable that the actions of the police officers were "arbitrary" and "prejudicial to the rights of Seales" in the sense that the adverse infringement into his office would be actionable as a civil tort. It is worth reiterating that to support an action of trespass it is not necessary that there should have been any actual damage; the trifling nature of the trespass is no defence. The wrongful possession of a third party's property by "A" does not entitle the police in law to enter "A's property without a search warrant: see Ebanks v. R 2000 CILR Note 8 (14th August 2000): paragraph 166 above; McLeod v. U.K., 27 E.H.R.R. 493, where the European Court found a violation of Article 8, where two police officers had entered the applicant's home in her absence to assist her ex-husband to remove items of property.

2011. For all the above reasons there was a proper alternative argument, to that decided by the CJ, that there was prima facie evidence that Kernohan and Jones had committed the section 95 offence of Abuse of Office.

Wilful disobedience of the law

212. Both Kernohan and Jones disregarded the advice of the AG, and wilfully disobeyed the relevant provisions of the Police Law (2006 Revision) relating to search warrants and proceeded to engineer the commission of an act which section 26 of the Police Law forbids namely, the unlawful entry and search of the private offices of Desmond Seales by the police without a warrant. Conversely, it can be said that they omitted to do any act which such laws required to be done - namely, obtain the requisite search warrant before proceeding to authorize and engineer the entry and search of the said premises. There was a proper and reasonable argument that their actions prima facie constituted the offence of Disobedience of Lawful Duty as prescribed by section 121 of the Penal Code.

213. Under section 26 of the Criminal Procedure Code (2006 Revision) the police when applying for a search warrant only had to establish that there was a reasonable suspicion that an offence had been committed. On the evidence before the CJ, in scenario 2, there was also a proper alternative argument, to that decided by the CJ, that there was a reasonable suspicion that the offences of Abuse of Office and Disobedience of Lawful Duty had been committed.

214. This alternative view was supported by the AG and the SG. They advised the Tempura team that there was sufficient evidence to proceed: in respect of Abuse of Office and Disobedience of Lawful Duty.

Fishing expedition

215. 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 heard evidence from Bridger on this issue and concluded there was no prima facie evidence of any criminal offence being committed, and 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.**

216. The CJ's conclusion that the police were embarking on a "fishing expedition", must have been firmly influenced by his view that there was no prima facie case of criminality in respect of Kernohan and Jones. This is because he was prepared to grant a search warrant in respect of Dixon. The CJ said

> "DCP Dixon as the subject having the closest connection to Mr.Martin and who, from the statement of DCP Ennis in particular, may reasonably be suspected to have been privy to and perhaps was associated with, the motives behind Mr.Martin's machinations. Of the three subjects, he is the only one whom, it could reasonably be suspected, might be aware of Mr.Martin's fabrications. And such a connection would make him a suspected accomplice to the blatant public mischief offences now alleged to have been perpetrated by the fabrications attributed to Mr.Martin. On that basis, there is reasonable ground for suspicion that proof of that complicity could exist": **paras. 145-146 of his ruling.**

217. The basis of the grant of the warrant against Dixon was because the CJ took the view there was prima facie evidence of criminality in his case and therefore the warrant should issue. So far as the actual material sought by the police (day books, cell phones, computers), Dixon was in exactly the same category as Kernohan and Jones, as can be seen from the warrant application, the relevant parts of which are set out above in paragraphs 120-121.

Alleged deliberate manipulation of the law by the CJ

218. The report makes a 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 fact that there was a respectable alternative view to that expressed by the CJ; or the fact that the CJ could have properly arrived at a different conclusion does not for one moment support a contention that there was any improper motive on his part. There is no evidence that his decision was made with malice or outwit the boundaries of judicial discretion. There are a number of reasons for this conclusion.

219. First, the CJ was never addressed in detail on the Penal Code offence of criminal trespass during the February application; and in the March applications his ruling again suggests there was an absence of detailed argument on the point. The arguments proceeded on the basis that Evans had committed a burglary; and once that argument failed, as it was bound to, little

attention was given to the offence of criminal trespass: see paragraphs 77, 103 and 104.

220. Secondly, in respect of the section 95 and 121 offences, the CJ was dealing with offences which rarely came before the Cayman Islands courts. As he was to state in his 4 April 2008 ruling: **para.97 and 98**

"Research has not revealed a single instance of any charge for this [section 95] offence (or that under section 121) having come before the Courts of these Islands. Further research among the reported cases of the Commonwealth met with only sparse results. (The case of William v. Regina (1986) 9 W.I.R. 129 cited by the Hon.Attorney General in his advice, bears certain similarities). I have had therefore to examine, without the benefit of direct precedents, the specific elements of this [section 95] offence in order to answer the crucial question whether it requires proof of criminal intent".

221. Thirdly, if the CJ and Henderson J were attempting to deliberately frustrate the Tempura investigation the CJ would not have told the Tempura team of his conversation with Henderson J during the warrant application in February. Instead the conversation with Henderson J would have remained private to themselves in line with their alleged ulterior motive.

222. Fourthly, on previous occasions before February 2008, the CJ had given judgments in the Cayman Islands Grand Court indicating he places considerable value on the liberty of the subject and will interpret legislation which seeks to restrict that liberty strictly: see his judgments in Jackson v. R [1996] CILR 338 at p345 where the CJ quoted Scott LJ's advice in Dumbell v.

Roberts [1944] 1 All E.R. 326 that police officers should not be over-zealous in the exercise of their powers:

> "The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until proven guilty, applies also to the police function of arrest..."

Smellie J (as he then was) in Jackson having quoted this passage said:

> "That dictum and the sentiment it embodies, which some might think reflects a by-gone era, must nonetheless be regarded as applicable today in the Cayman Islands".

223. Fifthly, the CJ made it clear in the February 2008 warrant application that he was content to recuse himself from the proceedings if that was what the applicant wanted. There is also the point that on 9 April 2008 the CJ told McCarthy that his ruling did not preclude disciplinary action from being taken: **Core Bundle D, Tab 21, page 63**. All this evidence militates away from the suggestion that the CJ was seeking to protect Kernohan, Jones, or Henderson J at all costs.

Judicial Bias

224. The report complains that during the February 2008 warrant applications it was improper for the CJ to have out of court discussions with Henderson J, 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 Henderson J's relationship with the witness.

225. The CJ had a personal interest in the police discovering the offending letters criticising the judiciary, which were also in Seales' possession. He had reported the matter to the police himself in July 2007; and during the search warrant hearing on 22nd February 2008 he became aware of Evans' secondary purpose of searching Seales' office at the indirect request of Henderson J.

226. In this respect, the CJ was close to the subject matter upon which he was adjudicating. The fact that (a) he had reported the offending letters to the police for investigation in July 2007; (b) that it was Jones who had been one of the investigating officers dealing with his complaint; and (c) that Henderson J was associated with Evans the chief protagonist in the events of 3 September 2007, might have given an appearance of bias.

227. The CJ himself recognised the potential for the appearance of judicial bias. On hearing the submissions of DS Ali during the February application he made a declaration of a potential conflict of interest. He stated that he, on behalf of the judiciary, had requested a police investigation into Cayman Net News in relation to a series of letters published by that paper that may have been seeking to undermine the judiciary, which he explained was in itself an offence. He had received a verbal briefing by Kernohan and Jones on the police investigation. His concerns were that it may be construed in future at any proceedings that part of the police tasking of Evans was for the purpose of searching for the source of the letters. He discussed the possibility of appointing another judge from Jamaica to hear the application or of being given assurances that the police tasking of Evans was not motivated by a

desire to obtain the letters criticising the judiciary. The CJ was provided with the unified view that it was the inquiry team's belief that Evans was not tasked either by the police or by the judiciary to search for the source of the letters, but had instead seized upon a window of opportunity of his own volition as stated in DS Ali's intelligence report dated 22.2.08 and in **Tab 21, page 53**.

228. After the search warrant application was made, the CJ retired to consider the application. When he returned to Court later that same day, to give his ruling, he 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 a conversation with John Evans but would not have described as a good social friend".

He said that Henderson J 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: **Para 1-4 of the CJ's ruling.**

229. The CJ recognising the potential difficulty that he was in, at the beginning of his judgment, gave the Tempura team the option to have the matter listed before another judge:

"The decision at which I have arrived I must give provisionally with the caveat that the Investigators, having heard it, **may wish at my invitation to have the matter convened again before a different judge**. I place this caveat on my decision because I have reflected further upon the involvement of Mr.John Evans in particular. This is lest it be thought that my decision lacks objectivity because Evans states... [Evans statement set out in judgment]. I have raised this aspect of my concern with Judge Henderson....Against that background; I do not think there is any real basis for perception of bias such as to require me to recuse myself.

Otherwise I would have. Nonetheless as indicated, **I am prepared, if the Investigators wish, to appoint a judge to reconsider the matters as I think it is open to me to do** because my decision is by no means a final decision as if by way of a trial of the matter":
(emphasis added) para.1-4 of his judgement.

230. No application was made for the CJ to recuse himself following this invitation. After the CJ gave his provisional ruling in February 2008 it would have been obvious to both Bridger and Mon Desir that the CJ was not in favour of the grant of search warrants in this particular case and so if they wanted a new judge they could have applied for one in accordance with the CJ's invitation. However, this course was not adopted by the police or Mon Desir when they renewed their application in March 2008.

231. The legal principles governing judicial bias, as applied in the United Kingdom, are set out by Lord Browne-Wilkinson in Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2) [2001] 1 AC 119 at para.2.

"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own

cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial"

232. Similar principles, as those expressed above, apply in Cayman law: see In re Public Service Company Ltd (1952-79) CILR 81; Prendergast v. Commissioner of Police (1990-91) CILR 265 (a case in which Smellie CJ acted as Solicitor General); In re Euro Bank Corp [2001] CILR 114 (in which Smellie CJ was the presiding judge).

233. Even where a judge is potentially disqualified because he has a relevant interest in the subject matter he is adjudicating on, where the judge makes **full** disclosure of his interest, the parties to the action can waive their right to have the judge disqualified and if they do, that is the end of the matter. In Sellar v. Highland Railway Co 1919 S.C (HL) 19 at page 20-21. Lord Buckmaster after setting out the general principles relating to judicial bias stated:

"In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set side".

234. Lord Hope put it this way in ex parte Pinochet

"the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case **or, if he fails to disclose his interest** and sits in judgment upon it, the decision cannot stand...The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. **The disqualification does not follow automatically in the strict sense of that word, because the parties to the**

suit may waive the objection...if the interest is not disclosed the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it"

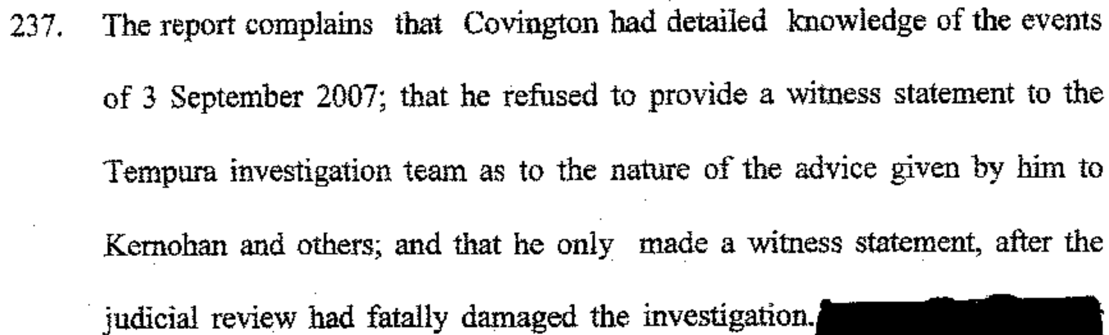
235. In the present case the learned CJ made full disclosure of the facts during the first search warrant application. Once he had done this, it was a matter for the Tempura team to seek a new judge if they so wished. Both Mon Desir and the investigators believed the CJ got the law wrong and were perplexed by his decision. Following the February ruling, the SOG in their report to the Governor were aware of the CJ's role in reporting the offending letters to the police and therefore his personal interest in material held at the offices of CNN. Therefore, with the full facts known **and considered in detail,** there was every opportunity by the Tempura team to ask the CJ to recuse himself before the fresh application hearing in March. This opportunity was not taken and the legal authorities cited make it clear that effectively there can be no complaint.

236. The report complains of a deliberate manipulation of the law by the CJ. There is no evidence to support such a conclusion; there is no evidence to support the contention of a judicial conspiracy between the CJ and Henderson J. Accordingly the complaint is summarily dismissed on this issue.

CHAPTER 5

LARRY COVINGTON

237. The report complains that Covington had detailed knowledge of the events of 3 September 2007; that he refused to provide a witness statement to the Tempura investigation team as to the nature of the advice given by him to Kernohan and others; and that he only made a witness statement, after the judicial review had fatally damaged the investigation.



Background

238. In August 2007 Covington was the FCO-OTD Law Enforcement Adviser for the Caribbean Overseas Territories and Bermuda. He had held this post since 31 March 2003. He was an experienced law enforcement officer who had been employed by the Metropolitan Police Service between February 1973 and 2003 (30 years) leading and managing Serious and Organised Crime investigations. He had also served in the Crime Operations Group where his duties had involved the management of the deployment of undercover officers, participating officers, participating informants, informant management, and witness protection. Part of his role as a Law Enforcement Adviser was to provide

> "day to day advice, guidance, and assistance to FCO-OTD...on the implementation of law enforcement operational and strategic policies, practices, procedures and initiatives, to assist in improving the capability, capacity and sustainability of the UK Caribbean Overseas Territories & Bermuda law enforcement agencies.": see Covington memorandum dated 7.1.09

239. On 19 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 take an independent oversight.

240. On 21 August 2007, Covington received an e-mail from Kernohan and spoke to him on the telephone the next day addressing the issues raised in Kernohan's confidential memorandum.

241. On 23 August 2007 Covington received from Kernohan a faxed copy of the note written by Martin addressed to Governor Jack in which he outlines his allegations against Ennis. Covington also had a telephone conversation with Governor Jack to discuss the allegations and the initial investigative strategy.

242. On 27 August 2007 Covington e-mailed Kernohan with a draft of an e-mail he intended to send to Governor Jack with his detailed advice and recommendations on how to proceed with the investigation and the Government officials who should be notified. Kernohan responded with some amendments and the e-mail was sent to the Governor. Governor Jack acknowledged receipt and made reference to being in possession of the AG's advice.

243. On 28 August 2007, Covington assisted in the drafting of the initial investigation terms of reference. He also received AG's opinion dated 28

August 2007, dealing with the unavailability of search warrants; and he also spoke to Governor Jack by phone about investigation strategy. On the same date Kernohan wrote an e-mail to Covington which included the following:

"Contact was made with the source on two occasions this evening....He then telephoned me at 2245hrs to inform me that he had gone to the offices of his business to obtain the documentary evidence that is required to support his statement. He said he had then accidentally set off the alarm to the offices and had to retreat in fear that Mr.Seales would discover him. I informed him that he should not place himself at risk of discovery...he indicated that he may have an opportunity to copy some of the documentation around midday tomorrow".

244. On 31 August 2007 Covington received an e-mail from Kernohan which included the following:

"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".

Covington also spoke to Jones. The conversation focused on the investigative strategy and the operational tasking of Martin and Evans.

245. On 3 September 2007 at 21:59, Kernohan sent an e-mail to Covington about what had just taken place at CNN in these terms:

"Larry

Update. Operation was abandoned for this evening. Further

Update tomorrow"

246. 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 3 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".

247. On 16 November 2007 the Strategic Oversight Group (SOG), set up to have an independent supervisory role over Operation Tempura, had its first meeting. Present at the meeting was George McCarthy, Mon Desir, Covington, Bridger, Simon Ashwin, and Tonge.

249. Also on 9 December 2007 Covington by e-mail to Helen Nellthorp (Nellthorp) stating:

> "There are significant implications in my giving a statement and potentially becoming a witness, none more so than the inclusion in my statement of all the persons I consulted and gave advice to, as well as my continued involvement on the Operation Tempura Strategic Oversight Group": para 8.

Covington's apparent concern was that he had given advice to the Governor and had been in contact with the staff of the FCO. Such communications would ordinarily be privileged and non disclosable and so careful advice on how to proceed was required.

250. This position was reflected in the reply of Nicola Walsh (Walsh), Head of Caribbean & Bermuda Section, FCO dated 19 December 2007 in which she stated that Susan Dickson (FCO Legal adviser) had suggested that

"the Governor/HOGO discuss our concerns with the AG (or the Legal Counsel if the AG prefers) and ask him for his advice on what if anything could be done to protect your/our position. There might be some public interest type local legislation that could be used...

251. In an e-mail dated 2 January 2008 Covington states:

"Potential difficulties of my continued role on the Strategic Oversight Group if Mon Desir determines that I am a material witness in any potential criminal or disciplinary investigation/proceedings against Kernohan & Jones..."

252. On 3 January 2008 Governor Jack wrote to Covington telling him

"I consulted Sam Bulgin today. He said that you could not be compelled to provide a statement but it would be preferable if you did provide one. You could, however, be compelled to give evidence in court".

On the same date the Governor wrote an e-mail to Nellthorp stating:

"I today sought our AG's advice on Larry as a witness... Sam said that whether Larry should withdraw from any involvement in this investigation depended on what exactly his involvement was and whether that might cast doubt on the process. **His advice was that it**

would be better for Larry to withdraw in the interests of the credibility of the investigation" [emphasis added].

253. On 13 January 2008, Covington wrote an e-mail to Tonge and Walsh which included the following:

"If Bridger in his legal advice report has indicated that he has reasonable grounds to suspect a criminal offence has been committed by Kernohan and Jones which warrants them being interviewed under caution...is the request from Mon Desir for me to provide a formal written statement 'fair having regard to all the circumstances, including the circumstances in which the evidence is to be obtained? In providing such a statement at this stage and in these circumstances am I leaving myself open to potential 'self incrimination' if the investigating officers or legal counsel were to consider that any advice that I may have given and included in my formal statement to be 'wrong, inappropriate or unlawful'. If Kernohan and Jones are to be interviewed under caution should I also be so interviewed if they had in fact acted on my advice? Additionally covert investigations which involve entry onto private land or interference with privately owned property as was proposed/intended in respect of the entry into Cayman Net News on 3rd September 2007, in the absence of any lawful authority, could constitute **a civil wrong, actionable by the owner of the property or land for damages. In this regard this would not rule out a potential action in the future against the FCO as my employer** should Mon Desir consider the actions in respect of Cayman Net News on 3rd September 2007 to be unlawful **and the officers acted on my advice**.....For all the reasons articulated above I now require legal advice on the request by Mon Desir to provide a formal written statement at this material time, and in relation to all the surrounding circumstances".

254. On 13 February 2008 the AG advised Governor Jack that he did not enjoy immunity from criminal liability (although he could only be dealt with in England); and that his staff could be compelled to give evidence in a Cayman Court.

255. On 10 March 2009 an e-mail from Fiona Sinclair to Sarah Latham, Walsh, and Nellthorp revealed that the issue of disclosure in respect of Covington was still being considered by the FCO officials. Covington's draft statement with relevant e-mails was submitted to the police on 15 March 2009.

256. In his witness statement made on 15 March 2009 Covington states that during the period 13 August 2007 and 4 September 2007 he had "discussions on the operational tasking of Martin and John Evans...and these discussions likely would have addressed identified best practice relating to intrusiveness...": page 3. He further states that during the same period he was aware: "from the e-mail exchanges, telephone and text calls that there was on going operational investigative tasking of Martin and Evans initially by Kernohan & Dixon, and then latterly by Kernohan and Jones...in an attempt to recover and safeguard potential evidence or the obtaining of copies of the alleged e-mails sent by Ennis to Seales".

257. On 16 March 2008, Covington stated in an e-mail to Governor Jack that he had received advice from Treasury counsel/solicitors in regard to the provision of his statement.

Initial Advice

258. In his report dated 27 August 2007 Covington recommends that:

"Ennis can be suspended from duty at the earliest opportunity whilst a comprehensive external criminal and disciplinary investigation is undertaken in the best interests of the Cayman Islands, the RCIPS and Ennis himself".

"1. An urgent conference takes place with the Attorney General, Kernohan and the Governor to determine

(a) Administrative procedure and action required to suspend [Ennis]

(b) The initial criminal investigation process to be followed, particularly the obtaining of appropriate warrants, to ensure that any potential evidence is seized including computers, (hard drives and other storage devices) used by both Ennis, Seales, and itemised telephone calls... (my recommendation is that when Ennis is suspended simultaneously the office of Seales is searched and immediately following suspension the home of Ennis is searched in his presence..."

259.

260. However in a written response dated 22 January 2011 Covington points out that the allegations against Ennis as reported and known to him on 27 August 2007 when he submitted his written advice in report format, were serious. Suspension from duty or administrative/required leave is a common procedure available to be used in cases where serious matters are alleged. He was not on the ground in the Cayman Islands when giving his advice, but was visiting London. Although he was following standard procedures in making a

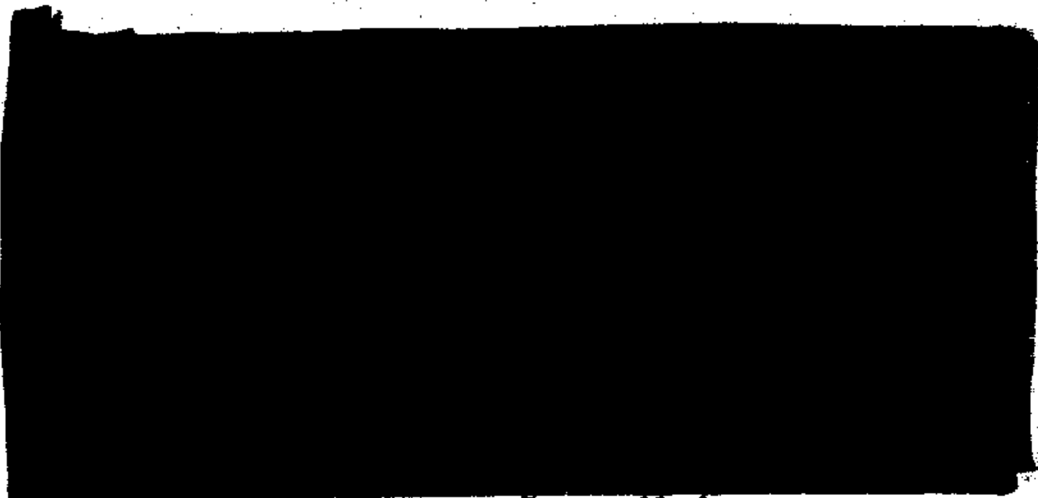
recommendation that Ennis should be suspended, the decision was ultimately one for the AG, the Commissioner of Police and Governor Jack. When these individuals met they considered his advice and other matters and unanimously decided not to suspend Ennis. They did not follow his recommendation and he concurred with their decision once a full debate had taken place.

261. The report complains of the inappropriate behaviour of Covington. However Covington's advice, in the above circumstances, cannot be deemed to be inappropriate behaviour. At the time of giving his advice he was not in the Cayman Islands and he was giving advice based on the facts as presented to him by Kernohan. When those on the ground in the Cayman Islands, considered his advice, and other facts known to them they decided not to follow Covington's recommendations. It is not uncommon for advice given by advisers to be ignored or not followed, in part or full, because the 'client' is in possession of facts or matters which the adviser is not privy to. That does not mean that the adviser has acted inappropriately in the advice he gave. Covington did not have an operational policing role in the Cayman Islands and therefore, unlike Kernohan, was not in a position to directly check or clarify information he was being provided. He could only give advice based upon the information he received. For these reasons the complaint based upon this ground is summarily dismissed.

Forwarding of Confidential Tempura information to Kernohan

262. Retrieved from the personal e-mail account of Kernohan was an e-mail dated 19 September 2007 from Covington to Kernohan. Covington had attached a

report written by the Tempura Team entitled "Thoughts on Scoping Study to date 18 September 2007". The e-mail was signed "Larry" and reads "Attached for your eyes only and you have not seen this-please delete on reading. Please note my highlighting and inserted comments. Once read; can you phone me ASAP tonight on my cell phone to discuss further." Covington has highlighted sections of the report and has marked up his comments on the right margin of the report.

263. 

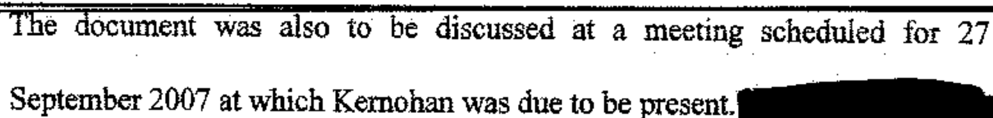
264. In his written response Covington states that his role was "to assist the investigation team, be briefed by the investigation team on the progress of the investigation, to provide an interface between the investigation team and Kernohan, to sit on the Operation Tempura Oversight Committee and to provide briefings to FCO-OTD". He was not a member of the investigating team. Covington states that he had a conversation with Assistant Commissioner John Yates in the Cayman Islands between 5 and 7 November 2007. In this conversation "we covered the importance of keeping Kernohan briefed on investigation developments in order that he could fulfil his statutory

and strategic responsibilities as Commissioner of Police". Covington makes the point that Kernohan, as Commissioner of Police, had responsibility for the management and outcome of the Tempura investigation; and that under the Police Law 2006 the Tempura police officers were sworn in to operate under his jurisdiction.

265. Although Kernohan had withdrawn from the operational side of the investigation on 31 August 2007, handing operational matters over to Jones, Kernohan had, according to Covington, "a strategic oversight responsibility for ensuring that the investigation was professionally, ethically, effectively and efficiently investigated". This was endorsed by Yates in recommendation 4 of his 5-7 November review where he wrote:

"Endorse and support Commissioner Kernohan's decision to recuse himself from direct involvement in these matters at this stage. This should be kept under continual review as the inquiry progresses. There remains obvious intrinsic value in being able to involve the Commissioner in key decisions involving the leadership of his Force".

266. Covington states that he sent the document entitled "Thoughts on Scoping Study" dated 18 September 2007 to Kernohan because he was entitled to see the document in line with his statutory and strategic role and responsibilities. The document was also to be discussed at a meeting scheduled for 27 September 2007 at which Kernohan was due to be present.



267. In respect of the words "Attached for your eyes only and you have not seen this-please delete on reading", Covington further states that "after much reflection and review of papers there is no logical reason I can provide ...for using those words, especially as Kernohan was fully entitled to see the document. I am personally at a complete lost as to why I used those words because they were obviously unnecessary. I fully recognise that reading the words "on their own" and without the benefit of the background I have provided, they look suspicious. However I must stress that there was certainly no improper, sinister, illegal or conspiratorial motive for using those words. My recollection is that Kernohan and I discussed the document and as we both kept copies of the document...this I submit negates any improper, sinister, illegal or conspiratorial motive, otherwise logically we would have deleted the document."

268. There can be no doubt that on 18 September 2007 Kernohan, as Commissioner of Police, was in fact entitled to see the e-mail which was sent to him by Covington. [redacted] It may be unfair to expect Covington to remember 3 years and 4 months after the event what exactly he meant with the words "Attached for your eyes only and you have not seen this-please delete on reading". However the words really speak for themselves. Whatever the factual or statutory position was on 27 September 2007, or in November 2007 when Yates was visiting, Covington, on 18 September 2007, was seeking to give Kernohan information which on 18 September 2007 he did not believe should be furnished to Kernohan **by Covington.** He was

seeking to give Kernohan "the heads up" on information which perhaps Kernohan would be entitled to at a later date.

269. It seems clear that Covington should not have divulged this information to Kernohan but should have waited [redacted] Covington's behaviour does not amount to a criminal offence and he is right to point out that his behaviour was not illegal. However, if Kernohan was entitled to see the document, Covington's language accompanying the document "...you have not seen this-please delete on reading" clearly carries the appearance of being "inappropriate". To this very limited extent there is a prima facie basis for the complaint on this issue made against Covington. Notwithstanding this conclusion it is unfair to expect Covington to remember 3 years and 4 months after the event what exactly he meant with the words he used. He should be given the benefit of the doubt that such "inappropriate" words may simply have been used to place himself in a favourable light with Kernohan in circumstances where Kernohan would later be entitled to the information.

Knowledge of the entries into CNN

270. The factual picture shows that Covington had knowledge before 3 September 2007 that Kernohan and Jones were sending Evans and Martin into the offices of CNN to obtain material covertly; and that Evans and Martin would be obtaining this material without permission. Covington may not have known the precise operational details but by virtue of his own admission, he had discussed the operational tasking of Martin and Evans and was kept abreast of

all developments up to and including the entry on 3rd September, 2007. He was certainly aware of the date, venue, and the covert nature of the operation. His involvement is capable of being seen as encouraging a trespass.

271. It was this involvement by Covington which led to the delay in his preparation and submission of a signed witness statement. He clearly needed to take legal advice on his position and was rightly concerned with self incrimination. There is therefore no substance in the criticism of the delay in him furnishing a witness statement. He had concerns about self incrimination and was entitled to refuse to provide a statement until he had taken legal advice.

272. Covington's involvement in the events of 3 September 2007 does not mean he would have faced prosecution. Prosecution can only take place if a person has the necessary mental state to accompany his actions as required by the relevant offence under consideration.

273. It may well be that Covington gave guidance to Kernohan and Jones based upon English law and procedure which in certain circumstances could have allowed for the actions of Kernohan and Jones. Furthermore, in his e-mail to Tonge and Walsh dated 13 January 2008 Covington stated the actions of Kernohan and Jones: "could constitute a civil wrong, actionable by the owner of the property or land for damages". This reference to civil action means that Covington may not have had the mens rea necessary to prove any penal code offence; and the reference properly raises the section 8 Penal code defence of "honest belief".

274. In his response dated 11 January 2011 Covington states:

"On 3 September 2007 at 21.59 Cayman Islands time, I was in the British Virgin Islands where the time would have been 22.59. Given the time I probably would not have seen the e-mail until the morning of 4 September 2007. I have no record of responding to that e-mail. In any event until I had spoken with Kernohan I would not know what he meant by 'Operation was abandoned for this evening'.

275. Beyond this response Covington has declined to comment further on the matter. He states as follows:

"If Aina is inferring, suggesting, suspecting or even alleging that I may have been a party to a criminal offence (s277 Penal Code (Revision 277) – Criminal Trespass) having been committed, or a civil tort in relation to trespass, then I take the view that the seeking of an explanation as documented in these papers by Aina, and in these circumstances, is totally inappropriate and improper. This may be an area where I need to seek legal advice. Additionally to seek an explanation 'as to his role and state of mind in respect of the events of 3rd September 2007' some 3 years and 4 months after the event, given all the external reporting, debate and discussions on 'Operation Tempura', I also take the view that it would be dangerous if not possible for me to deliver a true and reliable subjective response. Again this is an area where I may need to seek legal advice".

276. On 18 November 2007 Mon Desir brought to the attention of the Tempura team that he had received an e-mail from Covington requesting that he speak to him (Mon Desir) "in confidence' about the events of 3 September 2007. In his statement dated 15 March 2009 Covington's response is "I have no recollection of making any follow up 'in confidence' telephone call"

277. In his written response dated 22 January 2011 Covington states that on 6 November 2007 he met with Yates and Kernohan with the purpose of Yates

updating Kernohan on his review findings and recommendations and to inform Kernohan that a report was being prepared seeking legal advice in respect of the entry into CNN on 3 September 2007. During the meeting Kernohan informed Covington that he was seeking an early decision on the legal advice request and he was beginning to get concerned about the investigation timelines and cost after two months of investigation. Covington was not in the Cayman Islands between 8 November and 14 November 2007.

278. He returned to the Cayman Islands on 15 November 2007. The first meeting of the Operation Tempura Oversight Group was held on 16 November 2007. This was Mon Desir's first meeting as Legal Counsel to Operation Tempura. At that meeting it was agreed that "Larry Covington and Andre Mon Desir to liaise on draft contracts once the skills profiles had been drawn up". Covington then left the Cayman Islands on 16 November 2007 following this meeting. He states in his written response:

> "it would have been as a result of the 16 November 2007 Oversight Group meeting that I would have e-mailed Mon Desir two days later on 18th November.... 'In Confidence' was the general and overall descriptor that was being applied to all communication in the 'Operation Tempura'. My recollection is that the reason why I wanted to speak to Mon Desir was in relation to my role as the interface with Kernohan, with Kernohan asking for the advice to be delivered as quickly as possible, as well as to discuss the process and timing for the drafting of contracts. I believe Mon Desir was still working for the Cayman Islands Monetary Authority at the time and it was my understanding that he was under pressure as to how much time he could devote to Operation Tempura"

279. The explanation provided by Covington on this point provides a plausible clarification as to why he wished to speak to Mon Desir on 18 November 2007.

280. In all the above circumstances the position remains that whilst there is evidence that Covington was involved in the entry into the office of Seales on 3 September 2007, there is no evidence as to his state of mind. Indeed it would prove impossible 3 years and 4 months after the event to conclude that Covington's involvement had the appropriate mens rea to make him criminally liable for any offence as implied in the report. The complaint on this issue is summarily dismissed.

281. Furthermore, it would be unfair to consider contemplating any form of civil or disciplinary proceedings against Covington in circumstances where Mon Desir had given Covington an assurance in his e-mail dated 9 December 2007 about any information provided by him to the Tempura Team. The assurance was given in these terms

> "These matters like all other matters will obviously be treated with the strictest of confidence and as such Mr.Covington should be assured of the investigating team's intention and commitment to so treat them...it is submitted that this is an entirely proper and legitimate line of enquiry in the particular circumstances of this case, as it may well provide a legitimate explanation, a measure of mitigation, or even a possible defence for the relevant persons concerned in the Incident...".

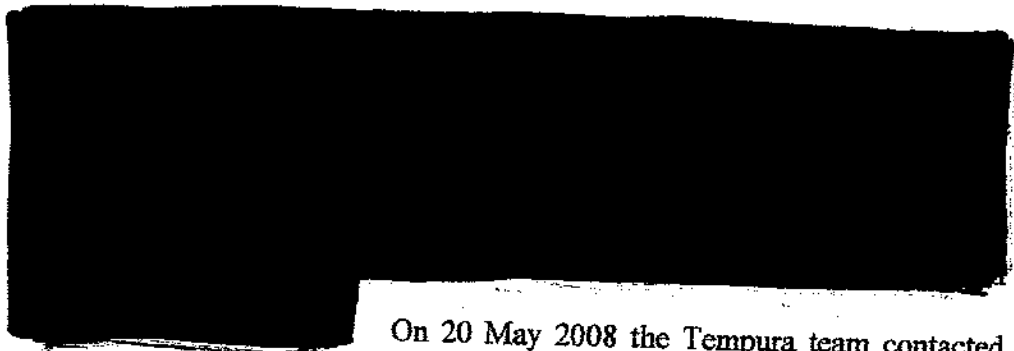
Finally it is not in the wider public interest to take this matter further three years after the event, in circumstances where there have been no prosecutions brought against Kernohan, Jones, or Evans; and no civil proceedings for trespass have been brought by CNN in relation to the entry into Seales office.

CHAPTER 6

THE ARREST OF JUDGE HENDERSON

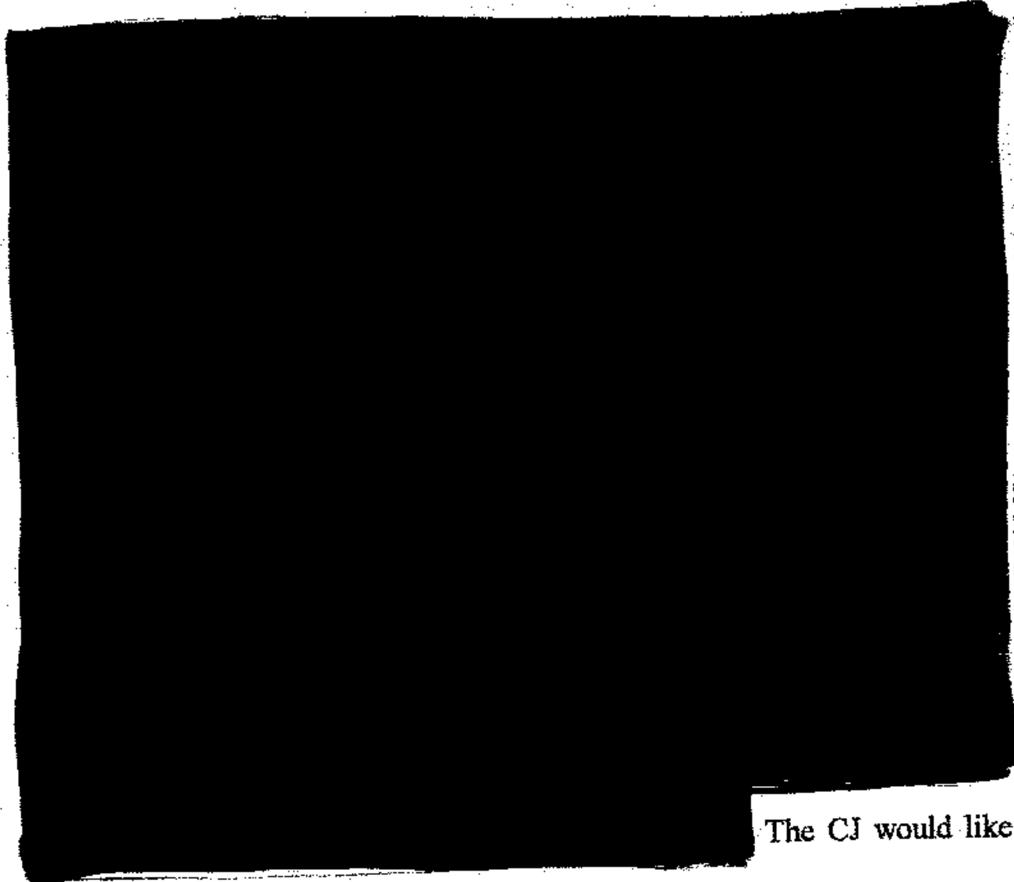
Background

282. On 17 May 2008 Mon Desir stepped down as Special Counsel to the Tempura team, and on 28 May 2008 Trevor Ward acted as legal adviser. The Tempura team then turned the spotlight onto Henderson J. It is not clear why this occurred. The ruling of the CJ dated 4 April 2008 was to the effect that no criminal offences had occurred by any person involved with the 3 September 2007 entry into CNN. There was no compelling evidence to cause the Tempura officers attention to focus or re-focus on the Grand Court Judge. The background to Henderson J's arrest is as follows:

283.  On 20 May 2008 the Tempura team contacted Henderson J by telephone to seek an appointment to speak with him with regards to the events of 3 September 2007. Henderson J stated he would speak to the CJ about this. On 21 May 2008 the SG informed the Tempura team that it was the protocol when asking things of the judiciary to make a request in writing. A formal letter was sent to the CJ on 21 May 2008 requesting a meeting with Henderson J to speak to him 'in respect of a witness': **Core Bundle D, Tab 21, page** 67.

284. On 22 May 2008 the Tempura team received a written response from the CJ and Henderson J as to their recollection of events. A meeting with the investigation team was declined.

285.



286. The CJ would like any additional matters with regard to Henderson J to be put in writing. If the Investigation Team were still dissatisfied, then a meeting could be considered with Henderson J: **Core Bundle D, Tab 21, page** 69-70

287. On 24 June 2008 Henderson J wrote a letter to Governor Jack stating that he had provided a written statement to the police. He set out his reasons for not wanting to submit to informal police questioning relating to the credibility of the witness.

288. On 26 June 2008 Bridger sent a letter to the CJ asking for an interview with Henderson J as a potential witness. On 10 July 2008 the CJ wrote to Bridger informing him that the position remained the same, namely any questions must be submitted in writing and that he (the CJ) supported that approach: **Core Bundle D, Tab 21, page** 72

289. On 31 July 2008 the AG stated that he had no objection to the appointment of Polaine as independent legal advisor to the Tempura team. On 5 August 2008 Polaine was appointed to act as independent legal adviser to Operation Tempura. He was introduced to the SOG on 20 August 2008.

290. On 26 August 2008 Bridger wrote to the CJ informing him that Henderson J was a significant witness to the investigation and that he would like to take a witness statement from him. The purpose of the interview was not just in relation to the credibility of a witness but related to the wider investigation: **Core Bundle D, Tab 21, page 74**

291. On 2 September 2008 Henderson J wrote to Bridger informing him that he did not encourage Evans to commit any unlawful act and that he would not consent to oral questioning. On 3 September 2008 the CJ responded to Bridger's letter of 26 August confirming that he supported the approach of Henderson J.

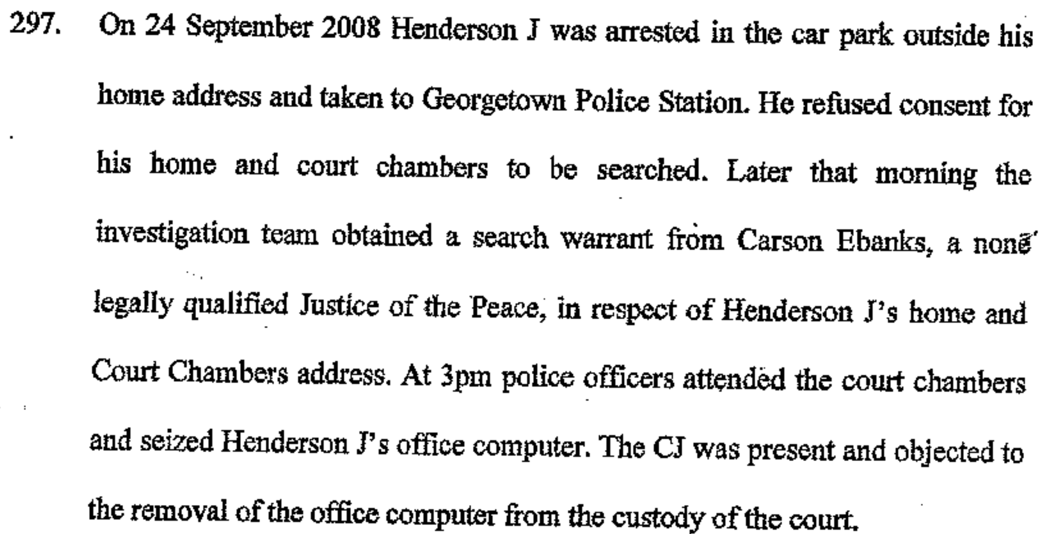
292. On 17 September 2008 Bridger met Governor Jack and informed him that he had received advice from Polaine that there were reasonable grounds to

suspect an offence of Misconduct in Public Office may have been committed by Henderson J. Governor Jack asked that he was informed immediately the advice was available and that "any decision to arrest Judge Henderson will be a decision for the Senior Investigating Officer". He stated that if he was considering the suspension of Henderson J he would require advice from the AG or SG but he "accepted that he would not be able to tell them of the proposed arrest of Judge Henderson beforehand".

293. On 18 September 2008 Polaine advised the Tempura team that there was a prima facie case against Henderson J 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 to both the entry by Evans into the premises of CNN on 3rd September 2007; and to the events leading up to that incident.

294. For the reasons set out in paragraphs 102-105 above, there was no evidential basis whatsoever for the conclusion reached by Polaine in respect of Henderson J. The decision was fundamentally wrong.

295.



297. On 24 September 2008 Henderson J was arrested in the car park outside his home address and taken to Georgetown Police Station. He refused consent for his home and court chambers to be searched. Later that morning the investigation team obtained a search warrant from Carson Ebanks, a none legally qualified Justice of the Peace, in respect of Henderson J's home and Court Chambers address. At 3pm police officers attended the court chambers and seized Henderson J's office computer. The CJ was present and objected to the removal of the office computer from the custody of the court.

298. On 24 September 2008 Henderson J was interviewed by RCIPS officers under caution and in the presence of his attorney, Ramon Alberga QC. At page 2 of his interview he stated the following:

"Let me say this. I provided you with a written statement voluntarily seven months ago. I made it known to you on that occasion and on subsequent occasions that I was perfectly willing to answer questions, but I expected you

to pose the questions to me in writing and I expected to provide my answers in writing...I do not propose to answer your questions".

299. On 25 September 2008 the CJ released to Henderson J's lawyers his ex parte judgment relating to the search warrant applications in respect of Kernohan and Jones. This judgment was then placed in the public domain on 3rd October 2008.

300. The report complains that the CJ and Henderson J illegitimately prevented the Tempura team from investigating allegations of corruption by

(a) Henderson J's refusing to submit to formal police questioning;

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

(c) the CJ attending Henderson J at the police station,

threatening police officers during the search of Henderson J's court offices, and releasing an ex parte judgment containing sensitive information without giving the Tempura team the opportunity to make representations.

<u>Henderson J's refusal to submit to formal police questioning</u>

301. The report complains that between 20 May 2008 and his arrest on 24 September 2008 Henderson J refused to be voluntarily interviewed by the Tempura team. He was only prepared to give answers in writing to questions supplied in advance. He provided a short written note stating that he had not encouraged Evans to search the office of Seales. The report complains (page 9) that Henderson J 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.

302. There is no obligation in Cayman law for a person to voluntarily submit to a police interview or even provide a witness statement. This power which used to exist under section 63 of the Police Law (Law 5 of 1976) has been abolished. The Judge's Rules which are applicable *pro tem* in the Cayman Islands by virtue of section 23 Evidence Law 2007 Revision, expressly state that a citizen has a duty to help a police officer to discover and apprehend offenders. In this instance a written response was given by the Grand Court Judge.

303. A protocol was agreed between the CJ, the SG and Mon Desir, to the effect that questions posed by the police to Henderson J would be answered in writing: **Core Bundle D, Tab 21, page 67.** Furthermore the specific advice of Mon Desir to Bridger on 8th December 2007 was:

"...some sort of official "response" should be obtained from Mr.Justice Henderson regarding **only the specific comments** of Evans in his statement which relate to his alleged interaction with the judge. I do **not** recommend that the judge be asked to give a formal written statement on the matter-bearing in mind that Evans is not saying that the judge either had knowledge of or was party to the Incident. Additionally, having a serving member of the judiciary depose to a formal statement in these circumstances could possibly expose him to the possibility of being called as a witness at a later stage, should matters progress that far, and that could obviously tend to have the effect of bringing the judiciary into disrepute. *For the purpose of your investigation therefore, what you will need to demonstrate is that you pursued the particular line of enquiry and obtained a response-whatever that may be*".

304. It is difficult to see how a refusal to be voluntarily interviewed can be said to be an **improper** attempt to frustrate the Tempura team. There was no evidence (even from Evans) that Henderson J or CJ had anything to do with the 3 September 2007 entry. Therefore a written response by these senior judges was entirely sensible. Their refusal did not stall the investigation: there simply was no evidence for the investigation to proceed on a basis that Henderson J or CJ were involved in the 3 September 2007 entry. The complaint is therefore summarily dismissed on this issue.

The CJ at the Police Station.

305. Following Henderson J's arrest on 24 September 2008 he was taken to George Town Police Station where he asked to make a telephone call to the CJ. The CJ arrived at the police station at 8.35 am, and without notifying the arresting officer, went into a private room with Henderson J where they remained until 8.43 am (8 minutes) as reflected in the custody record. When the CJ left the private room Henderson J asked the police officer (Special Constable Andy Cammidge) whether the CJ was still present. He was told that he had left. Henderson J then told Cammidge that he wanted to ask the CJ about his work that day and what arrangements needed to be put in place. Cammidge told Henderson J that he was sure these matters were in hand but if "they hadn't spoken about professional matters what had they spoken about". Henderson J declined to reply to this question: **Core Bundle D, Tab 21, page** 78

306. The report complains (page 10) that it was improper and incorrect for the CJ to have come to the police station without notifying the arresting officers. The report also complains that from the exchange of words between Henderson J and Cammidge it is suspected that the conversation between Henderson J and the CJ was not in respect of court management/workload.

307. The CJ has responsibility for the administration of justice in the Cayman Islands: **see section 4 Grand Court Law (2008 Revision).** By September 2008 there were only three permanent judges of the Grand Court: the CJ, Henderson J, Levers J, and one temporary Judge Quinn J. There was also a visiting part time judge, Sanderson J. There were approximately 500 attorneys entitled to practice before the Grand Court; and 65 court staff employed in dealing with Grand Court work. The figures for the work carried out by the Grand Court in 2007 were as follows:

Criminal Indictments	94 cases
Civil	1038 cases
Divorce	231 cases
Total	1,263 cases

308. Due to the small number of persons involved in the administration of justice in the Cayman Islands complaints and difficulties have to be resolved effectively and quickly. By 24 September 2008 the CJ's administrative burden was compounded by the fact that he had one judge under suspension (Levers J) and another judge arrested. In the circumstances he was entitled to speak to Henderson J for a number of obvious reasons:

(a) To ascertain whether there was any urgent court business (such as urgent court judgments or applications or sensitive hearings) which Henderson J was seized of, and which needed urgent attention;

(b) To ascertain what was going on; and how long the judge would be in police detention.

309. Indeed the CJ himself indicated the nature of the problem he faced in a letter to the AG dated 28 September 2008 (4 days after the arrest) in which he said:

"I await your urgent advice as I am concerned as to the legitimacy of any arrangements I may make for Henderson J's continuing absence from the performance of the functions of his office, or conversely, for his resumption of duties. There is an imminent 14 week fixture in a complex trust case set to commence in a month's time. Justice Henderson has been seized of that case for the past three years. I will have no other judge available to try the matter at short notice. Simply having to postpone the trial because of the Judge's arrest, would be detrimental to the parties as well as to the reputation of the jurisdiction".

310. It would appear that the CJ gained access to Henderson J without the permission of the custody officer because Henderson J was in the police corridor, rather than a police cell: a decision had been taken to treat him with dignity. The CJ met him in the corridor and took him into a room. In the UK the management of persons in custody would be a matter for the custody sergeant and other officers on duty at the police station. The law and procedure in the Cayman Islands is similar. The police could have denied the CJ entry if they were concerned about his involvement: **see section 37 (3) Police Law (2006 Revision).** In Cayman law at any stage of an investigation

the accused has a right to speak on the telephone to his friends provided that in doing so, no unreasonable delay or hindrance is caused to the progress of the investigation or to the administration of justice: **Administrative Direction 7 (a) of the Judge's Rules.** The Judge's Rules still apply in Cayman Law unlike the UK where the position is now governed by the Police and Criminal Evidence Act 1984.

311. As previously stated above, there was no basis in law for the exceptional decision made to arrest Henderson J. The CJ was entitled in the circumstances and with his detailed knowledge of the case (from the search warrant applications in February and March 2008) to see the arrest as an unwarranted attack on the Judiciary of the Cayman Islands for whom he was constitutionally responsible. There is no basis for the suggestion that the CJ's attendance at the police station for **8 minutes** was wrong or was an attempt to frustrate the Tempura team. The complaint on this issue is therefore summarily dismissed.

The CJ and the searching officers

312. Following the grant of the search warrant by the JP, Ebanks on 24 September 2008, Special Constable Worthington states that at 1455 hours he attended Henderson J's office, located at Kirk House in order to conduct a search. On arrival he was spoken to by the CJ. Also present was a member of the court staff, Katrina Johnson; and a member of Henderson J's defence team, Ms Kirsten Houghton. The CJ stated he had concerns with the warrant and questioned its authority, saying: "You don't want me to challenge the legality

of the warrant". He stated that items seized should be sealed and placed in storage within the court. He also stated that case papers held in the office should not be viewed by the investigation team. Worthington states he was very surprised by the CJ's comments as he was clearly an officer of the RCIPS engaged in his duty, executing a lawfully issued search warrant. Special Constable Kemp corroborates Mr.Worthington's account of events at 1455 hours.

313. Worthington states that at 16.05 the CJ was shown the exhibits that had been seized. The CJ stated that he did not want the items to be removed from the building and that they should be stored in the court vaults. Ms Houghton raised her concerns that the items should not be seized at all and the CJ stated: "You do not want me to challenge the legality of this warrant, do you officer".

Worthington states:

"I felt this was a disturbing comment, lending itself to be a threat directed towards me as officer in charge of the search. Whilst I did feel somewhat threatened by the Chief Justice of the Cayman Islands openly questioning my procedure and actions, I submitted that the items seized were done so lawfully by members of the RCIPS in compliance with a search warrant lawfully obtained.... The debate took several minutes and progressed to the point where Mr.Smellie would allow the release of all items except for Mr.Henderson's work station/computer, stating that it was government property and should therefore not be removed. At this point Mr.Smellie repeated his earlier comment to me stating 'You do not want me to challenge the legality of this warrant, do you officer'.

314. Worthington states that he again took this to be a threat and again he reiterated his stance that he was acting lawfully and that the items were to be taken by the officer.

315. A copy of the premises search book for the search which took place at Henderson J's office has been seen. In dealing with the judicial computer there is reference on the face of the document reading "sensitive to issues raised by the CJ"; "CJ raises concerns that it should be sealed and stored with the court". There is nothing on the face of the contemporaneous search book that any officer considered that the CJ was issuing a threat or was acting inappropriately by his actions in expressing concern about the police actions.

316. An affidavit was prepared by Katrina Johnson, a member of staff of the Grand Court, dated 24 October 2008. She was present during the search of Henderson J's offices. She makes reference to the CJ's objections in relation to the removal of the judicial computer and the fact that a heated debate took place; but she at no time describes his actions as improper or threatening. There is also no mention of any threat or improper behaviour in the affidavit of Timothy Thorne, a special constable, who was present during the search and responsible for the security of the judicial computer.

317. Assuming the alleged words were uttered by the CJ, a simple and obvious interpretation of them is that he was simply reiterating his legal view of the matter. He was aware of the salient facts from his previous dealings with the matter. He had given a written judgment. He had been part of the process of the written response to the police request for an interview with Henderson J. He had clearly formed a view that this was a fishing expedition: a view which he was entitled to, from the documents and evidence which were in existence

at the time. He was entitled to express that view to the officers who attended Henderson J's chambers. The view he was expressing was about challenging the search warrants by legal process. He was not threatening to take the law into his own hands. A judicial computer had been seized and the CJ was understandably concerned about the propriety of that course of action. The decision to search a Grand Court Judge's chambers was exceptional. It is understandable that the CJ, in the circumstances and with his detailed knowledge of the case, may have perceived these searches as an unwarranted attack on the Judiciary of the Cayman Islands for which he was constitutionally responsible.

318. A judge of the Grand Court cannot act as a legal representative or legal agent: see section 9 Grand Court Law (2008 Revision). However the CJ's actions (on the assumption they are true) did not breach section 9 and did not amount to an attempt to **improperly** frustrate the Tempura Team's investigation. In the above circumstances the complaint made on this issue is summarily dismissed.

The ex parte judgment

319. The report complains that it is unusual for a judge to give a detailed ruling from matters dealt with in an ex parte hearing.

320. The courts have consistently held that the issue of a search warrant is a very severe interference with the individual's liberty and as such, it is a step which should be taken only after mature consideration of the facts. In Maidstone Crown Court, ex p. Waitt [1988] Crim.L.R. 384, Lloyd L.J. said that the

special procedure for applying for an ex parte warrant was a serious inroad upon the liberty of the subject, and the responsibility for ensuring it was not abused lay with judges, who should be scrupulous in discharging that responsibility. In exceptional circumstances the judge should give reasons for his decision. Thus if the person making the application had taken the judge through the relevant statutory provisions and analysed the evidence in relation to them, it might be that it would suffice for him to say "in the light of the matters put before me I am satisfied on points (a), (b) and (c) and accordingly hold that this is a proper case in which to issue the warrant". But where the entire proceedings take a couple of minutes and the judge was referred to virtually nothing, there would be a need for a short statement of the judge's reasons for granting the warrant, so that it could be apparent that he had taken the appropriate matters into account: see Southwark Crown Court and HM Customs and Excise, ex parte Sorsky Defries (1996) Crim. LR 195. It has proved difficult to find any authority on a similar point, to which reference can be made, in the Cayman Islands.

321. On 22 February 2008 Mon Desir requested that the investigation team be provided with a copy of the CJ's ruling. The CJ stated that he fully understood the urgent nature of the request and as such would have his secretary, in confidence, type up his note over the weekend and have it with Mon Desir first thing on Monday morning (25 February 2008): **Core Bundle D, Tab 21, page** 53

322. In the March application the CJ was taken through the relevant statutory provisions by counsel, Mon Desir, and he analysed the evidence in relation to them. However he stated that Mon Desir had not considered the mental element of the offence and had not drawn his attention sufficiently to the case law: see para.86 of his ruling. The CJ also drew attention to the fact that the offence he was considering, section 95 of the Penal Code, had never been before the Grand Court: para.97 of his ruling.

323. Not writing a judgment on such an important and novel matter would later have been met with criticism. The benefits were clear. For the applicants, it allowed them to examine in detail the reasons for the refusal of the application and to renew their application on different grounds as they did in their second application. For the judiciary, it provided judicial certainty, in the form of a clear precedent for future matters in what was at that time a novel offence coming before the courts. In all the above circumstances, the judge was entitled to take the view that a detailed judgment was required so that it could be understood why on legal grounds he was refusing the application for a search warrant. There was nothing wrong with the CJ's writing of a detailed judgment in the circumstances; and accordingly the complaint is summarily dismissed on this issue.

Publication of the judgment

324. The CJ released the ex parte judgment dated 4 April 2008 to Henderson J's lawyers on 25 September 2008. The ex parte judgment was thereafter put into the public domain. The CJ stated in his memo dated 10 October 2008 that he

distributed a copy of the judgment to his fellow judges. The logical inference is that Henderson J was included amongst those to whom it was distributed; and that he gave a copy to Alberga QC, who was then representing Henderson J, after a request was made by Alberga QC.

325. When challenged CJ said he was perfectly entitled to release an ex parte ruling. This view was supported by Cresswell J when he gave judgment on the second Henderson judicial review on 23rd December 2008. Cresswell J said "any implied criticism of the Chief Justice was, in my opinion, wholly unfounded": **page 14, line 14 of his judgment**. Cresswell J did not state in his judgment the legal basis for this view.

326. Normally, a judgment, even when given in chambers, is to be regarded as a public document. Additionally, the general principle on proceedings in chambers is aptly stated in **Halsbury's Laws, 1982 edition** , as follows:

"Proceedings in chambers are held in private, but the publication of the whole or part of an order made in chambers is not in itself a contempt of court unless the court, having power to do so, expressly prohibits its publication".

327. In the UK this proposition is derived from The Administration of Justice Act 1960, section 12 (2). In the Cayman Islands, The Grand Court Practice Directions No. 3/97: Confidentiality and Publication of Chambers Proceedings, adopts the practice of the UK provision, with minor additions. This practice has further been reported in the Cayman Islands Law Reports in CHAMBERS PROCEEDINGS-confidentiality and Publication of Proceedings N1 1997 CILR. It is stated as follows:

"In the absence of local rules, the Cayman Islands practice for the reporting of proceedings heard in chambers is to be found in the English Administration of Justice Act 1960, section 12, with the addition of provisions of this direction".

328. The CJ's ruling included sensitive and confidential information about the case including the role of McKeeva Bush as a potential witness and certain suspects. Furthermore, at the time of the original complaint about the conduct of Ennis, Ennis was considering a law suit against Seales, so was unlikely to have been in a corrupt relationship with him. This was known by Kernohan at the time. Kernohan had never brought this to the attention of the investigation team. The release of the judgment meant that a tactical advantage to the investigation team had been lost as Bridger had intended to raise this matter with Kernohan when he interviewed him. : **Core Bundle D, Tab 21, page 61-62**

329. No formal application was made by anyone to place an embargo on the publication of the judgment, nor was it ever raised at the time of the application or before the delivery of the judgment. The report's complaint is that the CJ released the judgment knowing that it contained sensitive and confidential information. The inference is that he was told this or should have been able to glean this. The CJ stated in his memo of 10th October 2008: "…I was told at the time by Mr. Mon Desir that the investigation was "undercover", I did not release….". The CJ seemed to be of the view that it was an "undercover" investigation and that motivated his decision to place an embargo on the judgment in **April 2008**. The trigger for the release for the

CJ, was the request from Justice Henderson's attorneys and "the investigations long since becoming public" in **September 2008**.

330. The law makes provision for an application against publication and none was made. On the face of the judgment appear the words: **"UNAPPROVED VERSION: NO PERMISSION IS GRANTED TO PUBLICISE, COPY OR USE IN COURT"**. The police may have been led into a false sense of complacency not to make the application, in the circumstances where the judge of his own volition placed such an embargo on the judgment. Such an argument would mean a party to the proceedings did not formalise his position before the court and instead operated on an assumption, albeit apparently mistaken, on the reason for the embargo. There may have been a legitimate expectation on the part of the police that the embargo would be permanent. However the Latin phrase "Judex non reddit plus quam quod petens ipse requirit" comes to mind: a judge does not give more than the plaintiff himself demands.

331. The police were under a duty to formalise their application, and not leave it to assumption. In such circumstances, the CJ was legally free to lift his own embargo, without hearing from the police. The difficulty with a self imposed embargo is that a judge does not need permission or consent to lift his own embargo. In the unique circumstances of this case the CJ was entitled in the circumstances and with his knowledge of the case, to see the arrest of Henderson J and searches of his court offices, as an unwarranted constitutional attack on the Judiciary of the Cayman Islands for which he was

constitutionally responsible. The arrest and searches had the potential of undermining the judiciary and damaging the reputation of the Cayman Islands. In these unique and exceptional circumstances the CJ did nothing wrong in releasing the judgment.

332. The CJ would have appreciated the reference in his judgment to McKeeva Bush, (the then Opposition Leader, now Premier, of the Cayman Islands), and the obvious sensitivity surrounding that reference. In normal circumstances a judge would list the case to give the police the opportunity to make any representations they wished, and to hear any argument about whether any part of the ruling should be redacted. However the CJ was not faced with normal circumstances. He was faced with circumstances where the Tempura Team had taken the exceptional step of arresting a Grand Court Judge in circumstances where the CJ believed from his previous dealings with the case that there was no evidence in law to justify such an arrest. His ability to trust anything said by this team would have been low. With hindsight it might have been better for the CJ to have listed the matter for representations to be made; but in the circumstances which he faced no legitimate criticism can or should be made of the CJ's decision to release the judgment without having a court hearing. There has also been no complaint made by McKeeva Bush concerning the release of the judgment containing his name. In the above circumstances the complaint is summarily dismissed on this issue.