CHAPTER 7

THE SEARCH WARRANT JUDICIAL REVIEW

Background

333. Henderson J lodged an application for Judicial Review, challenging the search warrants on 2 October 2008, supported by the affidavit of Shaun McCann, Campbell's Attorneys at Law. On 7 October 2008 leave was granted by Mr.Justice Campbell: **cause 464 of 2008.**

334. Leave for judicial review having been granted ex parte on 7 October 2008, Mr.Justice Campbell directed that the applicant (Henderson J) should serve their application and accompanying documents by 8 October 2008, and that the police and JP should file their evidence by 13 October 2008.

335. On 10 October 2008 Nelson & Co wrote to the court on behalf of the police stating they had only just been instructed, and seeking to adjourn a hearing which Cresswell J had set for 16 October 2008. Campbell's, attorneys acting on behalf of Henderson J, wrote a letter to Nelson's dated 13 October 2008, stating that they were agreeable to an adjournment to give the police more time to prepare their case; and a draft consent order was drawn up.

336. The case was listed administratively for 16 October 2008. Cresswell J refused the application for an adjournment of issues on 17th October 2008 and directed that a preliminary issue into the validity of the search warrants based upon non disclosure should be heard on 21st October 2008. The police drafted grounds

of appeal against Cresswell J's direction. However these grounds were abandoned.

337. The Judicial Review hearings took place on 21, 22, 23 and 24 October 2008 and Cresswell J gave his ruling on 29 October 2008. The judge ruled that there was a duty upon an ex parte applicant for a court order to make full disclosure; and in this case the Tempura team when making an application for the warrant to search Henderson J's premises had not made full disclosure in a number of important respects. Furthermore, the Tempura team's application based on an argument that Henderson J had misconducted himself in public office was wholly unfounded because it had not taken into account the penal offence of Scandalising the Court enshrined in section 27 of the Grand Court Law. He also ruled that there was insufficient evidence before the JP that Henderson J had committed the offence of misconduct in a public office. Cresswell J also ruled that the application for search warrants did not provide the JP with sufficient particulars to explain why recovery of the articles described in the search warrants was necessary to the conduct of the investigation. Taking into account all these matters Cresswell J concluded that the search warrants could not stand.

338. There was no appeal against the decision of Cresswell J by the Tempura team.

339. The report complains that Cresswell J:

339.1 showed bias and improper conduct whilst presiding over the Judicial Review hearings brought by Henderson J;

339.2 made findings which were deliberately intended to ensure that the Tempura investigation went no further.

340. In essence the report implies that for the above reasons there was a judicial conspiracy between Cresswell J, Henderson J and the CJ to protect the position of the CJ in respect of his involvement in the Tempura investigation; and to protect the position of Henderson J in respect of his involvement in 3 September 2008 events.

341. In judicial review proceedings there is an avenue of appeal from the Grand Court to the Cayman Islands Court of Appeal; and then finally to the Privy Council. Section 5 of the Court of Appeal Law deals with the Court of Appeal's civil jurisdiction

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

342 Section 3 (2) of the Cayman Islands (Appeals to Privy Council) Order 1984 states:

"subject to the provisions of this order, an appeal shall lie from decisions of the Court of Her Majesty in Council with leave of the Court in the following cases:

(a) Decisions in any civil proceedings, where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or

public importance or otherwise, ought to be submitted to Her Majesty in Council"

343. The report complains about Cresswell J's rulings of law and fact and implies that the rulings were influenced by a judicial conspiracy between Cresswell J, Henderson J and the CJ to protect the position of the CJ in respect of his involvement in the Tempura investigation; and to protect the position of Henderson J in respect of his involvement in 3rd September 2008 events. The report also complains about the personal behaviour of Cresswell J during the proceedings and again implies that the judge's behaviour was influenced by the said judicial conspiracy. Finally the report complains about the behaviour of Cresswell J outside court and again implies that the judge's behaviour was influenced by the said judicial conspiracy.

344. It seems clear that the correct view in this case is that the complaints made in the report about the judicial findings of Cresswell J and his behaviour inside court, are matters which could have been dealt with through the normal court procedure of appeal. There was no appeal to the Cayman Court of Appeal by the Tempura team against the findings of Cresswell J. In these circumstances the Governor has no jurisdiction to entertain complaints about the matters which took place inside court. However he would have jurisdiction to consider a complaint which concerned the behaviour of a judge outside court.

The Court hearing on 17th October 2008

345. The report complains (page 12) that Cresswell J was hostile from the moment he sat on the directions hearing on 17th October 2008. He wanted the full hearing to take place on the following Monday 20th October 2008 even though he was told there were a number of affidavits to obtain; and counsel would need to be brought over from the UK.

346. Leave for judicial review having been granted ex parte on 7 October 2008, there is no doubt that a pressurised timetable was put in place by both Campbell J and Cresswell J. The additional work which was required to be undertaken on behalf of the police was substantial as set out in a note to Nicholas Purnell QC. However the proper avenue of complaint for this was by way of appeal to the Cayman Islands Court of Appeal. The police drafted grounds of appeal against Cresswell J's directions. These grounds were not proceeded with. There is no evidence of improper conduct by Cresswell J here which could not have been dealt with by way of appeal. There is nothing in this matter that supports a contention of judicial conspiracy. The complaint is therefore summarily dismissed on this issue.

347. The report complains (page 12) that on 17 October 2008 Cresswell J totally mismanaged an attempt by the Tempura team to make an application to withhold material relating to the suspicions around the CJ from those representing Henderson J. It is alleged that the learned judge succeeded, by attrition, in getting the PII application abandoned. At one point he urged that sensitive material be disclosed on a counsel to counsel basis. The effect would

have been to give the material to Henderson J himself. The report states that it is hard to escape concluding that this was an attempt to damage the investigation's case in the Judicial Review hearing.

348. Cresswell J stated at the directions hearing held on 17 October 2008 that the RCIPS should hand over to Henderson J's lawyers an unredacted version of the Information on Oath. Up until that stage all Henderson J had seen, prior to the withdrawal of a claim to public interest immunity ("PII") was the first page and part of the second page of the application. This meant that between his arrest on 24th September 2008 and the directions hearing on 17th October 2008 Henderson J was denied sight of the key parts of the material relied upon in support of the applications for the search warrants. The learned judge ruled that this was wrong: **pages 5-6.**

349. In fact the agreement reached between counsel for Henderson J and counsel for the Acting Commissioner of the RCIPS on 22 October 2008, stated that Henderson J did not require the court to consider the police claim for PII in relation to the undisclosed portion of Bridger's affidavit; and that the 48 paragraph affidavit would be removed from the judge's papers, sealed and kept in a confidential file in the Court Vault "marked not to be opened without leave of Sir Peter Cresswell". It was also agreed between the parties that the court would not refer to or make any use of the 48 paragraph affidavit in reaching its decision concerning Henderson J's application for judicial review.

350. From the above narrative it is difficult to see the basis of the complaint made by the report that "the learned judge succeeded, by attrition, in getting the PII application abandoned". The PII application was simply not proceeded with by way of agreement between the parties and the material was not considered by the court or seen by Henderson J. If there were any merit in this complaint then this is a matter which could properly have been dealt with by way of appeal, there was no appeal. There is nothing in this matter that supports a contention of judicial conspiracy. The complaint is therefore summarily dismissed on this issue.

The Judicial Review Hearing

351. The report's central complaint is about the learned judge's ruling. The report states that it was extreme:

(a) It did not address or recognise that Cayman law allows applications for search warrants to be made to JPs, magistrates and judges, and it does not provide for particular search warrant applications to be made to judges only;

(b) It did not refer to affidavits from the RCIPS officers addressing crucial aspects of procedure and practice;

(c) It makes findings that are not supported by the weight of the evidence (including in respect of the evidential case against Henderson J);

(d) Finds bad faith without supporting evidence to support such a draconian finding;

(e) Flies in the face of the evidence by attributing nefarious motives.

352. Bridger's complaints about the judgment are also contained within detailed documents which he wrote in 2008.

353. All the above mentioned matters complained of, could have been dealt with by the Cayman Islands Court of Appeal. It would be a potential interference with the independence of the judiciary for a Governor to seek to review these matters in the absence of any appeal. In these circumstances the complaint is summarily dismissed.

Behaviour outside Court

354. The report complains (page 13) that Cresswell J had a lengthy meeting with the CJ (2 or 3 hours) when he arrived on the island; and that he had the use of the services of Henderson J's secretary and his chambers. The source of this information has not been revealed and has not been seen in any written document. There is therefore no evidential basis for these allegations and the complaint is summarily dismissed on this ground alone.

355. Before leaving this matter it is worth emphasising that judges are sworn to "well and truly serve Her Majesty Queen Elizabeth the Second in the office of

Grand Judge and ..... Do right to all manner of people according to the law without fear or favour affection or ill-will. So help me God": **see the Second Schedule to the Cayman Islands (Constitution) Order 1972 (page 49)**. The public must proceed on the basis that all judges will uphold their oaths. Furthermore, the CJ as the head of the judicial administration would be expected to speak to a visiting judge from overseas as a matter of courtesy.

356. Furthermore, judges frequently have to share rooms and court staff in England without being accused of judicial bias; just as barristers in chambers in the same room may be on opposing sides in an action, without being accused of compromising their professional standards. A level of integrity must be presumed when dealing with senior legal officials. There is no merit at all in the report's implication that judicial independence would be compromised simply because a judge is using the room or the services of a secretary of one of the parties to the action who happens to be a sitting judge in the same court. This could not have been a proper legal basis for an application for the judge to recuse himself.

The affidavit in the safe

357. On 23rd February 2010, Cresswell J was sworn in as a judge to the Financial Services Division of the Grand Court. The report complains that Cresswell J continued to list court hearings to deal with a confidential affidavit which he had been given during the first Judicial Review proceedings brought by Henderson J. This is a matter which the Governor has no jurisdiction to deal with. Any listing, ruling or decision by Cresswell J in the search warrant

judicial review proceedings is a matter to be dealt with by the parties to those proceedings who have a right of appeal if they are dissatisfied with any adjudication. There has been no appeal to the Cayman Island Court of Appeal and the complaint is summarily dismissed on this basis.

Alleged conspiracy to pervert the course of justice

358. The factual history concerning the entry into the office of Seales on 3 September 2007, and the involvement of the CJ, Henderson J, and Cresswell J at various stages in that history has been considered. There is no evidence to support any contention that there was a judicial conspiracy between Cresswell J, Henderson J and the CJ to protect the position of the CJ in respect of his involvement in the Tempura investigation; and to protect the position of Henderson J in respect of his involvement in the 3 September 2008 events. Each ruling, judgment and action of the CJ and Cresswell J had a proper legal foundation and justification; and in the case of Cresswell J if any party was dissatisfied with any aspect of his ruling they had the option of seeking redress in the Cayman Court of Appeal. This option was not pursued by any party to the action.

CHAPTER 8

THE ARREST JUDICIAL REVIEW

Background

359. While preparing for his judicial review proceedings in respect of the search warrants matter, Henderson J's solicitors, Campbell's wrote to the RCIPS on 13 October 2008 stating that they considered that Henderson J's arrest on 24 September 2008 was also unlawful. Following this letter, and his success on the search warrants matter, Henderson J on 12 November 2008, lodged a further application for judicial review, challenging the lawfulness of his arrest on the basis that the offence of misconduct in public office is not arrestable without a warrant in the Cayman Islands **Cause 528 of 2008**

360. On 17 November 2008, David George, Acting Commissioner of Police, wrote to Bridger informing him that Polaine was no longer a source of independent advice, and future advice should be sought from the AG's chambers.

361. Leave was granted for Henderson J's second application for judicial review on 20 November 2008 by Campbell J.

362. On 24 November 2008 the Deputy Solicitor General, Vicki Ellis (DSG) wrote to Henderson J's solicitors on behalf of the Acting Assistant Commissioner of Police stating that the AG would not "contest the claim in respect of the unlawful arrest sought on behalf of Henderson J.

363. The judicial review application was heard on 23 December 2008 when the AG made a concession that the offence was not arrestable without a warrant. On this basis Cresswell J gave a ruling stating that the arrest of Henderson J was unlawful and that the Operation Tempura investigation team had acted in bad faith.

364. On 23 January 2009 Gillian Merron MP, Minister of State for the FCO, authorised Governor Jack to act against the advice given to him by the Cayman Islands Cabinet in order that the AG could seek to resolve the matter of Henderson J's damages. Damages to Henderson J were agreed by the AG in the sum of CI$1.275 million (approximately £1.025 million).

365. The report makes a complaint that the AG made an arbitrary decision that the offence of misconduct in a public office was not an arrestable offence under Cayman law when Henderson J had been arrested; and that this had been contrary to his previously expressed view when Dixon and Scott were arrested and Dixon was charged. No rationale for the AG's change of view has been provided.

Misconduct in a Public Office.

366. The common law offence of Misconduct in a Public Office is not arrestable without a warrant in the Cayman Islands. Powers of arrest without warrant are defined in section 24 (4) and 36 (a) of the Police Law (2006 Revision). Section 24 (4) states that a police officer may arrest without warrant any person who commits or attempts to commit an arrestable offence in his view

or whom he reasonably suspects to have committed an arrestable offence. Section 36 states: Any police officer may, without an order from a Justice of the Peace and without a warrant, arrest any person:

(a) Whom he suspects on reasonable grounds to have committed or to be about to commit an arrestable offence:

367. The first question is always: "Was the arrest for an arrestable offence?" The fact that the police officer believed he had a power of arrest is not sufficient. He must actually have had the power: Wershof v MPC [1978] 3 All ER 540.

368. In Cayman law criminal offences are to be found set out principally in two statutes. The Criminal Procedure Code (2006) and the Penal Code (2007 Revision)

The Criminal Procedure Code (2006)

369. The Criminal Procedure Code, in its First Schedule, (page 66) sets out a list of offences which are arrestable without a warrant and those which require a warrant. Section 14 (7) Criminal Procedure Code (2006) states: Subject to any other law, no person shall be arrested without a warrant otherwise than in connection with an offence prescribed in the First Schedule as an arrestable offence.

370. The offence of Misconduct in a Public Office is a common law offence. It is not expressly referred to in the schedule. However the First Schedule states (page 80):

"Offences against other laws where power of arrest is not prescribed:

If the offence is punishable more severely than with 6 years imprisonment then such offence is arrestable".

371. The question arises as to whether the common law offence of Misconduct in a Public Office falls within the definition of "other laws" as set out in page 80 of the First Schedule. The phrase "Offences against other laws where the power of arrest is not prescribed" refers to any other law specified by statute not contained within the Criminal Procedure Code. This does not include common law offences. The use of the word prescribed suggests an authoritative certainty which only a statute could give. Indeed the Blacks Law dictionary defines prescribed as "to dictate, ordain or direct; to establish authoritatively (as a rule or guideline)...".

372. Furthermore this interpretation of the phrase "Offences against other laws where the power of arrest is not prescribed" is consistent with the use of the phrase 'any other law' where it appears in other parts of the Criminal Procedure Code such as sections 4, 5, 6, 9, 35, 82, 112 (8), 113 where clearly the reference is to other statutory provisions. This interpretation is also consistent with section 1 of the Criminal Procedure Code which defines "This Law" in terms of reference to a specific statute, namely the Criminal Procedure Code (page 9). This interpretation is consistent with section 3, which states "Subject to the express provisions of any other law for the **time being in force**, all offences shall be inquired into, tried and otherwise dealt with according to this Code".

373. Finally this interpretation is consistent with the Interpretation Law (1995 Revision) when consideration is given to its definition of the term of "prescribed" and "Laws". Section 2 states:

"Law" means any Law and any regulation made thereunder, and any prerogative Order of the Sovereign in Council applicable exclusively to the Islands, whether enacted before or after the commencement of this Law.

374. Section 3 (1) of the Interpretation Laws (1995 Revision) states: "In this Law and in all...Laws...relating to the Islands, now in force or hereafter to be made, the following words and expressions shall have the meanings hereby assigned to them respectively, **unless there is something in the subject or context inconsistent with such construction**, or unless it is therein otherwise expressly provided". Section 3 then gives the following definition:

"common law" means the common law of England

"prescribed" means prescribed by the Law in which the word occurs or by any regulations made thereunder, and, in relation to any regulations, where no other authority is empowered in that behalf in the Law, prescribed by the Governor in Council

375. For the above mentioned reasons the Criminal Procedure Code does not apply to the Common law offence of Misconduct in Public Office.

Penal Code 2007 Revision

376. The Penal Code 2007 Revision is a statue which codifies a number of the criminal offences contained in the Criminal Procedure Code. In particular the Penal Code sets out the maximum sentences of imprisonment applicable to those offences. The code does not deal with the definition of arrestable offence neither does it mention the offence of Misconduct in a Public Office. In short the Penal Code does not codify the common law offence of Misconduct in a Public Office. Therefore the code does not assist on whether the common law offence of Misconduct in public office is an arrestable offence.

377. Section 38 (1) of the code states: When in this Law, no punishment is specially provided for any offence it is punishable with imprisonment for four years and with a fine. Section 1 states "This Law may be cited as the Penal Code (2007 Revision). Section 3 states "In this Law – "offence" is an act, attempt or omission punishable by law. Taking these two sections together section 38 (1) would read: "When in the Penal Code (2007 Revision) no punishment is specially provided for any offence (act, attempt or omission punishable by law) it is punishable with imprisonment for four years and with a fine".

378. At first glance, Section 38 (1) given its natural meaning would only include offences referred to in the Penal Code and would not include common law offences or other statutory offences not referred to in the Penal Code. However this is not the correct interpretation of this section because if the phrase "this Law" referred only to the offences referred to in the Penal Code

then section 38 would in practise be otiose and have no practical application: there are no offences mentioned in the Penal code for which a sentence is NOT provided.

379. It could not have been the draftsman's intention to legislate a section which in practice has no legal effect. To have legal effect Section 38 (1) should be read as to include offences not covered by the Penal Code (ie other offences created by other statutes and common law offences not covered by the Penal Code) where no specific punishment has been provided for. In these circumstances the effect of section 38 (1) would be to give a statutory offence or a common law offence a maximum sentence of 4 years if no specific sentence has been provided by the statute or the common law. This interpretation is supported by the definition of "law" in section 3 of the Penal Code:

In this Law- "law" includes any order, rule, or regulation made under the authority of **any** law.

380. Neither interpretation assists on the definition of arrestable offence and on whether misconduct in a public office is an arrestable offence without a warrant.

381. Section 2 of the Penal Code states

Nothing in this Law shall affect

(a) "the liability, trial or punishment of a person for an offence against the common law or any other law in force in the Islands".

382. These words given their natural meaning imply that the Penal Code does not alter or affect the operation of common law offences in terms of trial or punishment (sentence) or any other statutory offence which specifies a maximum sentence. This supports the argument that the Penal Code, and particularly section 38 (1) covers the maximum sentence of all offences, save that, if a statute gives a common law offence or a statutory offence a particular maximum sentence, that sentence would prevail. If a statute or common law does not specify a maximum sentence then section 38 (1) will impose a maximum sentence of 4 years imprisonment.

383. It should be stressed that the interpretation of sections 38 (1) and 2 (a) do not assist on the definition of arrestable offence and on whether misconduct in a public office is an arrestable offence. For the reasons expressed above it would appear that none of the two statutes which deal with criminal offences in the Cayman Islands apply to the common law offence of Misconduct in a Public Office and neither deals with whether that offence is an arrestable offence. If statute does not assist then the answer can only be contained within the common law itself.

The Common Law

384. In essence it would appear that Ward's summary of the common law in his opinion provided to the AG on 24th October 2008 and set out in brief form in the judgment of Cresswell J dated 23rd December 2008 was a correct summary of the law. At common law a police officer could only arrest a person without

a warrant if he was committing a felony. A constable as a general rule could not arrest without a warrant for misdemeanour after it had been committed: Griffin v Coleman (1859) 28 L.J.Ex 134; Leachinsky v Christy & Others [1946] K.B.124 at page 129, 148.

385. At common law the offence of misconduct in public office is a misdemeanour: AG's Ref (No.3 of 2003) [2005]; Nicholls, Daniel, Polaine, & Hatchand, Corruption and Misuse of Public Office, 2006 Oxford University Press, at p66 *et eq*

386. It follows that as a misdemeanour, misconduct in a public office is not an arrestable offence without warrant at common law; and for the reasons expressed above it is not an arrestable offence under the two principal criminal law statutes in the Cayman Islands.

387. The above conclusion is not only correct as a matter of statutory construction, but is correct as a matter of public policy for two further reasons. First the majority of misconduct offences specified in the First Schedule of the Criminal Procedure Code (see p68-70) are not arrestable offences:

Official corruption

Extortion by public officer

Public officer receiving property to show favour

Breach of trust by public officer

False claim by public officer

Abuse of office

Abuse of office for gain.

Neglect of official duty

Disobedience of lawful duty

388. In this respect it should be specifically noted that the section 95 offence of Abuse of Power and the section 121 offence of disobedience of lawful duty appear to have their genesis in the common law offence of misbehaviour in public office. Russell on Crime 11th edition chapter 24, page 407 states the general common law rule as follows:

"Where a public officer is guilty of misbehaviour in office by neglecting a duty imposed upon him either at common law or by statute, he commits a misdemeanour and is liable to indictment unless other remedy is substituted by statute; citing R v.Hall [1891] 1 Q.B.747"

389. Both the section 95 and 121 offences are not arrestable offences. A warrant is required. It is unlikely that the draftsman of the Criminal Procedure Code would have created statutory offences to effectively mirror a common law offence and then deliberately make the statutory offences non arrestable offences whilst leaving the almost identical common law offence as an arrestable offence.

390. Secondly, powers granted by statute which infringe upon individual liberty should be strictly construed if there is any ambiguity:

"if the statutory words relied upon as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is at least restrictive of individual rights which would otherwise enjoy the protection of common law": Lord Diplock: IRC v Rossminster [1980] AC 952; Morris v Beardmore [1981] Ac 446, 463.

391. The arrest of a subject is a power which infringes upon individual liberty. On a strict interpretation the First Schedule of the Criminal Procedure Code, which requires a warrant for the arrest of a person for the offence of misconduct in public office would be in accordance with the principles set out in Rossminster and Morris v. Beardmore.

Alternative interpretations

392. In the judicial review proceedings the analysis relied upon by Henderson J was set out at paragraphs 20-23 of his application: Misconduct in a Public Office does not have a prescribed penalty in the Penal Code (2007) or any other law in the Cayman Islands. Therefore punishment is governed by section 38 (1) of the Penal Code which provides that if no penalty is expressly set out for any offence in the Code, a penalty of up to 4 years imprisonment and a fine can be imposed. Accordingly, Misconduct in a Public Office is not arrestable because it is not punishable with imprisonment of 6 years or more. The Governor had taken the AG's view that misconduct in a public office is not governed by either statute. However it must be conceded that on one possible interpretation of the First schedule at page 80, it is arguable that misconduct in a public office does fall under the provisions of the First schedule at page 80 as set out in Henderson J's argument: the result is the same however: misconduct is not an arrestable offence without a warrant.

393. The report argues (page 14) that the phrase 'other laws' set out in the First Schedule at page 80 includes common law offences. As the common law offence of Misconduct in a Public Office does not prescribe a power of arrest

the offence will be arrestable if it is punishable with more than six years imprisonment. The report argues that as a common law offence, the punishment for misconduct in public office is at large and carries a maximum sentence of life imprisonment. The offence is one "punishable more severely than with six years imprisonment" and therefore is arrestable without a warrant. The report argues that the imposition of a maximum sentence of 4 years imprisonment by section 38 (1) of the Penal Code does not apply to common law offences because section 38 is confined to offences contained only within the Penal Code; and the report relies upon the exclusionary effect of section 2 (a) of the Penal Code to support this argument.

394. The difficulty with the report's argument is that the First Schedule at page 80 is dealing with situations where a "power of arrest is not prescribed" or where "no mode of trial is prescribed". The use of the word "prescribed" is more applicable to a statutory instrument than to the common law"; and as already indicated on a thorough analysis of the Criminal Procedure Code the phrase "Other Laws" is used throughout the statute to refer to other Statutory laws. Therefore this analysis does not appear to be correct. However, in coming to this conclusion it will be clear from the above legal debate that it cannot be said that the interpretation of the Cayman Statutory provisions on this topic are trite or elementary law; or that there was a correct interpretation which should have been **obvious** to any lawyer considering these provisions.

The AG's Concession

395. At the second Judicial Review hearing a concession was made on behalf of the AG that the offence of Misconduct in a Public Office was not arrestable. The concession is set out in the judgment of Sir Peter Cresswell

396. In light of the conclusion reached by Ward that Misconduct in a Public Office was not an arrestable offence either at common law or under the Cayman Island statues; the AG had no option but to make the concession which he did. That concession was properly made for the reasons already set out. There is therefore no merit in the report's complaint that the AG got the law wrong when he made his concession at the Henderson J judicial review hearing into the legality of his arrest. This complaint is summarily dismissed.

397. The report makes a further complaint (page 15) that there had been a fundamental shift in the AG's approach when dealing with the arrest of Henderson J, to that taken when he was asked to advise on the arrest of two police officers, Dixon and Scott.

The Arrest of Dixon and Scott

398. On 14th May 2008, a decision was made by the Tempura team to arrest Dixon without a warrant for the offence of Misconduct in a Public Office, and Conspiracy to Pervert the Course of Justice. The misconduct allegations were that on 22nd June 2003 Dixon unlawfully released two men from police custody (Eddylee Martin and Kenroy Martin) who had both been arrested for the offence of gambling. The allegation was that he did this because he had a

corrupt relationship with the Martin family, and also may have been involved in gambling himself.

399. The Perverting the Course of Justice allegations arose out of Dixon's alleged conspiracy with Martin in relation to the making of the original false allegations against Ennis and Seales. Dixon was also investigated in relation to an incident on 7th April 2004 whereby ex-Deputy Commissioner Evans was arrested for offences related to drink driving. It was alleged that Dixon ordered Mr.Evans' release without charge because of the personal relationship he had with Mr.Evans. They both shared a love of fishing and Mr.Evans had been Dixon's mentor. A decision was also made to arrest Scott for his involvement in the Rudolph Evans drink-drive incident.

400. The decision to arrest was made in the following way. Mon Desir, was consulted by Ashwin stating that it was the desire of the team to arrest Dixon for the offence of Misconduct in a Public Office. Mon Desir informed Ashwin that he could not find the relevant section in Archbold to confirm that Misconduct in a Public Office was an arrestable offence. After some further research Mon Desir reiterated that whilst he was confident that there was a power of arrest, he could not find it in Archbold. He advised Ashwin that because he could not find the information in Archbold it would be prudent to apply for an arrest warrant. Mon Desir went further: He stated he had spoken to a Magistrate and had made an appointment to apply for a warrant that afternoon (14th May 2008).

401. Ashwin had earlier indicated that he would be prepared to apply for a warrant. However having received Mon Desir's clear advice he ignored it and sought advice from Mark Carroll of the CPS team in London. Mark Carroll then sought advice from unnamed counsel in London who informed him that Misconduct in a Public Office was an arrestable offence. Ashwin informed Mon Desir of the advice from London, and Mon Desir told the officer that if he was happy with the advice then the decision was for him to make. On this basis Bridger agreed to arrest Dixon without a warrant and this took place on 15th May 2008. It is likely that the advice the investigators received would have been based on the Criminal Law Act 1967, a UK statute that has no application in the Cayman Islands.

402. At the time of Dixon's arrest officers read from a pre-prepared arrest script which informed Dixon of exactly what he was being arrested for. He was invited to sign the note which he duly did. On 15th May 2008 while Dixon was in custody an ex parte hearing took place before the CJ (the prosecution was not represented). The application was made by attorneys acting for Dixon. The information given to the CJ during this hearing was that Dixon had not been informed he was under arrest. The arrest script was not mentioned. As a consequence the CJ ordered the immediate release of Dixon from Police Custody on the basis that the arrest and immediate detention was unlawful and that a writ of habeas corpus be issued for return to court on 16th May 2008. Dixon was released from custody.

403. Following the CJ's decision Mon Desir spoke to the SG about what had taken place at 8pm on the evening of 15th May 2008. Two Operation Tempura investigators attended upon her office the following morning, before a court hearing which had been listed. Although the matter was set for an inter partes hearing at 9am, the SG reached an understanding with Dixon's counsel that the matter would be adjourned to another date. Consistent with that expectation Dixon's counsel opened the proceedings before the CJ by stating that the defendant (Commissioner of Police) should file and serve affidavit material and that a hearing on the return of the Writ should be scheduled for a later date. However within minutes of the commencement of proceedings it became clear that the sole issue being relied upon by Dixon's counsel was that the arresting officers had not told Dixon the offence for which he had been arrested. The SG was immediately able to demonstrate that this contention was incorrect by showing the CJ the arrest script. This took place on 16th May 2008.

404. Faced with clear evidence of non-disclosure of a material fact on Dixon's part, the CJ immediately discharged his previous order. He stated that he was satisfied that there had been reasonable and probable cause to arrest, that there had been non disclosure by Dixon, that he would not have made his original order had he known, and that he doubted that an order of the High Court would have been made. He indicated that should Dixon be re-arrested the police should be mindful of their duty to consider objectively and reasonably whether Dixon should be allowed bail. The hearing lasted less than 20

minutes. Dixon was admitted to bail on the same date, and subsequently filed an affidavit apologising to the Court for misleading the CJ.

405. At no stage during the habeas corpus proceedings did the SG make any comment that the offence of Misconduct in a Public Office required a warrant and therefore the Dixon arrest was unlawful. Furthermore, on 16th May 2008, during the return date hearing, all parties were concerned with the lawfulness of Dixon's arrest. Neither the SG, Dixon's attorneys nor the CJ raised at any stage any complaint or concern that Dixon had been arrested without a warrant for an offence that required a warrant.

406. On 28th May 2008 Ward replaced Mon Desir as legal adviser to Operation Tempura. On 30th June 2008 Ward was informed by Bridger of the offence for which Dixon and Scott had been arrested and the circumstances of their arrest. He was also informed of the events that had occurred regarding the ex parte hearing and the Writ of Habeas Corpus matters.

407. Ward has no recollection of being informed about events at the habeas corpus hearing in May. He anticipated that the completed Dixon/Scott file would be delivered to him at the beginning of July 2008 for review and ruling on charges. The file was not ready before Ward was about to depart Grand Cayman on vacation leave. Bridger advised Ward that he had spoken to the Governor and that they were content to await his return from vacation. However the SG gave instructions for the file to be delivered to the AG's chambers, and Ward advised Bridger accordingly.

408. On 2nd July 2008 a file was submitted to the AG's Chambers in respect of Dixon and Scott for a decision to be made as to whether there was sufficient evidence to lay charges of Misconduct in a Public Office in relation to the Evans drink drive matter, and charges of Misconduct in a Public Office against Dixon in respect of Martin's gambling matter. This was followed by a further file of additional material submitted on 3rd July 2008.

409. On 11th July 2008, Doug Schofield, Assistant Solicitor General, recommended that Dixon should be charged with two counts of Misconduct in Public Office, contrary to the Common Law and two counts of Perverting the Course of Justice, contrary to section 107 (1) (D) of the Penal Code. Schofield also recommended that Scott should not be charged for Misconduct but should be approached to see if he would be a prosecution witness. These recommendations were passed to the SG who in turn passed them to the AG via a memo dated 16th July 2008. Within the Memo the SG agreed that Dixon should be charged with two counts of Misconduct in a Public Office contrary to Common Law after considering whether the statutory offence of Abuse in Office and Neglect of Office Duty were more appropriate and finding they were not. The Memo was endorsed by the AG on 21st July 2008.

410. [redacted]

[redacted] Ward's next involvement occurred shortly before Dixon was to be formally charged. [redacted] Ward never raised any concerns about the lawfulness of the arrests made without a warrant.

411. On 4th August 2008 Dixon was charged with two counts of Misconduct in Public Office contrary to Common Law, and two counts of Perverting the Course of Justice contrary to the Common Law.

412. At no stage during the chronology of events mentioned above did Ward, Schofield, the SG or the AG raise the issue of the lawfulness of the arrest. None of the legal officers from the AG's Chambers considered the issue of whether misconduct in a public office was arrestable without a warrant until the matter was raised on 13th October 2008 by Henderson J's solicitors following his arrest. The report complains that the AG changed his mind about the law when Henderson J was arrested.

413. During the second judicial review hearing Cresswell J described the necessity of checking whether the common law offence of misconduct in a public office was arrestable without a warrant as "elementary". He was very critical of Polaine for operating under the assumption that the offence was arrestable without a warrant, when he gave his judgment on 23rd December 2008. The

report complains that the AG appeared to operate under the same mistaken assumption of the law as Polaine. Therefore this should have been drawn to the attention of Cresswell J by the AG. The report implies that Cresswell J should have been informed that the law was difficult and errors had been made by several lawyers, and Polaine was not alone in this regard.

The AG's response dated 14th January 2011 and 12th February 2011

414. In his response the AG makes the following relevant points. First, his chambers were never asked specifically to advise on the arrest of Dixon and Scott and therefore had never considered the legal matter. There was therefore no shift in opinion which had taken place. The AG's chambers were only asked to advise on whether there was sufficient evidence to charge Dixon and Scott with the offence of Misconduct in a Public Office.

415. It is clear from the AG's response that he is accurate when he states that his Chambers were never asked to specifically advise on whether a warrant was required to arrest a person for misconduct in a public office until this matter was drawn to their attention on 16th October 2008, by Polaine, following the arrest of Henderson J. It is therefore wrong to characterise the AG's concession at the Henderson J judicial review hearing as a 'fundamental shift'. There was no shift in position because the matter had never been previously considered. The real issue therefore is whether the matter could and should have been considered by the AG's Chambers before it was drawn to their attention by Polaine on 16th October 2008.

416. Secondly, the AG argues in his response that it is not ordinarily the duty of a prosecutor in the Cayman Islands (acting under the AG) to consider, **on his own motion,** whether a person has been correctly arrested: that is a matter for the police. A prosecutor's duty is simply to consider the sufficiency of evidence and decide whether there is enough evidence for a person to be charged. A prosecutor is entitled to assume a person has been correctly arrested unless the police specifically ask him for advice on any aspect of arrest.

416.1 In addition, in this case the Tempura Team had the benefit of the legal advice of independent counsel Mon Desir and thus it was reasonable for the AG's Chambers to assume that he had given legal advice on all operational issues concerning arrest (as indeed he had).

416.2 Furthermore, in this case Ward , unlike Mon Desir, was not assigned to the Tempura Team full time and continued to carry his full workload at the Legal Department. He has no recollection of Bridger discussing what had transpired at the habeas corpus hearing in May 2008, or whether the arrests had been effected with or without a warrant.

<u>Was there a duty on the prosecutors to consider the warrant point on their own motion</u>

<u>The role of the AG in supervising police operations</u>

417. Section 16A of the 1972 Constitution (now section 57 of the 2009 Constitution) vests the Attorney General with the power to institute, take over and discontinue criminal prosecutions when he considers it desirable so to do.

Section 11 of the Crown Proceedings Law (1997 Revision) provides that all civil proceedings by the Crown shall be instituted by the Attorney General and all civil proceedings against the Crown shall be instituted against the Attorney General.

418. Furthermore, Section 25 Grand Court Law (2008 Revision) states:

"Notwithstanding the foregoing provisions, the Attorney-General shall, in addition to any power conferred upon him by any other law, be entitled to act and appear in his official capacity on behalf of the Crown, the Governor, the Government or any department or officer of the Government in the Court of Appeal, the Court and any other court in the Islands and, subject to the Constitution and any other law, shall have and exercise within the Islands **the same powers and duties as the Attorney-General has and exercises in England**".

419. In England, the Attorney General is the chief law officer of the Crown. His deputy is the Solicitor General. The Attorney General advises and represents the Crown and government departments in court. In practice the Treasury Solicitor normally provides the lawyers, or briefs Treasury Counsel to appear in court, although the Attorney General may appear in person. The Attorney General provides legal advice to the Government, acts as the representative of the public interest and resolves issues between government departments.

420. The Attorney General has supervisory powers over the prosecution of criminal offences, but is not personally involved with prosecutions. He does have power to halt prosecutions generally. The Attorney General exercises powers over three Directors: The Director of Public Prosecutions (section 3(1) Prosecution of Offences Act 1985, the Director of the Serious Fraud Office

(Section 1 (2) Criminal Justice Act 1987, and the Director of the Revenue and Customs Prosecution Office (section 36 (1) Commissioners for Revenue and Customs Act 2005).

421. Each one of these Directors has a statutory power to give advice and/or investigate criminal offences before they arrive at the stage for instigation of criminal proceedings. Thus section 3(1) (e) of the Prosecution of Offences Act 1985 gives the DPP power to:

"give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences".

Section 1 (3) of the Criminal Justice Act 1987 states the Director of the Serious Fraud Office "may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud"

Section 1 (4) states "the Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it"

422. Section 35 (2) Commissioners for Revenue and Customs Act 2005 states:

"The Director shall provide such advice as he thinks appropriate, to such persons as he thinks appropriate, in relation to

(a) a criminal investigation by the Revenue and Customs...."

423. Furthermore both the Director of Revenue and Customs Prosecutions and the DPP have a statutory power to give advice as they think appropriate in relation

to a criminal investigation by the Serious and Organised Crime Agency: see section 38 Serious Organised Crime and Police Act 2005.

424. The effect of these statutory provisions is that the Attorney General in England, through his subordinate Directors, has a large number of powers relating to the investigation of crime and giving advice to police officers in relation to the investigation of crimes should he think it appropriate to do so. It is arguable that such powers by virtue of section 25 Grand Court Law are also given to the Attorney General of the Cayman Islands. However in this respect it should be borne in mind that the exercise by the Attorney General of the Cayman Islands of similar powers and duties as the UK Attorney General is subject to the Constitution and any other law. In this context that means that where there is local legislation which deals with the supervision of police investigations and police operational matters, then it is not for the AG to carry out such supervision.

425. There is local legislation which deals with the supervision of police investigations and police operational matters in the Cayman Islands. The arrest of a suspect and the method of arrest is a police operational matter. Thus Section 24 (3) of the Police Law (2006 Revision) provides: "it is the duty of police officers...to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom they are legally authorised to apprehend...".

The remit of the police as it relates to operational matters has been further codified under the 2009 Constitution in section 58 which establishes the National Security Council (NSC). Section 58 (4) provides that the NSC shall

advise the Governor on matters relating to internal security with the exception of operational and staffing matters. Section 58 (5) also states that the Commissioner shall have responsibility for the day to day operation of the police force and shall report regularly on such operation to the Governor. Thus all matters relating to the initiation, continuation and discontinuation of any criminal **investigation** or police operation in the Cayman Islands rests with the police, rather than with the AG.

426. There is one qualification to this position. Although the police have the statutory responsibility in respect of police investigations and police operational matters, the AG's chambers retain a role of providing legal guidance and assistance when appropriate circumstances arise. One example of this is an application for a search warrant. Thus in Rea v. Gibbs (1994-95) CILR 553 at 611 Collett JA dealing with applications for search warrants stated:

> "There is no reason why a legitimate application by a police officer under s16M [Misuse of Drugs Law] should be presented by him in person, since the assistance of a legally qualified officer of the **Attorney General's chambers** can always be made available. This course would have the twin advantages of filtering such applications before the judge is approached so as to ensure that they fall within the ambit of the statute and of ensuring that the facts are placed before the judge "fully and fairly" to employ once more the language of Lord Coleridge CJ Such a practice would to a great extent ensure that the circumstances which have unhappily prevailed in the present case are not repeated and **I commend it to all those charged with responsibility for such applications in this jurisdiction in the future**".

The Role of the AG chambers on deciding whether to approve a charge

427. Rule 8 (3) of the Cayman Island Prosecutor's Code states:

"It is the duty of Crown Prosecutors to review, advise on, and prosecute cases, ensuring that the law is properly applied...."

428. Rule 8 (4) states:

"Review is a continuing process and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should speak to the police first if they are thinking about changing the charges or discontinuing the case. This gives the police the chance to provide more information that may affect the decision. The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service".

429. Rule 10 states:

"Crown Counsel must review the entire file submitted for ruling not only the Summary of Facts and must first determine whether there is a sufficiency of reliable and credible evidence which will ground or prove a charge beyond a reasonable doubt. The UK code of conduct describes this as evidence to provide a realistic prospect of conviction".

430. Page 24 of the Policy Manual on Ruling on Civil Servants Cases states: "Crown Counsel should review and do an initial opinion. All such files should then be referred to the Solicitor General". This instruction demonstrates a policy of additional care that is required in respect of Civil Servants.

431. A consideration of the above provisions leads to several conclusions. The duty of a prosecutor when considering any charge is to consider whether there is a reasonable prospect of a conviction. If a person has been unlawfully arrested it may be that the defence may wish to argue abuse of process arising out of the arrest; or they may wish to argue that the unlawful arrest should lead to the exclusion of evidence. Such arguments may ultimately fail at trial, but the prosecutor when reviewing the police file to advise on sufficiency of evidence must be aware of such matters when considering the evidence. It is difficult to see how a Crown Prosecutor can advise on whether there is a realistic prospect of conviction in any case without a review which includes consideration of the admissibility of evidence and the lawfulness of any arrest.

432. Such a review may also be relevant to the public interest test. There may be sufficient evidence to prosecute a case. However, the circumstances of arrest may be such that a prosecutor may wish to draw the AG's attention to an inevitable civil action, where the police will be in an uncomfortable position concerning their actions and a criminal prosecution will only seek to highlight the inappropriate behaviour of the police. A short example may illustrate the point. A young man leaves a supermarket with a can of beans which he has not paid for. He is arrested by two police officers who throw him to the ground, kick him in the head and body. He sustains severe head injuries, fractured ribs, and a broken collar bone. The file is passed to the AG's chambers to advise on charge.

433. It would appear inconceivable that a prosecutor when reviewing the file will not consider the lawfulness of the arrest together with the injuries sustained. At the very least, he would wish to advise the AG of potential public attention which may be drawn to the case, and the effect such attention may have on damages which may be awarded in a future civil claim. These are matters which may be relevant to the public interest test. The AG's response tends to suggest that none of these matters would be relevant to a prosecutor's review of the file, unless specifically drawn to the prosecutor's attention by the police. The prosecution would be allowed to proceed and the young man would have a civil remedy. This response appears to overlook the unique position of the AG in the Cayman Islands, where he has responsibility not only for the initiation of criminal proceedings, but also responsibility for civil proceedings brought against the police.

434. In his response the AG properly draws attention to the fact that each individual case will have its own unique set of facts. Therefore a distinction must be made in respect of cases where the prosecutor's review relates to an offence that includes among its essential elements a lawful arrest. In such cases, the charge is dependent upon the arrest-for example, the offences of resisting arrest or escaping lawful custody- and will be dismissed if the arrest was ruled illegal. The AG's position is that in any other case, the defendant's remedy for an unlawful arrest is by way of a civil action. The unlawfulness of his arrest will invariably have no adverse effect on the admissibility of evidence at his criminal trial: see R v. Hughes (1879) 4 QBD 614; Murphy V. Richards (1960) 2 WIR 143 (Jamaica); and R v. Kulnyez [1970] 3 All ER 881.

435. The distinction which the AG draws between cases where the arrest is a relevant element of the offence and those where it is not is accepted as a valid point. Furthermore it is accepted that a review of a case is fact specific.

436. It is also accepted that a prosecutor may be entitled to assume that an arrest is lawful when dealing with common criminal offences which he deals with on an everyday basis. The position is clearly different when he is dealing with an obscure offence such as misconduct in public office. In such circumstances additional care may be required. The arrest of senior police officers Dixon and Burmon Scott for the offence of misconduct in public office was unique. The AG's chambers had never prosecuted this offence before.

437. The AG raises a further difficulty which arose in this case. [redacted] Furthermore the prosecutors were entitled to rely on the fact that a former Senior Crown Prosecutor, Mon Desir, was advising the police on operational matters.

438. In the case of Scott and Dixon the police were being specifically advised on operational matters by experienced and senior counsel, Mon Desir (a former senior prosecutor in the AG's Chambers). Mon Desir had on many occasions brought to the attention of the AG matters of operational concern where he felt there was need for the AG's or SG's input. Mon Desir was appointed by the

Governor, who had constitutional responsibility for the police. The AG's position is that he was entitled to rely upon the fact that the investigators were being advised by Mon Desir.

439. It is clear from the statutory provisions that the AG's chambers had a primary responsibility of carrying out a full review of the police file when it was presented to them. That is precisely the reason why the AG informed Governor Jack in November 2007 that his chambers would maintain an independent distance from the Tempura team: so that they could carry out their own independent assessment and review of the police file when presented to them uninfluenced by any operational decisions or advice given during the operational stage. It is therefore difficult to see how the appointment of Mon Desir or for example even a Queen's Counsel, however eminent could absolve the AG's Chambers from their statutory duty. As stated in rule 8 of the Manual for Crown Counsel "The Crown Prosecution Service and the police work closely together to reach the right decision, but the **final responsibility** for the decision rests with the Crown Prosecution Service". Ultimately, Mon Desir was part of the "Police" team. He was not the prosecutor, who had that ultimate responsibility.

440. The above legal principles and accepted standards of practice appear to be at odds with the view of the AG when he states in his response that the lawyers in his Chambers, when dealing with the Scott and Dixon files either at the habeas corpus hearing or when advising on sufficiency of evidence for charge, were entitled to assume that Mon Desir had given the police detailed and

proper advice on all operational matters including arrest. It may be that these are matters which which the AG's chambers might wish to consider revisiting in future cases.

441. However the gravamen of the complaint is that the AG's Chambers failed to draw to the attention of Cresswell J when he was criticising Polaine during the Judicial Review proceedings, that the law relating to arrest for the offence of misconduct in a public office was far from elementary as suggested by the judge.

442. The short point is that Henderson J was not arrested without warrant because of any mistake made by the AG's chambers or because of the absence of advice. Rather, he was arrested as a result of erroneous advice given to the investigators by their Special Counsel, Polaine. The AG's chambers were not made aware of the decision to arrest Henderson J until after he had been arrested. In the Judicial Review proceedings the AG's role was to represent the view of the Crown rather than defend the position of Polaine who had made fundamental errors in his advice. The position of the AG when reviewing the charge file in respect of Scott and Dixon could have no bearing or relevance so far as the correct position which he had adopted by reason of his concession in the Henderson proceedings. In all the above circumstances there is no merit in the complaint that the AG should have drawn to Cresswell J's attention the difficulty in the law.

443. The report complains that the AG did not explain the reasons for his concession to Polaine. The matter was clearly in the public domain as shown by the press reporting on the issue in January 2009; and by the report submitted by Acting Commissioner of Police James Smith to the SG on highlighting the fact that 'on the face of it' three individuals had been dealt with differently for the same offence. On 13th January 2009 and 30th January 2009 Polaine wrote to the AG asking for some explanation. The response from the AG's chambers was a terse reply with no explanation.

444. In his response the AG explains that he did not give a response to Polaine's letter for several reasons. First, the only possible basis for Polaine's 13th January 2009 letter was an attempt to persuade the AG that his interpretation of the law relating to arrest was incorrect. This was a discussion which was academic by that time, the concession having already been made. [redacted]. The AG was not representing Polaine. Thirdly, the matter of damages remained a live issue after the December 2008 hearing. The AG was concerned that any discussion between the AG and Polaine would eventually become a public discourse in the media in circumstances where there were still pending matters, and potential matters, directly related to Operation Tempura. In the circumstances it would not have been in the public interest for the AG to have engaged in a private or public discussion with Polaine. This especially given his predilection for ventilating his position in the press.

445. It is clear from the AG's response that in the circumstances no criticism can be made of his failure to respond substantively to Polaine's enquiry. The complaint on this matter is summarily dismissed.

BENJAMIN AINA QC
25th February 2011

Old Bailey Chambers
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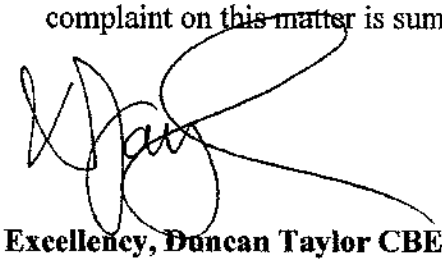

His Excellency, Duncan Taylor CBE,

Governor of the Cayman Islands

7 March, 2011