IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE CIVIL DIVISION

Cause No: G 169 of 2019

BETWEEN:

1) CAYMAN ISLANDS URGENT CARE LTD
2) KAISER DAY CANNACEUTICALS LTD
3) KAISER DAY PHARMACEUTICALS LTD

APPLICANTS

AND:

1) HM DIRECTOR OF CUSTOMS
2) CATHERINE O'NEIL JP
3) COMMISSIONER OF RCIPS
4) THE CHIEF MEDICAL OFFICER

RESPONDENTS

IN OPEN COURT

Appearances:	Mr. James Austin-Smith of Campbells for the Applicants. Mr. Nigel Gayle and Ms. Anne-Marie Rambarran of the Attorney General's Chambers for the First, Third and Fourth Respondents. Ms. Amelia Fosuhene of Brady Law for the Second Respondent.
Before:	The Honourable Mr. Justice Robin McMillan
Heard:	31 August 2020, 2 - 4 September 2020, 19 October 2020, 3 – 6 November 2020, 10 - 13 November 2020
Draft Judgment Circulated:	27 January 2021
Judgment Delivered:	4 February 2021

HEADNOTE

The construction of section 14 of the Misuse of Drugs Act (2017 Revision) – The construction of section 58(1) of the Public Health Act (2002 Revision) – Use of statutory powers for improper purpose – The principles governing applications for search warrants – The need for full and frank disclosure.

JUDGMENT

Introduction

1. This matter arises from a Notice of Originating Motion dated 21 November 2019.

2. The Applicants are Cayman Islands Urgent Care Ltd. T/A Doctors Express ("Doctors Express"), Kaiser Day Cannaceuticals, Ltd., and Kaiser Day Pharmaceuticals, Ltd. (together "Kaiser Day") ("Applicants").

3. By Order of this Court dated 13 February 2020 by consent the Chief Medical Officer ("CMO") was added as the Fourth Respondent.

4. This Court initially granted to the Applicants Leave to Apply for Judicial Review in respect of the actions and omissions of H.M. Director of Customs ("First Respondent"), Ms. Catherine O'Neil JP ("Second Respondent") and the Commissioner of the Royal Cayman Islands Police Service ("Third Respondent") on 5 November 2019.

5. The summary grounds were as set out in the Grounds of the Judicial Review leave application, and in respect of any additional formal defects that may be identified in respect of the Search Warrant dated 17 September 2019 and signed by the Second Respondent on the same date.

6. It is important to note that as the scope of this Application has unfolded additional factors and grounds have come to be identified. The Court is satisfied that in the course of these proceedings ample opportunity has been provided to all of the parties to deal with any additional factors as they see fit and without any resulting material prejudice to them whatsoever.

The Background

7. In its most current form as amended and on that basis argued the relief sought is as follows:

"Relief Sought:

1. Orders of certiorari in respect of the search warrant issued by the Second Respondent at the request of the First Respondent, on 17 September 2019.

*~~1.~~2. A Declaration that the issuance of a Cease Notice on or around 14 September 2019 (the "**Cease Notice**"), by the Fourth Respondent was unlawful.*

*~~2.~~3. Declarations that the entry of Customs and Police officers, whether named in the Warrant or otherwise, into the Applicants' premises at 81 Godfrey Nixon Way, George Town, Grand Cayman, ("**the Premises**") and the search conducted at the Premises on 17 September 2019 were unlawful.*

~~3.~~4. Delivery up of all items seized from the Premises.

~~4.~~5. Damages, including exemplary and aggravated damages, for the unlawful issuance of the Cease Notice, unlawful procurement of a warrant, abuse of process, trespass to land and

goods, unlawful interference with goods and damage to reputation.

~~5.~~6. An Order that the costs of and incidental to this application be paid, on an indemnity basis by the Respondents or such other person or persons as this Honourable Court thinks fit.

~~6.~~7. Such further or other relief as this Honourable Court thinks fit."

8. The Applicants, Doctors Express and Kaiser Day are three firms who between them hold, variously:

   i. Import Certificates permitting the importation and possession of Cannabis, issued by the CMO (issued to Kaiser Day Cannaceuticals and Doctors Express);

   ii. A Trade and Business Licence, authorising the carrying on of business as an "agent importer of cannabis extracts and tinctures for medical purposes" (issued to Kaiser Day); and

   iii. a Certificate of Operation of a Health Care Facility (including a pharmacy), issued in accordance with the Health Practice Act (2013 Revision) (issued to Doctors Express).

9. Collectively these certificates and licences allow the Applicants lawfully to import, possess and (for doctors working at Doctors Express) prescribe medical cannabinoids in accordance with the provisions of, inter alia, section 2A of the Misuse of Drugs Act (2017 Revision).

10. Since June 2017 Doctors Express has operated an urgent care medical facility, providing on-site x-ray facilities an in-house laboratory and pharmacy. Doctors, licensed under the Health Practice Act (2017 Revision), provide medical diagnosis, advice and treatment to members of the public, including prescribing medications. Pharmacists, also licensed under the Health Practice Act, fill and dispense these prescriptions at Doctors Express onsite pharmacy.

11. In January 2019 the Applicants applied for and received permission to import, possess and prescribe medical cannabinoids in accordance with the provisions of the Misuse of Drugs Act. There is no restriction on the manner in which these are dispensed, the dosage or the method of administration, which are a matter solely for the medical judgment of the prescribing physician. (Specifically, in the case of medical cannabinoids, there was no restriction on the prescription of these for administration by vapourisation (or any other method) until a notice was issued by the CMO on Saturday 14 or Sunday 15 September 2019 ("the Cease Notice")).

12. On 10 September 2019 a text message advertising the availability of vapourisable medical cannabinoids at Doctors Express was sent to users of Digicel telephones ("the 10 September Text"). Although that message was factually accurate, and referred to prescription medications about which HM Customs ("Customs") was fully aware (since duty had been paid on them), Customs Officers decided to conduct some form of enquiry. The officer in charge of this enquiry was Customs Officer Schneider ("the OIC").

13. At around 4.30pm on Tuesday 17 September 2019, approximately 15 Customs and Royal Cayman Islands Police Service officers ("the Officers") entered the medical facility and offices of Doctors Express and Kaiser Day ("the Search"). The Officers claimed to be acting under the authority of a search warrant ("the Warrant") issued by Justice of the Peace Catherine O'Neil ("the JP") to the OIC earlier that day.

14. During the search a representative of the Applicants, Mr. Samuel Banks, asked the OIC why they were searching the surgery and offices (as the Warrant did not specify the purpose of the search). The OIC replied they were "*there for the THC vape cartridges that had been advertised*". It was explained by Mr. Banks to the OIC that the Applicants were fully licensed by the Health Practice Commission ("the HPC") and other relevant bodies and that the cannabinoids had been imported under the authority of certificates issued by the CMO. The OIC replied that "*although the CMO had granted such permission, he also had the power to rescind such permission, which he had indicated that he had*". In fact, the right to possess had never been rescinded.

15. The Officers searched the medical facility and offices for several hours and seized property belonging to the Applicants. At sometime after the search had started the Applicants were sent the Cease Notice by the HPC with an apology that they had not received it previously.

16. Following the raid of their medical facility and offices the Applicants wrote repeatedly to Respondents and their attorneys setting out why they regarded the Warrant as unlawfully issued and the Officers as acting unlawfully. Repeated requests were made for:

i. A copy of the information laid before the Justice of the Peace at the application for the Purported Warrant;

ii. The identity of the individual who made the application for the Warrant;

iii. A complete note of the evidence given on oath in support of the application for the Warrant;

iv. Copies of all materials placed before the Justice of the Peace at the application to grant the Warrant; and

v. A copy of the Justice of the Peace's written record of the application for the Warrant.

17. Despite being personally served the Second Respondent was said by the Applicants to have ignored all correspondence from the Applicants' lawyers. On 1 October 2019, the Applicants' attorneys received an email from the OIC which attached an unsigned statement purporting to provide answers to the questions above and exhibiting certain materials. Later that day the OIC emailed a further unsigned statement and a request for information from the Applicants.

18. From the disclosure provided the Applicants have claimed that it is apparent that no note was made of the evidence given on oath in support of the Warrant by either the OIC or the Justice of the Peace. Aside from the content of the Information form itself a question arises for this Court as to what, if any, further evidence was provided, and in respect of what specific alleged offence.

The Principal Grounds for Judicial Review

19. The Applicants' case as amplified and amended is that the Respondents' actions were unlawful for a number of reasons:

i. Customs themselves had procured the Cease Notice, which they claimed the Applicants were acting in breach of, *after* they had commenced their enquiries on 10 September;

ii. The OIC failed to make full and frank disclosure to the Justice of the Peace at the application for the Warrant;

iii. The OIC had no reasonable grounds to suspect that the Applicants had committed any crime;

iv. The Justice of the Peace had no, or insufficient, evidence before her prior to the issue of the Warrant to have reasonable grounds to suspect that the Applicants had committed any crime;

v. The Warrant itself was defective in a number of important material ways;

vi. The Respondents had no reasonable grounds to believe that there would be material "essential" to any inquiry at the Applicants' offices or medical facility; and

vii. The Respondents had no reasonable grounds to believe that entry to the offices or medical facility would not have been granted without a warrant.

viii. The CMO's decision to issue the Cease Notice was unlawful in that:

(a) he did not have the power to issue the Cease Notice pursuant to Section 14 of the misuse of Drugs Law (2017 Revision) or at all; and/or

(b) his decision to issue the Cease Notice was unreasonable, unnecessary, disproportionate and procedurally unfair;

ix. The CMO failed to take into consideration all relevant information and took into consideration irrelevant information when he decided to issue the Cease Notice;

~~vii.~~x. The CMO failed to discharge his statutory obligations pursuant to s.19 (1) and (2) of the Cayman Islands Constitution Order 2009 (the "**Constitution**").

20. In broad outline therefore these are the issues which the Court has been asked by the Applicants to consider. However, as we shall see, as the hearing unfolded additional aspects of the overarching issues have emerged not only in terms of the relevant law but also in terms of the relevant facts.

An Outline of the Case

21. Although the course of the hearing has been a lengthy one, nonetheless it has provided to the various parties an ample opportunity to develop their respective arguments in a comprehensive manner. The issues in dispute may appear to be complex, but ultimately they can be resolved by the application of the well-established principles of public law.

22. Accordingly, the Court has identified for its consideration the following broadly stated subjects.

23. First, in general informational terms what is vapourisable medical cannabis?

24. Secondly, was the Cease Notice issued by the CMO dated 14 September 2019 unlawful, and if so, in what specific ways was it unlawful?

25. Thirdly, was the Search Warrant issued by Ms. Catherine O'Neil JP, the Second Respondent, on 17 September 2019 unlawful, and if so in what specific ways was it unlawful?

26. Fourthly, in relation to obtaining either the Cease Notice or this Search Warrant or both of them was there any accompanying improper purpose?

27. Fifthly, if there was found to be any such improper purpose, what bearing might that have on the validity of the Cease Notice, the Search Warrant or the process leading to the procurement of either of them?

28. Sixthly, where a presumption of regularity arises, how may that presumption be displaced? In the present instance the Court will conclude in due course that there is not only a sufficient evidential basis to displace the presumption but also an overwhelming evidential basis to displace it and that in the premises the Respondents have failed to establish on a balance of probabilities in that they acted lawfully or properly. In the alternative, the Court will also conclude that in any event on a balance or probabilities the Applicants have proved their case in all essential respects.

29. The Court at this early juncture makes the observation that although the public law issues engaged by this application are not intrinsically difficult or complex the manner in which the First, Third, and Fourth Respondents have chosen to conduct their representation without any timely concessions has inevitably added complexity to the proceedings.

30. The Court likewise observes that in the final stages of the hearing Mr. Gayle did make some concession as to there being defects in relation to the Search Warrant documentation, without thereby conceding that such defects rendered the Search Warrant unlawful.

31. At various points it will be necessary to examine and address issues of both fact and law. At the same time the Court is fully cognizant of the public nature of these proceedings. This is not a legal action where every potentially relevant fact can or should be set out individually. Practicality, good sense and proportionality inevitably lead to an approach which is necessarily selective as

well as being determinative. In other words, it is not in the public interest to pursue and resolve every conceivable matter of dispute that arises.

What is Vapourisable Medical Cannabis?

32. As part of the evidence adduced in support of their Application, the Applicants rely on an Expert Report of Professor Kevin P. Moore dated 29 May 2020.

33. For reasons which will become clear when the Court comes to consider the material email correspondence in this matter and one revelation by the CMO in particular, the Court will not consider it necessary for its purposes to review in exhaustive detail what may summarily be called the scientific medical aspects of the Cease Notice. That is a separate area of debate, or perhaps more accurately of further debate, but it no longer arises in this particular hearing.

34. Professor Moore is Professor of Hepatology at University College London, Royal Free Campus. He has more than 15 years of experience as a member of various committees on the Medicine Healthcare Products Regulatory Authority, the UK body responsible for ensuring the medicines, medical devices and blood components for transfusion meet applicable standards of safety, quality and efficiency and advise its Pharmacovigilance Group.

35. The Court accepts that Professor Moore is an established expert in his field and it finds a number of explanatory statements in his Report to be factually helpful and significant by way of background.

36. Professor Moore introduces the subject of vapes at pages 5- 6:

*"4. **Background: What are Vapes, what is EVALI and why is it of concern?***

Before it is possible to embark upon an analysis of the issues related the Cease Notice and the particular medications referred to this case, it is important to understand the medical background to the concerns raised by the US authorities in the autumn of 2019.

Electronic cigarettes (vapes)

Electronic cigarettes are battery powered devices that produce an inhaled aerosol by heating a liquid that contains nicotine, flavourings, and other chemicals. Commercially available devices are available to purchase legally for adults that contain various amounts of nicotine and flavours. The term vaping is used because the devices heat the liquid to the point where it becomes vapour - but does not actually combust, which would instead create smoke. This vapour consists of fine particles of chemicals. The vaping device consists of a mouthpiece, a battery, a cartridge for containing the e-liquid or e-juice, and a heating component for the device. When the device is used, the heating component turns the contents of the e-liquid into

an aerosol that is inhaled into the lungs and then exhaled. Vaping devices include e-cigarettes, vape pens and personal vaporizers (also known as 'MODS'). The e-liquid in vaporizer products usually contains a propylene glycol or vegetable glycerine-based liquid with nicotine, flavouring, various chemicals and other impurities and additives.

Electronic cigarettes were approved for use in Europe in 2006 and in the United States in 2007. The use of electronic cigarettes and vaping has exploded in the United States over the last 12 years. In 2018, more than 3.6 million U.S. middle and high school students had used electronic cigarettes in the previous 30 days.

Electronic Vaping Associated Lung Injury (EVALI)

EVALI refers to a specific form of lung injury that has become associated with vaping in the USA."

37. Professor Moore then continues at pages 15- 18:

"In an editorial by Gordon and Fine published in the New England Journal of Medicine, to coincide with the publication by Werner et al., the authors stated:

"A great deal of confusion has arisen regarding the underlying causes of EVALI, and <u>somewhat rash reactions and decisions have been made with a focus on protecting the public health</u>. E-liquids that are vaped in nicotine-delivery devices consist largely of

propylene glycol, glycerin, flavors, and nicotine, and the entire nicotine-delivery system is being rapidly targeted for legislation. Unfortunately, to date, e-cigarette and e-liquid manufacturing is not being tightly regulated, and numerous e-liquid formulations are being sold in local vape shops and online with no regulations or quality-control oversight. "

The inhalation of cannabis has been in use for many years, and yet the development of EVALI is a new phenomenon. This suggests strongly that inhalation of cannabis and its various constituents including THC (tetrahydrocannabinol) are not likely responsible for this illness. Importantly, it is recognised by the CDC and the FDA that this is a likely consequence of vaping "street" products, rather than those supplied by reputable pharmaceutical companies such as Kaiser Day Cannaceuticals.

Vitamin E acetate and EVALI

As far as I can tell the first association of vitamin E acetate and EVALI was published on October 3rd 2019 in an article by Leny Sun in the Washington Post. In the article she states "One particular oil is a key focus of investigators: vitamin E oil, also known as vitamin E acetate. Experts in the legal marijuana industry have said it has been used on the marijuana black market to stretch THC oil that is used to fill vape cartridges. It is colorless and odorless, has similar viscosity to THC oil, and is much cheaper."

Later that month on October 25th Lewis and colleagues reported:

> *"Among 53 interviewed patients, all of whom reported using e-cigarette, or vaping, products within 3 months of acute lung injury, 49 (92%) reported using any products containing tetrohydrocannabinol (THC), the principal psychoactive component of cannabis; 35 (66%) reported using any nicotine-containing products, and 32 (60%) reported using both. As reported in Wisconsin and Illinois (1), most THC-containing products were acquired from informal sources such as friends or illicit in-person and online dealers. THC-containing products were most commonly used one to five times per day, whereas nicotine-containing products were most commonly used >25 times per day. Product sample testing at the Utah Public Health Laboratory (UPHL) showed evidence of vitamin E acetate in 17 of 20 (89%) THC-containing cartridges, which were provided by six of 53 interviewed patients."*

A later study by Blount and colleagues and published on November 15th 2019, demonstrated that vitamin E acetate was present in all 29 BAL (bronchoalveolar lavage fluid) patients with EVALI.

Later that same month (November 26th 2019) Taylor and colleagues published a paper on the characteristics of E-cigarette or Vaping products used by patients with EVALI. They stated the following, and I quote:

"During August 9-October 31, 2019, 96 patients were classified as having e-cigarette, or vaping, product use-associated lung injury (EVALI) by the Minnesota Department of Health (MDH). Among 58 patients interviewed, 53 (91%) reported obtaining tetrahydrocannabinol (THC)-containing products from informal sources such as friends, family members, or in-person or online dealers. Using gas chromatography-mass spectrometry (GCMS), the MDH Public Health Laboratory (PHL) analyzed 46 THC-containing e-cigarette, or vaping, products obtained from 12 EVALI patients for various potential toxicants, including vitamin E acetate, which has recently been detected in some THC-containing products and in samples of lung fluid from EVALI patients. To explore whether vitamin E acetate is a recently added component in THC-containing products, MDH tested ten products seized by law enforcement in 2018, before the EVALI outbreak, and 20 products seized in 2019, during the outbreak. Twenty-four products obtained from 11 EVALI patients from 2019 contained vitamin E acetate. Among the seized products tested by MDH, none seized in 2018 contained vitamin E acetate, although all tested THC-containing products seized in 2019 tested positive for vitamin E acetate."

Thus, quite early on during the outbreak it was recognized by the CDC and FDA that the cause of EVALI was not a simple link with THC in vape, and that the association was clearly or

increasingly likely linked to illicit or street products. It was for this reason that the advice reflected the dangers of street products. Thus, on October 4th the FDA issued this warning "Vaping Illness Update: FDA Warns Public to Stop Using Tetrahydrocannabinol (THC)-Containing Vaping Products and Any Vaping Products Obtained Off the Street".

By March 19th 2020 a mouse model of VAPING showed that vitamin E acetate led to the development of a similar form of lung injury found in patients with EVALI. In other words, vitamin E was found in the lung fluids of all patients with EVALI, and if inhaled by mice causes a similar lung injury. On March 24th 2020, the putative chemical mechanism, was published in the Proceedings of the National Academy of Sciences by Wu et al. In their paper they state:

> *"The vaping of vitamin E acetate has the potential to produce exceptionally toxic ketene gas, which may be a contributing factor to the upsurge in pulmonary injuries associated with using e-cigarette/vaping products. Additionally, the pyrolysis of vitamin E acetate also produces carcinogen alkenes and benzene for which the negative long-term medical effects are well recognized."*

38. Additionally on the subject of EVALI Professor Moore states at pages 18- 19:

"Thus, some individuals or dealers have taken to making their own illicit products. This can involve soaking cannabis buds in vegetarian glycerine or polypropylene glycol for either a few months, or enhancing the dissolution of THC into the oil through heating, or alternatively to make THC rosin, which is then dissolved in a variety of oils. Some of these oils are cut with vitamin E acetate, which is a thick oil a bit like treacle, and which is used to thicken the final product. In addition there are many other unknown additives, including various flavourings, aldehydes, other vitamins which may or may not contribute to the development of EVALI in individual patients. Thus, even now that it seems accepted that vitamin E acetate was largely responsible, it may still be the case that a combination of factors may cause EVALI in certain susceptible individuals.

There were a number of high-profile raids on premises in the US that supplied the oils used for cutting THC, which together with the surrounding publicity seems have led to marked decline in the number of cases of EVALI."

39. Then in more general terms Professor Moore highlights inhalational delivery at page 21:

"Why is inhalational delivery of cannabinoids better than oral medication?

Most drugs are taken orally and are absorbed through the intestines. The blood from the intestines goes to the liver, which importantly removes or detoxifies most toxins that we ingest. Thus, most drugs that we take including cannabinoids, are metabolised by the liver to something less toxic or to a drug that actually provides the intended effect. Further, and importantly we all metabolise drugs differently. For example, if you take codeine, a common analgesic, it is metabolised by the liver to morphine which provides the analgesic effect. However, some people are super metabolisers and produce a lot of morphine from a single tablet of codeine and become "high" after a single tablet, and others convert very little codeine to morphine, and find codeine ineffective. The same can occur with the metabolism and detoxification of drugs. In reality probably less than 50% of drugs work effectively in real life because of inherent differences in the way we metabolise them. Thus, as a liver specialist seeing patients with alcohol addiction, we know that most drugs used to prevent cravings (e.g. acamprosate) are only effective in ~30% of patients.

If you inject any drug intravenously the bioavailability is 100% since it is injected directly into the systemic circulation (the blood stream). If you take the same amount orally the reality is that only some of the drug gets absorbed (i.e. some or much does NOT), and once absorbed

some of the drug gets metabolised before (termed first pass metabolism) it enters the rest of the blood stream (the systemic circulation). Thus, for oral cannabis CBD capsules the bioavailability is estimated at 6%, which increases to 40% by vaping. The main reason being that inhalation avoids first pass metabolism by the liver. In other words inhaled THC directly enters the blood stream or systemic circulation and bypasses the liver. As discussed below, these pharmacokinetic principles have a major impact, and importantly are the main reason why inhalational delivery of cannabinoids has many advantages over oral administration."

40. Professor Moore returns to the discussion of EVALI at page 26 in response to a question put to him:

"3. "As at the date of your report, is the decision to maintain the Cease Notice in force reasonable based on all the medical evidence currently available?"

It was clear as far back as October 2019 that vitamin E acetate was the likely cause, but proof was lacking. As of February or March 2020, there has been incontrovertible evidence that the outbreak of lung injury or EVALI was due to the addition of vitamin E acetate, a cutting agent added to the vaping oil to improve consistency and profit by illicit street dealers. As outlined below, the pharmaceutical grade products manufactured by Kaiser Day Cannaceuticals do not contain any such additives, and cannot be compared to or described as a street product."

41. The Court has comprehensively set out this discussion of EVALI not simply for the purposes of technical explanation but much more specifically to illustrate that the views expressed by Professor Moore on the subject actually reflect the views expressed by the CMO himself in an email to Doctor Mon Desir, Chairwoman of the HPC on 14 September 2019 at 10:23 am.

42. Dr. Lee writes:

"Dear Dr Mondesir,

Further to our discussions and call just now, please find attached a revised letter asking the health care professional to cease in the prescription, dispensing and sales of vaporisable cannabinoids. The wording more correctly reflects my concerns as laid out to the HPC /MDC/ Pharmacy Council and I very much thank you for your support.

I think it is highly likely that vaporising cannabinoids is not more injurious to health than smoking marijuana. The deaths from vaping seem more related to an additive (an oily Vitamin E compound) which is found in cheaper vapes, and not in the medical cannabinoid vapes that Doctors Express are using, so I am told. However, the juxtaposition of the worldwide focus on vaping deaths at the same time as the Doctors Express flagrant use of blanket advertising was unfortunate for Doctors Express and gives us a chance to rein in this widespread use of cannabinoids in the face of guidance to the contrary.

We need to act on vaping in general, and I would favour regulation with constituent requirements, age restrictions, and banning of flavours (to try to prevent children being encouraged to take it up). But that's an issue for later.

For now, please see my attached memo and let me know if you are happy to send it out. I will be also alerting the Acting Chief Officer for her guidance as to whether we should obtain legal advice before sending this note.

Kind regards,

John

--

Dr John Lee

Chief Medical Officer

Ministry of Health, Environment, Culture & Housing

Cayman Islands Government"

43. In other words, on or about the same date as the CMO issued the Cease Notice the CMO had formed the view that the medical cannabinoid vapes issued by Doctors Express were not themselves injurious to health.

44. The Court will return to this email in due course, bearing in mind that the purpose of the Court at this early stage is to set out the professional medical context for what follows. Finally, it is to be noted that in light of the emergence of this email the areas of medical dispute in this case have diminished and in all probability even vanished.

The Formal legality of the Cease Notice

45. On 14 September 2019 the CMO issued what he described as a "*Cease Notice*" in the following terms:

"THE DEPARTMENT OF HEALTH REGULATORY SERVICES

Health Practice Commission

HEALTH PRACTICE COMMISSION

3rd Floor, Government Administration Building, Box 132

133 Elgin Avenue, Grand Cayman KYI-9000, CAYMAN ISLANDS

Telephone: (345) 949 -2813 / 946 -2084, Fax: (345) 946 -2845

Email: HPBUSERS@,gov.ky

Website: www.dhrs.gov.ky

MEMORANDUM

TO: All Registered Health Care Practitioners

FR: Office of the Chief Medical Officer

Date: l4th September 2019

Cease Notice -Vaporisable Medical Cannabinoids

Dear Registered Health Care Practitioners,

It has come to the attention of the Ministry responsible for Health that vaporizable medical cannabinoids are available on island to patients. A principal responsibility of the Ministry responsible for Health is to ensure the safety of the public. Therefore, in the best interest of the Cayman Islands public, the Ministry, in collaboration with the Health Practice Commission, Councils and other relevant entities, has opened an investigation into the use of cannabinoids in medicine at my request.

Serious concerns have been received from many different groups, agencies and individual healthcare practitioners about the exponential growth in cannabinoid prescribing in the Cayman Islands, as evidenced by the increase in imported products and import certificate requests. This is on a background of professional advice by internationally recognised professional bodies such as the Royal College of Physicians (London), the British Paediatric Neurology Association, the National Institute for Health and Care Excellence (UK), and NHS England; there are similarly restrictive guidelines in the Americas. In addition, there is a lack of sufficient evidence surrounding the safety and efficacy of vaporising cannabinoids.

Pursuant to my powers in relation to controlled drugs under section 14 of the Misuse of Drugs Law (2017 revision) I request that all healthcare practitioners cease and desist from the issuance, processing, dispensing or selling of any cannabinoid which, will be used by vaporisation until further notice.

Further investigations into this issue are ongoing. If you have any question you may contact the Health Practice Commission at hpbusers@gov.ky or 949-2813.

Yours faithfully,

[SIGNATURE]

Dr. John Lee BSc, MSc,:MB BS, FRCA, FRCP, FFPMRCA

Chief Medical Officer

46. It seems that this Cease Notice was intended to be sent out to all registered medical practitioners on 15 September 2019. However, because of the apparent position that not all practitioners received it due to incomplete or missing email addresses it was then resent on 17 September 2019 at 5:22 pm. On both occasions it was sent by Dr. Carlene Vassell-Webb Registrar, Health Practice Councils and Deputy Director, Department of Health Regulatory Services.

47. It was not sent to the Applicants even though they were the subject of the investigation and though they constituted the only medical facility prescribing and dispensing vapourisable medical cannabinoids in the Cayman Islands. In fact Doctors Express received the email only at 5:22 pm on 17 September 2019, an hour after the Search Warrant itself was executed and the ensuing premises search had begun.

48. The CMO states in the Cease Notice that the Ministry responsible for Health has opened an investigation into the use of cannabinoids in medicine at his request and later in the Cease Notice he states that further investigations into this issue are ongoing.

49. He also states that he makes his request to cease and desist from the issuance, processing, dispensing or selling of any cannabinoids which will be used by vapourisation until further notice, and that he does so pursuant to his powers in relation to controlled drugs under section 14 of the Misuse of Drugs Act (2017 Revision). No other statute is identified in the Cease Notice.

50. The Court will now examine and consider whether as a matter of law the CMO had the authority to issue this Notice or whether his action in so doing was effectively *ultra vires.*

51. Other legal issues to do with the Cease Notice itself will be considered in due course.

52. The most immediate relevant place to begin this examination is with the Misuse of Drugs Act itself. Section 14 states:

> *"14. The C.M.O. may make rules for inspection, keeping of inventories, and general control and distribution of controlled drugs in the hands of persons authorised under this Law to be in possession of the same, and every such person shall, at the request of the C.M.O. or of any constable, give full information as to the controlled drugs in his possession and the whereabouts of the same and account for the distribution of all such drugs as have passed through his hands."*

53. As one can readily see, section 14 is a provision for the making of Rules but it does not itself actually identify any Rules.

54. Additionally, the Court takes note of Section 2A of the Act, which states:

> *"2A. (1) The use of cannabis extracts and tinctures of cannabis for medical or therapeutic purposes, where prescribed by a medical doctor licenced in*

accordance with the Health Practice Law (2017 Revision) as part of a course of treatment for a person under that medical doctor's care, is lawful.

(2) The medical doctor shall establish the dosage of the cannabis extract or tincture of cannabis required for any person for whom the medical doctor prescribes it.

(3) The Cabinet may make Regulations providing for the importation, transport, storage and dispensing of cannabis extracts and tinctures of cannabis and for anything required to be prescribed under this Law relating to the medical or therapeutic uses of cannabis extracts and tinctures of cannabis."

55. As one can readily see, section 2A (3) is a provision for the making of Regulations but it does not itself actually identify any Regulations.

56. In summary, no Rules and no Regulations exist.

57. In order for the CMO to issue a Cease Notice under and in accordance with section 14 it would first be necessary for him to formulate and publish rules containing the power to issue cease notices and under what particular circumstances and conditions.

58. Consequently, there are compelling grounds to conclude that in exercising powers pursuant to section 14 the CMO acted unlawfully and *ultra vires.*

59. However at a formal level the First, Third and Fourth Respondents contend that the CMO had an additional source of authority and that either explicitly or implicitly he was able to issue the Cease Notice derived from that source in any event.

60. For this purpose Mr. Gayle relies upon Part XIV of the Public Health Act (2002 Revision), dealing with emergency powers. Section 58 states:

> *"58. (1) In case of urgency the Chief Medical Officer may, by order in writing, require any person to adopt any measures which he considers necessary to prevent, or avert danger of, the spread of disease. Such an order shall specify the measures to be taken and shall be served personally by a Medical Officer of Health or an Environmental Health Officer who shall explain the matter to the persons concerned and superintend or assist in the carrying out of the measures specified.*
>
> *(2) Whoever makes default in complying with an order under subsection (1) or offers or threatens any resistance or obstruction to the carrying out of the order is guilty of an offence and liable on conviction to a fine of five hundred dollars and to imprisonment for three months."*

61. Purported reliance is made upon section 58 by the CMO, as we shall see. However a fundamental formal problem which immediately arises is that such an order shall be served personally by a Medical Officer of Health or an Environmental Health Officer who shall explain the matter to the persons concerned and superintend or assist in the carrying out of the measures specified.

62. Not only is there no evidence that these steps were even taken, but it is entirely clear that they were not taken. For that reason alone, any purported reliance upon section 58 fails by operation of law and is likewise invalid.

63. In an unsigned Witness Statement dated 14 October 2019 and forwarded to the Applicants, the CMO indicated that the basis for him issuing a cease and desist request on 14 September 2019 "*was set out as background information in the same document.*" As we have seen, there is no reference whatsoever to the Public Health Act in that document.

64. Then in his Affidavit dated 10th February 2020 at paragraph 8 he goes on to state that he further believes, and did then, that he also has emergency powers under the Public Health Act (2002 Revision) to take action for urgent matters, inclusive of preventing and averting the danger of the spread of disease.

65. The CMO then adds at paragraph 9:

"In further explaining what, among others, operated on my mind in issuing the said "Cease Notice" as a necessity in protection of public health, prior to ***September 13, 2019****, I have had cause to conduct intensive research on the use of medical cannabinoids in the treatment of disease. In particular, I consulted the National Institute for Health and Care Excellence (UK) (NICE), which published draft guidelines to practitioners for consultation on cannabis-based medicinal products in August 2019. I had also given serious consideration to its application in the Cayman Islands. A copy of the NICE Guidelines Draft (August 2019) is now produced and hereto marked as exhibit "JL-3"."*

66. The CMO continues at paragraphs 13 - 14:

"13. Based on my expertise, experience and research, some of which was earlier outlined, the concerns expressed to me by several members of the Cayman Islands' Medical fraternity, the CDC's interim guidance, 'Severe Pulmonary Disease Associated with Electronic-Cigarette-Product Use - Interim Guidance', the reported deaths and several lung-disease cases occurring across the United States, as well as, bearing in mind my legal obligations under the law, inclusive of the Misuse of Drugs Law and the Public Health Law, and after giving the matter due consideration, I caused, out of necessity, that the" Cease Notice" be circulated via email, to all registered practitioners on Sunday ***September 15, 2019****.*

14. I was neither aware that my 'Cease Notice' was being relied upon by the Cayman Islands' Customs and Border Control on the 17th September 2019, when they conducted an operation on the premises of the Applicants, nor, was I aware of any details of the search and seizure operation, other than those in the press, until some days after that event. The Applicants should have been in receipt of my issued "Cease Notice" before that date."

67. Perhaps somewhat surprisingly the CMO does not identify what the consequences would be for the issuing of an order under Section 58 of the Public Health Act where the order is not personally served as stipulated in the statute itself.

68. Moreover, it is equally strange that if the CMO was at the relevant and material time relying upon Section 58 he only chose to specify that the Cease Notice was made pursuant to his powers in relation to controlled drugs under Section 14 of Misuse of Drugs Act.

69. Given the obvious predicament in which the CMO therefore finds himself, the question inevitably rises as to his credibility.

70. In order to address this difficulty, Mr. Gayle makes the broad submission that a public official can exercise all of the powers conferred upon him by Parliament. Mr. Gayle relies for this proposition on the following statement by Lord Lloyd-James in *Commissioner of the Independent Commission of Investigations v. Police Federation and others* [2020] UK PC11 at paragraph 15:

"15. The significance of this characterisation, for present purposes, is that a statutory corporation has only the powers conferred directly or indirectly upon it by statute. In Attorney General v Manchester Corpn [1906] 1 Ch 643, distinguishing the powers of a body incorporated by Royal Charter, Farwell J observed (at p 651):

> *"Now the difference between a statutory corporation and a corporation incorporated by Royal Charter is well settled; the former can do such acts only as are authorized directly or indirectly by the statute creating it; the latter (speaking generally) can do everything that an ordinary individual can do."*

(See also, Attorney General v Great Eastern Railway Co (1880) 5 App Cas 473, per Lord Blackburn at p 481, considered further below.) Similarly, in public law, public officials are considered to have limited powers when they act in a public capacity even if they are natural persons. When natural persons hold a statutory office, their public law powers are limited to those conferred on them by Parliament. Thus, judicial reviews of the conduct of chief constables, coroners and prison governors, for example, on grounds that they have exceeded their powers are an everyday occurrence. In the Board's view, therefore, the starting point for the examination of the powers of the Commission is clear: the Commission only has the powers that are conferred on it directly or indirectly by the 2010 Act or other relevant legislation."

71. It is correct that a public official can exercise statutory powers under more than one statute at the same time if the powers to do so have been conferred directly or indirectly.

72. However, in the opinion of the Court that argument does not provide a safety net where as here the CMO has expressly stated that he acts, whether lawfully or otherwise, pursuant to one particular statute as in this case.

73. In the alternative, even if the CMO could so act under the Public Health Act without informing anyone that he has chosen to do so, then an order made under section 58 would still fail in formal terms because of the personal services issue.

74. In conclusion, as a matter of formal legal analysis the Court finds that the order issued under the Misuse of Drugs Act was done so without lawful authority and/or jurisdiction. Furthermore, even if it had been issued simultaneously under the Public Health Act it would still be fundamentally unlawful because of the fundamental personal service deficiency.

75. There remains on this subject an additional matter of concern. The CMO according to his own logic could have issued the Cease Notice under either relevant enactment, identifying both, or under one relevant enactment, identifying that one. Instead it has been argued for the CMO that although he identified only one statute he should, presumably in the public interest, be entitled to the benefit of the other one.

76. Therefore if for technical reasons there is no authority in the enactment identified in the Cease Notice he can find authority in the enactment not identified in the Cease Notice.

77. In this particular context and at this stage of the Judgement it is necessary for the Court to adjudicate on whether it accepts the CMO's evidence on this point even though for the reasons previously set out both statutory limbs of the argument fail. The Cease Notice was defective in these respects, and fatally so.

78. However, in light of the contemporaneous documentary evidence and in light of the findings which the Court will later make as to improper purpose, the Court considers the CMO's evidence that he had recourse to section 58 at the relevant time unreliable and unpersuasive.

79. In terms of procedural formality the Court now turns to consider whether the First, Third and Fourth Respondents had a duty to act fairly towards the Applicants and whether they failed to discharge that duty or even to assume it.

80. In his Second Affidavit dated 29 January 2020 Mr. Samuel Banks, a Director of the Applicant companies, states at paragraph 7:

"7. As set out in my First Affidavit the Applicants hold variously:

a. an Import Certificate permitting the importation and possession of Cannabis, issued by the CMO (issued to Kaiser Day and Doctors Express);

b. *A Trade and Business Licence, authorising the carrying on of business as an "agent importer of cannabis extracts and tinctures for medical purposes" (issued to Kaiser Day);*

c. *a Certificate of Operation of a Health Care Facility (including a pharmacy), issued in accordance with the Health Practice Law (2013 Revision) (issued to Doctors Express);*

81. In addition, in response to a question put to him by the Court Mr. Gayle confirmed that the Cease Notice operated upon the Trade and Business Licence identified above.

82. Even if it is assumed for sake of argument that the CMO was justified in ordering the Applicants to cease and desist from the issuance, processing, dispensing or selling of any cannabinoids which would be used by vapourisation until further notice, what opportunity was ever provided to the Applicants to be informed of the adverse factors against them which weighed upon such a decision and to afford them a means of reply?

83. Putting the matter another way, the Applicants as licencees operating under a Trade and Business Licence surely had a legitimate expectation that at some appropriate point they would be afforded a fair hearing which would enable them to be informed of and if appropiate to contest the relevant facts.

84. The Court put this question directly to Mr. Gayle and he replied that this Application for Judicial Review was in fact the fair hearing. By that reply the Court understood Mr. Gayle to mean that prior to this hearing no other form of natural justice hearing was either provided or necessary.

85. The Court views this position with some dismay. If it amounts to depriving a party of the benefit of its licence without any form or mechanism of redress it is entirely unacceptable.

86. In this instance, there has been a clear departure from the principles of natural justice and in this important respect to the Cease Notice was both wrongly issued and wrongly maintained. Where a power exists under a statute, it must be exercised reasonably and fairly. If as in the present case there is a lack of reasonableness and fairness in terms of the procedure adopted, then the power in question has been exercised in a manner that is arbitrary and unlawful.

87. Within the myriad of issues to which these proceedings have given rise, this fundamental point must not be either minimised or overlooked; a licencee should not have its licence suspended or revoked indefinitely without some means of knowing why it is so and an opportunity at least to argue that the decision should be reversed.

88. The Court notes that in regard to statutory construction an additional issue is raised by the Applicants at paragraph 43 - 44 of their Skeleton Argument in this way:

"43) In the instant case it is submitted that the rule-making power did not grant the CMO the power to ban the dispensing of a medication expressly declared to be lawful by the Legislature:

a) The medication in question was expressly legalised by the enabling legislation, the MDL:

"The use of cannabis extracts and tinctures of cannabis for medical or therapeutic purposes, where prescribed by a medical doctor ..."

b) The manner of administration of the medication was expressly provided to be a matter for the prescribing doctor by the enabling legislation:

"The medical doctor shall establish the dosage of the cannabis extract or tincture of cannabis required for any person for whom the medical doctor prescribes it ..."

c) The enabling legislation expressly reserved the power to pass regulations dealing with dispensing to Cabinet:

"The Cabinet may make regulation providing for the importation, transport, storage and <u>dispensing of cannabis extracts</u> and tinctures of cannabis <u>and for anything required to be prescribed under this Law</u> relating to the medical or therapeutic uses of cannabis extracts and tinctures of cannabis." (emphasis added)

d) Section 14 of the MDL relied upon by the CMO is expressly stated to provide for rules:

" .. for inspection, keeping of inventories, and the general control and distribution of controlled drugs ... " (emphasis added)

The use of a general delegated power to make rules for all controlled drugs generally to overrule a specific legislative enactment is impermissible.

e) The CMO did in fact have an explicit power to ban medications in a case of emergency. S.58 of the Public Health Law (2002 Revision) provides:

"In case of urgency the Chief Medical Officer may, by order in writing, require any person to adopt any measures which he considers necessary to prevent, or covert danger of, the spread of disease ..."

Where such an explicit provision exists it is to be inferred that the general rule-making power in the MDL was not intended to circumvent it. Crucially, the CMO never purported to act pursuant to his Public Health Law powers. (Although for the reasons articulated above, had he done so that decision would have been irrational and contrary to the evidence in any event.)

44. Accordingly, even were the court were to find (against the overwhelming weight of evidence) that the CMO had properly considered the issues his actions would have been unlawful as he acted ultra vires the legislation he claimed to act under."

89. Mr. Austin Smith's submission is essentially a hypothetical one which the Court need not address. The Court has already ruled that the CMO has failed to issue any rules under Section 14 of the Misuse of Drugs Act upon which he can then rely to issue a Cease Notice. Moreover, the Court has found that no order was or could be validly issued under Section 58 of the Public Health Act because of the absence of personal service.

90. Nonetheless the Court must express some doubt as to whether if all formal requirements had somehow been met the CMO could ban dispensing, as Mr. Austin-Smith has characterised that action. Assuming for practical purposes that the CMO could have banned dispensing, the CMO in those circumstances would have to act only in the public interest and not for an improper purpose in any event, a question which brings the Court to the next issue in these proceedings.

Was the Cease Notice issued for an improper purpose?

91. On 10 September 2019 a text message advertising the availability of vapourisable medical cannabinoids at Doctors Express was sent out to users of Digicel telephones.

92. Ms. Holly Schneider, Officer of Customs and Border Control ("CBC"), sets out what then transpired at paragraphs 3- 4 of her Affidavit dated 29 January 2020:

*"3. On the **10 September 2019**, I received a text message which was sent by Kaiser Day advertising Medical Cannabis THC Vapes for sale at Doctors Express, which was sent via text message to all Digicel cell phone users which stated "Medical Cannabis THC Vapes now available in Cayman! Exclusively at Doctors Express -745-6000. Hurry! While supplies last. Kaiserday.com/now-available/." I was given instructions to investigate the text message.*

*4. Shortly thereafter, I was advised that on the **11th September 2019**, four CBC officers, including Assistant Director Tina Campbell, Senior Customs & Border Control Officer Don Parsons, Senior Customs & Border Control Officer Trevor Tummings and Customs & Border Control Officer Zoan Marin met with Ms. Carleen Vassel Webb,.*

-

Deputy Director, Department of Health Regulatory Services, Registrar of the Health Practice Councils, and requested to meet with the Chief Medical Officer and the Chief Pharmacist. Attempts were made to contact the Chief Medical Officer and the Chief Pharmacist at that time, but were unsuccessful."

93. In an unsworn statement dated 30 September 2019 Ms. Schneider further states at paragraph 6 that the CBC Officers were advised that the HPC would be meeting regarding this request "*and the concerns of the CBC would be brought forward at that time.*"

94. There then followed a meeting, a short record of which is to be found in the Affidavit of the CMO at Exhibit "JL- 1". The email, which the Court regards as highly important, states in full:

> "***From:*** *Webb, Carlene*
>
> ***Sent:*** *Friday, September 13, 2020 8:09 PM*
>
> ***To:*** *Lee, John*
>
> ***Cc:*** *Michelle Mon Desir; Dr.cona*
>
> ***Subject:*** *Vaporize Medical Cannabis*
>
> ***Attachments: Memo_Vaporize Medical Cannabis_13 Sep 2019.docx***
>
> *Hello Dr. Lee,*
>
> *The HPC Board met today and discussed the above captioned matter. The Board agreed a cease notice should be sent from each Councils to all practitioners. However, upon further discussion with the HPC and MDC-chairs, it was agreed it might be best if the notice is sent from the office of the CMO. I have included a draft of the notice suggested by the HPC Board.*

Additionally, the Customs and Border Control (Narcotics Enforcement) Unit is asking if the Board can request the product be detained until a decision has been reached.

We can discuss further on Monday when you return to office. Thanks.

Best regards,

Dr. Carlene Vassel-Webb, DBA, BSN, RN

Registrar, Health Practice Councils &

Deputy Director, Department of Health Regulatory Services

3rd Floor, Government Administration Building

133 Elgin Ave, George Town, Grand Cayman

Box 132, Grand Cayman KYI-9000

CAYMAN ISLANDS

Main line -949.2813. Fax -345.946.2845

Email -Carlene.Webb@gov.ky. hpbusers@gov.ky

FOI-foi.hrb@gov.ky

Website -www.dhrs.gov.ky

95. The Court carefully notes at this juncture that the CBC (Narcotics Enforcement) Unit is asking if the HPC Board can request that the product be "*detained*" until a decision has been reached. This statement becomes particularly important when the Court comes to consider the history leading to the application for a Search Warrant, but it is also important in that it seeks to focus the CMO's attention at the time on the role of the Customs officials.

96. In fact, accompanying this email is a prepared draft Cease Notice for vapourisable medical cannabis.

97. In relation to this development, the Applicants make the following point at paragraph 10 of their Skeleton Argument:

> *" 10) It should be noted that the HPC does not have the responsibility for regulating the prescription and supply of medications (or any role in the administration of the MDL), notwithstanding this they told HM Customs that they thought medical cannabinoids should not be administered by vape "as vaping is in the process of being banned in certain countries". Although not a Respondent in these proceedings it is important to note regarding the HPC that:*
>
> *a) The HPC had no authority (or evidence) upon which to offer a view on the legality of these medications.*
>
> *b) Even if they did the question of a potential ban in other countries would be an irrelevant consideration.*
>
> *c) There was in fact no such ban being processed in any other country.*
>
> *d) No such ban was ever processed in any other country."*

98. On 14 September 2019, which was the following day, the CMO drafted the Cease Notice on HPC notepaper, reflecting in large measure the terms of the draft document which had been sent to him.

99. The CMO then explains at paragraph 13 of his Affidavit how he came to act in this regard:

> *"Based on my expertise, experience and research, some of which was earlier outlined, the concerns expressed to me by several members of the Cayman Islands' Medical fraternity, the CDC's interim guidance, 'Severe Pulmonary Disease Associated with Electronic-Cigarette-Product Use -Interim Guidance', the reported deaths and several lung disease cases occurring across the United States, as well as, bearing in mind my legal obligations under the law, inclusive of the Misuse of Drugs Law and the Public Health Law, and after giving the matter due consideration, I caused, out of necessity, that the" Cease Notice" be circulated via email, to all registered practitioners on Sunday* ***September 15, 2019****."*

100. That is not quite the end of this event because as Ms. Schneider states at paragraph 8 of her Affidavit she was advised and verily believed that Ms. Vassel-Webb informed CBC officer Don Parsons that on 15 September 2019 she had emailed the said letter, meaning the Cease Notice, dated 14 September 2019 to all registered health practitioners.

101. It is accepted that in fact it was not sent to the Applicants on 15 September 2019 notwithstanding that their advertisement had become an object of interest and the Applicants as Mr. Banks has stated at paragraph 2 of his Affidavit dated 9th October 2019 and at paragraph 53 of his Affidavit dated 29 May 2019 were the only medical facility actually prescribing/ dispensing vapourisable medical cannabis.

102. A further email exchange has been identified and produced dated 14 and 15 September 2019.

103. The first one is dated 14 September 2019 at 10:57 from Ms. Nancy Barnard, Acting Chief Officer of the Ministry of Health to Doctor Lee:

*"**From:** "Nancy Barnard" <Nancy.Barnard@gov.ky>*

***Sent:** Saturday, 14 September, 2019 at 10:57*

***To:** "Lee, John" <John.Lee@gov.ky>*

***Cc:** Michelle Mon Desir <cir mondesir@yahoo.com>, "Dr.cona" <dr.lou@candw.ky>, "Medford, Colin" <colin.medford@hsa.ky>, "Flynn, Janett" <Janett.Flynn@gov.ky>, "Webb, Carlene" <Carlene.Webb@gov.ky>*

***Subject:** Re: Vaporize Medical Cannabis*

Good morning Dr Lee, HPC, colleagues:

I have reviewed the below and attached and also discussed with Dr Lee this morning.

I am of the opinion that we ought to seek legal advice, Carlene - is there someone to whom DHRS normally goes at Legal? If so please send this through for guidance. Alternatively I am happy to sent through the the Solicitor General for her assignment to a member of the Legal team.

Please advise.

Nancy Barnard"

104. The CMO replied to this on 15 September 2019 at 9:48 PM as follows:

*"**From:** Lee, John*

***Sent:** Sunday, 15 September, 2019 at 9:48 AM*

***To:** Webb, Carlene" <Carlene.Webb@gov.ky>*

***Cc:** "Nancy Barnard" Nancy.Barnard@gov.ky>, "Michelle Mon Desir <cir mondesir@yahoo.com>, "Dr.cona" <dr.lou@candw.ky>, "Medford, Colin" <colin.medford@hsa.ky>, "Flynn, Janett" <Janett.Flynn@gov.ky>,*

***Subject:** Re: Vaporize Medical Cannabis*

***Importance:** High*

Dear Carlene,

Following the Acting CO's request, I have had consultations with Ms Celia Middleton and revised the notice we have been discussing. I would be grateful if you could issue the attached to all healthcare practitioners at the earliest opportunity. We should also consider drafting a press release for Monday.

With thanks.

Kind regards,

John

Dr John Lee

Chief Medical Officer

Ministry of Health, Environment, Culture & Housing

Cayman Islands Government"

105. What is both striking and frankly disturbing is the email sent by the CMO to Doctor Mon Desir on 14 September 2019 at 10:23 AM and set out earlier in the Judgement, where the CMO precisely distinguished the medical cannabinoid vapes that Doctors Express are using from an injurious classification of "*cheaper vapes*" related to "*deaths from vaping*".

106. In these circumstances, why was a Cease Notice even issued in relation to the activity of the Applicants?

107. Mr. Gayle contends that the Cease Notice was directed to all registered health care practitioners and that it was not targeted at the Applicants as such.

108. However given that the Applicants were the only medical facility prescribing any dispensing vapourisable medical cannabinoids, and the CMO did not regard their product in the same light as *"cheaper vapes"* it is difficult to see any reason for including them in the ambit of the Cease Notice as distinct from exempting them from it entirely.

109. It should be noted that the Court pressed Mr. Gayle on this specific point but beyond stating that the Cease Notice applied to all eligible practitioners he was unable to provide any more detailed answers to that question.

110. There is an additional aspect of concern. Attached to the Affidavit of Mr. Banks dated 29 May 2020 there appears at "SB- 3" a note taken by him of a telephone conversation with the CMO on 13 September 2019. It arose from an earlier conversation that Mr. Banks had with Ms. Sherry Banks-Bailey of the Health Services Authority and a suggestion by her that vapourisable medical cannabis was not permitted for importation.

111. In the course of the subsequent telephone conversation Mr. Banks had with the CMO the CMO is reported in reference to the advertisement as saying *"your text message has ruffled quite a few feathers and a lot of people are expecting me to do something about it"*.

112. In other words, the CMO considered that he was expected to act even though as we have seen in relation to the Applicants the CMO believed that he had no genuine medical reason to act at all.

113. In light of this unfortunate situation did the CMO act for an improper purpose in issuing the Cease Notice?

114. The First, Third and Fourth Respondents rely at paragraph 77 of their Supplemental Skeleton Arguments, for the proposition that the Ceased Notice was issued to all medical practitioners; "*so it is not true as alleged that the applicants were targeted.*"

115. What is clear, however is that the Applicants had already became an object of interest to the First Respondent and that as a result of communication with the HPC this had resulted in the presentation of a draft Cease Notice to the CMO from the HPC.

116. There is no evidence that prior to this initiative the CMO had formed an intention to take any action whatsoever.

117. It is also factually correct as we have seen that only the Applicants were dispensing vapourisable medical cannabis in the Cayman Islands.

118. Furthermore, it is known from Mr. Banks' evidence which is uncontested and undisputed on this point that the CMO told him that a lot of people were expecting the CMO to do something about the Applicant's text message, viz., the advertisement. This comment as we have seen was made by the CMO on 13 September 2019.

119. Finally, we have by way of insight the CMO's own remarkable comments in his email to Doctor Mon Desir on 14 September 2019, amounting as they do to an admission of his true opinion.

120. In summary, the proposition "*it is not true as alleged that the applicants were targeted*" is not in itself self-evidently correct. The proposition must be further examined with a high degree of care and circumspection.

121. In his Affidavit dated 10 February 2020 the CMO states at paragraph 9-13:

> *"9. In further explaining what, among others, operated on my mind in issuing the said" Cease Notice" as a necessity in protection of public health, prior to September 13, 2019, I have had cause to conduct intensive research on the use of medical cannabinoids in the treatment of disease. In particular, I consulted the National Institute for Health and Care Excellence (UK) (NICE), which published draft guidelines to practitioners for consultation on cannabis-based medicinal products in August 2019. I had also given serious consideration to its application in the Cayman Islands. A copy of the NICE Guidelines Draft (August 2019) is now produced and hereto marked as exhibit "JL-3",*
>
> *10. On or around the same second week in September 2019, and prior to September 13, 2019, there were reports in the international media, concerning reported deaths and lung disease arising from Cannabis Vaping products, which was a cause for concern. I also read several*

articles to that effect. A copy of the articles that I had read and duly considered with respect to the said reported deaths and lung disease from Bloomberg, the BBC, etc., are now produced and hereto collectively marked "JL-4".

11. *The Centers for Disease Control and Prevention ("CDC") issued its Morbidity and Mortality Weekly Report ("MMWR") on September 6, 2019, entitled, 'Severe Pulmonary Disease Associated with Electronic-Cigarette-Product Use-Interim Guidance'. The report was finalised on September 13, 2019 and was instructive lo me. A copy of the report is now produced and hereto marked as exhibit "JL-5".*

12. *The CDC concluded the said interim guidance, as follows:*

"While this investigation is ongoing and the definitive cause of reported illnesses remains uncertain, persons should consider not using e-cigarette products. Those who do use e-cigarette products should monitor themselves for symptoms (eg., cough, shortness of breath, chest pain, nausea, vomiting, or other symptoms) and seek medical attention for any health concerns. Regardless of the ongoing investigation, persons who use e-cigarette products should not buy these products off the street and should not modify e-cigarette products or add any substances that are not intended by the manufacturer.

E-cigarette products should never be used by youths, young adults, pregnant women, or by adults who do not currently use tobacco products. Adult smokers who are attempting to quit should use evidence-based smoking cessation treatments, including counseling and FDA-approved medications; those who need help quilting tobacco products, including e-cigarettes, should contact their medical provider. Persons who are concerned about harmful effects from e-cigarette products may call their local poison control center at: 1-800-222-1222. CDC will continue to advise and alert the public as more information becomes available."

13. *Based on my expertise, experience and research, some of which was earlier outlined, the concerns expressed to me by several members of the Cayman Islands' Medical fraternity, the CDC's interim guidance, 'Severe Pulmonary Disease Associated with Electronic-Cigarette-Product Use - Interim Guidance', the reported deaths and several lung disease cases occurring across the United States, as well as, bearing in mind my legal obligations under the law, inclusive of the Misuse of Drugs Law and the Public Health Law, and after giving the matter due consideration, I caused, out of necessity, that the "Cease Notice" be circulated via email, to all registered practitioners on Sunday September 15, 2019."*

122. When paragraph 9 is considered and analysed, it becomes apparent that the CMO is not in fact stating that prior to 13th September 2019 (or 14 September for that matter) he personally had in mind the professional medical literature which is then set out. Instead, their role is "*in further explanation*" of what among others, operated on his mind in issuing the Cease Notice. These materials themselves are not claimed to have been in his mind at the relevant time and he has never explicitly stated that they were in his mind at that point.

123. There is no explanation as to what if any material was before him at the relevant time. There is reference at paragraph 11 to a Report by the Centers for Disease Control and Prevention which was finalized on 13 September. The CMO does not state however that he read it before issuing the Cease Notice and although he states that it "*was instructive to me*" he fails to state when it was instructive and in what context it was instructive.

124. By way of further example of this opacity and ambivalence the CMO states at paragraph 21:

> *"It was my view in September 2019 (the material time) and still is, that vaping cannabinoids present a real and present danger to Public Health of the Cayman Islands, and until such time as there is concrete evidence from the CDC and/or the Food and Drug Administration ("FDA"), and/ or the European Medicines Agency, of the safety and efficacy of cannabinoid products to be used by that mode of delivery, then they ought not to be dispensed."*

125. What the CMO does not say in the paragraph is that he had formed this view by or on 13/14 September itself insofar as it relates to the Applicants' Trade and Business Operations. Whether this was because of the views separately expressed to Doctor Mon Desir on 14 September 2019 it is not logically possible to determine. By what date in September it became his view is totally indeterminate. As well, moreover, at no point in his Affidavit dated 10th February 2020 does the CMO indicate that the health issues being raised are not applicable or relevant in the context of the medical cannabinoid vapes which Doctors Express were using. He obviously should have done so fully and truthfully. Combined with the circumstances leading up to the Cease Notice, that omission was both an error of judgment and unfortunately misleading in its impression and effect. The other paragraphs identified by the Court were likewise misleading in their impression and effect.

126. Following this Affidavit, the CMO swore a further one on 5 August 2020. It contains what the Court would characterize as the following revision at paragraphs 3 - 4:

> *"3. In my first Affidavit dated and filed 10th February 2020 in respect of this matter, among others, I deposed of my authority, reasons and the process involved in the issuance of the Cease Notice, which this Affidavit supplements by way of update.*

4. *In reliance on, inter alia, a prevailing body of scientific publications and learnings available at the material time, which was far less precise than it is now, I issued a 'Cease Notice - Vaporisable Medical Cannabinoids', dated 14th September 2019 ("Cease Notice"), and caused that it be circulated to all registered practitioners on Sunday 15 September 2019, which I considered at the material time was an appropriate, reasonable, proportionate and necessary response to a potential serious risk to public health, and in fulfillment of my statutory duties."*

127. In terms of evidence, in the former Affidavit the CMO had never stated that he issued the Cease Notice dated 14 September 2019 in reliance on, inter alia, a prevailing body of scientific publication and learnings availed at the material time. The fact that they were available at the material time does not in itself mean that CMO read them at the material time. Now, as the Court understands it, on 5th August 2020 the CMO states that he relied upon them in issuing the Cease Notice, and therefore that he must have read them by necessary implication.

128. With all due respect to the CMO, this is the evidence he would reasonably have been expected to provide in the first place, and not merely many months afterwards. Frankly, the Court has genuine difficultly in accepting the reliability and persuasiveness of his evidence in relation to this chronology.

129. The email message dated 14 September 2019 only emerged on the final morning of this hearing. It was provided on behalf of the CMO and Ms. Vassel-Webb in response to a specific request from Mr. Austin-Smith. Mr. Gayle stated to the Court that he and Ms. Rambarran had only become aware of it that morning, and the Court accepts that statement.

130. Mr. Austin-Smith submitted that the email provided proof that the CMO had never believed that the vaporing products of the Applicants were dangerous on the basis of what was said about them in the Cease Notice and he further submitted that what the CMO told the Court in his evidence was untrue. He also emphasized that the use of the court proceedings for an improper purpose not in contemplation of an authorised statue could amount to an abuse of process.

131. Mr. Gayle on the other hand made the point that the CMO clearly had concerns at the relevant time that vapourisable cannabinoids posed a risk to public health. In addition, he contended that the Cease Notice did not constitute a ban on Doctors Express. Instead it was a ban on all vapourisable cannabinoids.

The Legal Submissions of the First, Third and Fourth Respondents in relation to the Cease Notice

132. The Applicants raised a number of arguments in their Skeleton Arguments dated 16 July 2020. These are the technical arguments as to whether the CMO acted within his authority in issuing the Cease Notice, whether he did so based upon any rational grounds and whether in acting as he did he acted properly and independently.

133. The First, Third and Fourth Respondents emphasised in what are now called their Supplemental Skeleton Arguments dated 4th November 2020 that at all material times the CMO acted honestly and in good faith (paragraph 13) as well as responsibly (paragraph 14). They contend that section 14 of the Misuse of Drugs Act empowers the CMO to exercise general control in respect of control drugs and that vapourisable medical cannabinoids were within that jurisdiction (paragraphs 22 and 23). They also rely on section 58(1) of the Public Health Act. As far as the Court understands it, they submit that the absence of personal service effected in accordance with section 58(1) is inconsequential.

134. The Respondents rely upon a body of medical literature identified by the CMO in relation to public health concerns. However, the Court notes that their submissions were made before the CMO's email dated 14 September 2019 had actually come to light.

135. It is difficult to see however how in light of the views expressed by the CMO in that email it can still be said that the decision made was one within the range of reasonable responses, (paragraph 37). Moreover, if it was not independently arrived at, the Court has reservations as to how the decision was even reasonably formed.

136. As the Respondents point out at paragraph 90, judicial review will lie where the decision maker was motivated by some aim or purpose regarded by the law as illegitimate.

137. The Respondents call for and indeed urge "*certain latitude*" in how decision makers express themselves (paragraph 98), and they contend that the CMO's decision was not unreasonable in the sense of the well-known "*Wednesbury*" principle.

138. With great respect, the problem which arises in this case is not so much a matter of general law but rather a matter of particular fact. There is no doubt that this process was initiated by Customs and that they wanted to "*detain*" these vapourisable products until a decision of some kind was reached. In addition, their concerns as originally conceived and indeed as largely developed related to whether the products which had been imported were in fact authorised for legal importation.

139. Ms. Schneider raises that issue very clearly in her sworn evidence.

140. It is also clear that a later point, whether in relation to section 14 or in relation to section 58(1) or in relation to both, an issue then emerged as to the alleged protection of public health.

141. Finally by the time a search warrant was sought the issue has transformed again into whether a criminal office may have been committed, and then what was the definition of the criminal offence.

142. In other words, the challenge for the relevant Respondents is not in relation to the law but in relation to the application of the law to their emerging and evolving allegations of fact.

143. Because of this distinction the Court has seen fit to set out and examine the evidence in this case in very considerable detail.

Conclusion regarding the Cease Notice

144. The Court has no difficulty in finding on a balance of probabilities that at the material time the Cease Notice was issued for a reason other than that specifically identified, viz., serious health risks associated with the use of vapourisable medical cannabis.

145. It was issued in response to an initiative undertaken by the First Respondent, and supported by the HPC.

146. The CMO knew that in relation to the products of the Applicants there was no health risk to justify issuing the Cease Notice. Conversely in relation to the other medical dispensaries it is a matter of fact that none were in practice dispensing this product. Therefore, other than to target the Applicants there was no reason to issue the Cease Notice. The decision to issue it was in terms of natural justice principles irrational and unfair. It was intended to accommodate the concerns such as they might be on the part of the First Respondent and of the HPC arising from the Digicel advertisement. Whatever actions such concerns may have justified they did not unfortunately justify the specific action that the CMO took.

147. In relation to the Cease Notice, the Court has come to these conclusions:

1. There was no basis in fact or in law to issue the Cease Notice under section 14 of the Misuse of Drugs Act.

2. There was no basis in fact or in law to issue a corresponding Notice under section 58(1) of the Public Health Act. Alternatively, even if there had been such a basis the failure to serve the Notice personally was fatal to the statutory validity of that notice in any event.

3. There was a breach of the widely recognized principles of natural justice in that no fair opportunity was even provided to the Applicants to argue for the restoration of their suspended licence.

4. In issuing the Cease Notice the CMO acted for what in fact and in law would properly be described as an improper purpose.

5. The CMO had no reasonable basis to issue the Cease Notice. Not only was it functionally targeted against the Applicants but it was also issued as against these Applicants on a basis on which the CMO himself did not truly believe.

6. The presumption of regularity in relation to administrative acts is a rebuttable one, and in the case there is more than enough evidence both to rebut any such presumption and in any event to conclude on a balance of probabilities that the Applicants have made out their case as well. The Court grants a declaration that the issuance of a Cease Notice on or around 14 September 2019 by the Fourth Respondent was unlawful and rules that it should be set aside.

The Circumstances of the Search Warrant

148. The background to the application for the granting of a Search Warrant for the premises of the Applicants on 17 September 2019 will be set out in essentially summary form. This will be followed by an analysis of the alleged formal defects in both the application for the Warrant and the Warrant itself. Finally the Court will consider whether in the context of the events themselves the Search Warrant was sought and obtained without valid reasons and/or for an improper purpose.

149. It is necessary to begin by clarifying that the CMO has asserted at paragraph 14 of his Affidavit dated 10 February 2020 that he had no involvement in the relevant operation, and indeed there is in this respect no reason to doubt the truth of his statement. Paragraph 14 states:

> *"14. I was neither aware that my 'Cease Notice' was being relied upon by the Cayman Islands' Customs and Border Control on the 17th September 2019, when they conducted an operation on the premises of the Applicants, nor, was I aware of any details of the search and seizure operation, other than those in the press, until some days after that event. The Applicants should have been in receipt of my issued "Cease Notice" before that date."*

150. Nonetheless, it will become evident that although the Applicants were not in fact in receipt of the Cease Notice, Mr. Banks on their behalf had informally become aware of its existence.

151. It will also become clear that the Applicants had in no way taken or attempted to take any actions which were or could be inconsistent with the terms of the Cease Notice. There is no evidence that this point of evidence was ever explicitly communicated to the issuing Justice of the Peace.

152. An account of how the Search Warrant in this case was obtained and executed was provided by Ms. Holly Schneider, of the CBC. Ms. Schneider has sworn an Affidavit dated 29 July 2020. She also provided sworn oral testimony at the hearing, and in that testimony she adopted into her evidence the contents of two unsigned Witness Statements dated 25 September 2019 and 30 September 2019.

153. For practical reasons of chronology, the Court will begin by setting out relevant passages from the two unsigned but adopted Statements.

154. Because of an error of some kind, the Statement dated 30 September 2019 in fact preceded the one dated 25 September 2019 as will become clear.

155. Turning to the one of 30 September, Ms. Schneider confirms that she was a CBC Officer presently still attached to the CBC Narcotics Enforcement team, and that she had been employed by the Customs Service for 7 years.

156. Ms. Schneider states at paragraphs 5-8:

*"3. I received a copy of an advertisement dated **10th September 2019**, which was sent via text message to all Digicel cellphone users which stated "Medical Cannabis THC Vapes now available in Cayman! Exclusively at Doctors Express - 745-6000. Hurry! While supplies last. Kaiserday.com/now-available/'. I was given instructions to investigate same.*

4. Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd. and Kaiser Day Pharmaceutical Ltd. is located at #81 Godfrey Nixon Way, Units 1-4 Corporate Plaza, George Town, Grand Cayman.

5. CBC Officers met with Ms. Carlene Webb, the Registrar of the Health Practice Commission (HPC), during which a request to meet with the Chief Medical Officer (CMO) and the Chief Pharmacist was made.

6. They were advised that the HPC would be meeting regarding the said request and that the concerns of the CBC would be brought forward at that time. A follow-up meeting was scheduled inviting several other persons including members of the RCIPS and CBC Management for Friday 13th September, 2019. However, they did not receive any feedback from the HPC.

7. On or about the 15 September, 2019 CBC Officers saw an article on Cayman Marl Road stating that the CMO had issued a Cease Notice to all Medical Practitioners. However, there was no correspondence between the CBC officers and the HPC.

8. On Monday 16th September 2019, the HPC was contacted regarding the article on Cayman Marl Road. At this time, we were provided with a copy of a letter dated 14 September 2019."

157. At this stage it is necessary to emphasise that there was at this early stage some issue of dispute as to whether in fact existing approvals would or could cover the importation of vapourized cannabinoids as distinct from other forms of cannabinoids. This former dispute has now been resolved in favour of the Applicants.

158. Ms. Schneider has set the problem out as follows at paragraph 9:

"As Cannabinol, except where contained in cannabis or cannabis resin, or Cannabinol derivatives or Cannabis extracts and tinctures of cannabis collectively remain a controlled drug, under the Misuse of Drugs Law, CBC Officers investigated the records of approved import certificates in relation to Cannabis tinctures and extracts which were approved for importation. However there was no record which indicated that approval was given for the importation of the Vape pens (e-cigarettes) and or Cannabinol containing e-liquids. The only declaration that was found was for the CBD extract Oil. It is noted that Vape pens (e-cigarettes) and vapeing e-liquids would attract a different rate of duty than the CBD Oil itself."

159. More importantly for our present purposes Ms. Schneider then sets out a brief account of the Cease Notice:

*"10. The letter dated the **14 September 2019** from the Chief Medical Officer issued a cease notice to all Registered Health Care Practitioners which was headed 'Cease Notice of Vaporisable Medical Cannabinoids'. The said letter stated inter alia: 'It has come to the attention of the Ministry responsible for Health that vaporizable medical cannabinoids are available on island to patients. A principal responsibility of the Ministry responsible for Health is to ensure the safety of the public .... Pursuant to my powers under section 14 of the Misuse of Drugs Law (2017 Revision) I request that all healthcare practitioners cease issuing, processing, dispensing or selling of any cannabinoid which will be used by vaporisation until further notice.' A true copy of the letter dated 14 September 2019 from the CMO is hereto produced and marked as "**HS1**".*

*11. On the **15 September 2019**, Ms. Carlene Webb emailed the said letter dated the 14 September 2019, to all Registered Health Care Practitioners. A true copy of the email I dated the 15 September 2019 from the Ms. Webb is hereto produced and marked as "**HS2**"."*

160. We now know of course that the Cease Notice was not emailed to all registered health practitioners on 15 September 2019 although that seems to be what Ms. Schneider believed.

161. Ms. Schneider then returns to the subject of permission to import vapes before reaching a conclusion as to her suspicions, set out at paragraphs 12 – 16:

" 12. By letter dated 24 January 2019 the Former Acting Chief Medical Officer granted permission to Kaiser Day Cannaceuticals Ltd, Doctors Express Medical Centre to import a quantity of Tetrahydrocannabinol (THC) & CBD base products. The said permissions referred to 'CBD Extract 6,000 g THC less than or equal to 95%, CBD less than or equal to 3 %, less than or equal to 5,700,000 g THC Base, less than or equal to 180,000 g CBD Base'. However, it is noted that the said permission did not include Cannabis/THC Vapes.

13. Based on the aforesaid information I had reasonable and probable cause to suspect that the said company was in unlawful possession of a controlled substance with intent to supply.

14. On the 17 September 2019, I made an application for a search warrant to the Justice of the Peace, Ms. Catherine O'Neil, Identification Number CO26110. A true copy of the information given on oath in support of the application for the search warrant before the Justice of the Peace Ms. Catherine O'Neil JP is hereto produced and marked as "HS3".

15. A true copy of the warrant obtained dated 17 September 2019 is hereto produced and marked as "HS4".

16. A true copy of the JP's written record of the application for the said search warrant is hereto produced and marked as "HS5"."

162. At this stage Ms. Schneider did not state that a failure of the Applicants to revoke or retract the Digicel advertisement following the issuance of the Cease Notice was itself a basis for reasonable and probable cause. There is also no mention of a note being taken either by Ms. Schneider or Ms. O'Neil.

163. The Search Warrant having been obtained, it was then executed, and then the subject of the scope of the relevant permission to import and dispense seems to have arisen, as paragraphs 18 - 20 indicated:

> *"18. The warrant was handed and explained to the Director Samuel Banks. He then escorted officers to the Pharmacy where he indicated the Vaporisable Medical Cannabis were kept. Mr. Banks was asked if the indicated items were all of the Vaping/CBD Products in the possession of the said companies, he confirmed that they were. Photographs were taken and a large quantity of items were counted and seized.*
>
> *19. Mr. Samuel Banks stated that he is the Director of the said company. At the time Mr. Banks informed me that he had been granted permission by the CMO to import and dispense Medical THC and CANABINOIDS products and did not understand why we were now coming to the premises to search for said products.*

20. PC Durant and I explained to Mr. Banks that although the CMO had granted such permission, he also had the power to rescind such permission, which he had indicated that he had. Mr. Banks escorted officers to the pharmacy area and indicated that this is where the said products were kept. During the search of the pharmacy, I witnessed the said Officers recovered a large quantity of different coloured cardboard tube like packaging which were said to contain the THC and CBD Vapes."

164. Incidentally, Ms. Schneider's contention that although the CMO had granted such permission he also had the power to rescind such permission is now accepted to be wrong both in fact and in law. However, it remains indicative of Ms. Schneider's relevant state of mind at that particular time.

165. The second unsigned statement of Ms. Schneider, erroneously dated 25 September 2019, sheds a little more light on her somewhat confused way of thinking both at the particular time and subsequently when these statements were drawn up. Page 2 proceeds that in reference to the Digicel advertisement:

"• I was given instructions to investigate same as the advert was sent to all Digicel Cellphone Users. As per the advertisement the Vapes appeared to be available to the general public.

- *CBC Officers contacted the HPC to enquire if vapes could be administered medically. However, although the CMO was unavailable to address this concern, the HPC was of the opinion that it shouldn't be as Vaping is in the process of being banned in certain countries.*

- *After our concerns were communicated to the HPC the said letter from the CMO was issued to all All Registered Health Care Practitioners*

- *The advertisement which urged persons to "Hurry! While supplies last." prompted Officers to act quickly to ensure that these products were removed and detained pending further investigations.*

- *A review of documentation for import of TCH/CBD products which was submitted to CBC on behalf of Doctors Express, revealed that no vaping products were declared to CBC.*

- *It was the belief of CBC that Doctors Express failed to make a truthful declaration, and if a search was not conducted as per Section 14 of the Misuse of Drugs Law, a true account of the quantity and products would not have been obtained."*

166. We see that several themes begin to emerge. First, the original focus on importation of vapes has expanded to include the additional problem of vaping being in the process of being banned in certain countries. Secondly, the Cease Notice letter from the CMO is said to have been issued after *"our concerns"* were communicated to the HPC, meaning clearly the concerns of the CBC. Thirdly, we find the first mention of section 14 of the Misuse of Drugs Act and a belief that a premises search could be conducted *"as per section 14"*.

167. With those preliminary observations firmly in mind, the Court now proceeds to the sworn Affidavit of Ms. Schneider dated 29 January 2020.

168. Paragraphs 3- 9 set out more comprehensively the matters which were previously mentioned:

> *"3. On the 10 September 2019, I received a text message which was sent by Kaiser Day advertising Medical Cannabis THC Vapes for sale at Doctors Express, which was sent via text message to all Digicel cell phone users which stated "Medical Cannabis THC Vapes now available in Cayman! Exclusively at Doctors Express - 745-6000. Hurry! While supplies last. Kaiserday.com/now-available/." I was given instructions to investigate the text message.*
>
> *4. Shortly thereafter, I was advised that on the 11th September 2019, four CBC officers, including Assistant Director Tina Campbell, Senior Customs & Border Control*

Officer Don Parsons, Senior Customs & Border Control Officer Trevor Tummings and Customs & Border Control Officer Zoan Marin met with Ms. Carleen Vassel Webb, Deputy Director, Department of Health Regulatory Services, Registrar of the Health Practice Councils, and requested to meet with the Chief Medical Officer and the Chief Pharmacist. Attempts were made to contact the Chief Medical Officer and the Chief Pharmacist at that time, but were unsuccessful.

5. The aforesaid CBC Officers informed me that they were advised by Mrs. Vassell-Webb that the Health Practice Commission (HPC) was scheduled to have their monthly meeting on Friday 13 September 2019, and that my investigation would be tabled at the meeting, however at that point, they did not receive any feedback.

6. Thereafter, on Sunday 15 September 20191 there was an article on Cayman Marl Road, wherein it was alleged that the Chief Medical Officer had issued a 'Cease Notice' to all medical practitioners. However, up to that date, I still had not received any feedback from the Health Practice Commission.

7. On Monday 16 September 2019, Ms. Vassell-Webb was contacted regarding an article on Cayman Marl Road and on the said day, Ms. Vassell Webb provided a letter dated 14 September 2019 from the Chief Medical Officer which was a cease notice to all Registered Health Care Practitioners which was headed 'Cease Notice- Vaporisable

Medical Cannabinoids'. The said letter stated inter alia: "It has come to the attention of the Ministry responsible for Health that vaporizable medical cannabinoids are available on island to patients. A principal responsibility of the Ministry responsible for Health is to ensure the safety of the public ... Pursuant to my powers under section 14 of the Misuse of Drugs Law (2017 Revision) I request that all healthcare practitioners cease and desist from issuing, processing, dispensing or selling of any cannabinoid which will be used by vaporisation until further notice." A true copy of the said letter is now produced and marked as exhibit "HS1".

8. I am advised and verily believe, that Ms Vassel-Webb informed CBC Officer Don Parsons that on the 15 September 2019, she had emailed the said letter dated the 14 September 2019, to all Registered Health Care Practitioners. A true copy of the email dated the 15 September 2019 from Ms. Vassel Webb is now produced and marked as exhibit "HS2".

9. I had all reasons to believe that the Cayman Islands urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd and/or Kaiser Day Pharmaceutical Ltd were aware of the cease notice, before I had applied for the search warrant.

169. Ms. Schneider next sets out section 14 itself.

170. Then for the first time there is reference to an additional source of the power of search, described at paragraphs 16 - 19:

> *"16. At all material times when I acted, I was cognizant that, the CBC, pursuant to the Misuse of Drugs Law (2017 Revision) (MDL), has the power to search under section 6 of that Law, which provides as follows:*
>
> > *"16. (1) If a constable or customs officer has reasonable grounds to suspect that any person is in possession of a controlled drug or scheduled substance in contravention of this Law he may, without warrant, detain and search such person and whether or not any person is detained or searched may, without warrant, break open and search any premises, vessel or thing whatsoever in which he has reasonable grounds to suspect that any such drug or substance may be concealed.*
> >
> > *(2) ...*
> >
> > *(3) A Justice of the Peace may, at any time, issue a warrant for the search of any premises in furtherance of the enforcement of this Law and such warrant may be executed at any time of the day or night within one month of its issue, and, where necessary for entry to such premises, such force may be used as may be requisite thereto.'*

17. As per section 6(1) of the MDL, the CBC may search premises without a warrant in circumstances where a CBC officer has reasonable grounds to suspect that a person is in possession of controlled drugs in contravention of the law, and the drugs are stored at the particular location. Further section 6(3) of the MDL allows the CBC to enter and search any premises with a warrant for the enforcement of the MDL and the Customs and Border Control Act 2018.

18. Based on the aforesaid information, I had reasonable cause to suspect that Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd and/or Kaiser Day Pharmaceutical Ltd were in unlawful possession of a controlled drugs with intent to supply in breach of the Law.

19. Also based on the aforesaid information, I had reasonable cause to suspect that Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd and/or Kaiser Day Pharmaceutical Ltd, had in its possession, uncustomed goods."

171. Ms. Schneider then turns to the Search Warrant application itself at paragraph 20- 21:

"20. As a result of the evidence, I was of the view that there was reasonable and probable cause to suspect that Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd and/or Kaiser Day Pharmaceutical Ltd was acting contrary

to the Misuse of Drugs Law (2017 Revision) and the Customs and Border Control Law 2018, and on the 17 September 2019, I made an application for a search warrant to the Justice of the Peace, Ms. Catherine O'Neil, Identification Number CO261101 the Second Respondent herein. A true copy of the information given on oath dated 17 September 2019 in support of the application for the search warrant under the Misuse of Drugs Law (2017 Revision) that I had reasonable grounds for believing that an offence, possession of a controlled substance, cannabinoids which will be used by vaporisation, under the Misuse of Drugs Law (2017 Revision) which was on the said premises of the Applicants. A true copy of the Information on Oath in support of the application for a Search Warrant dated the 17 September 2019 is now produced and hereto marked as exhibit "HS5".

21. A true copy of the warrant dated 17 September 2019 issued by the said Justice of the Peace, the Second Respondent herein, and a copy of the record as per the Schedule 3 of the Justice of the Peace Regulation is now produced and marked as exhibit "HS6"."

172. Once again, certain observations immediately become pertinent. First, there is no written record of the application other than the information itself and the Warrant which was then issued. Secondly, there is no explicit assertion that in seeking a Search Warrant the Justice of the Peace was told that an alternative means of lawful entry under section 6 of the Misuse of Drugs Act was also available. Thirdly, there is reference to an offence of possession of a controllable substance

cannabinoids, as well as to an offence of possession of a controlled drug with intent to supply. It is the latter offence and not the former which according to Ms. Schneider's oral evidence was the true basis of the application, and which she claims was communicated to the Second Respondent. Fourthly, the Affidavit also refers once more to the importation issue, a ground of complaint against the Applicants as noted previously which has since been abandoned. Fifthly, even if possession with intent to supply had been the basis of the application, why is the justification later to be identified as to the unrevoked nature of the advertisement not mentioned in that capacity?

173. Ms. Schneider concludes her Affidavit at paragraph 33 as follows:

> *"At all material times, I had an honest belief that there were reasonable grounds to suspect that an offence was committed in breach of the Misuse of Drugs Law (2017 Revision) and I acted in good faith and without malice, in furtherance of my duties at all material times, by procuring the warrant from the personnel with jurisdiction to so issue, and facilitating its execution with the only purpose of upholding the law. Having so acted, I verily believe that, without more, under the law, there can be no liability for acts done under the Warrant, regardless of its subsequent determined validity. Besides, all the police officers and CBC officers during the operation acted in accordance with the law, at all material times."*

174. At this stage the Court notes that there is no evidence that it was explained to the Second Respondent that the Cease Notice had preceded the advertisement. This would have been particularly important both to show that the advertisement was not published in breach of the Cease Notice, and that the only and exclusive complaint in relation to the Cease Notice was that it had not been retracted or withdrawn once the Cease Notice was somehow effectively notified to the Applicants. In any event, whatever may have transpired in relation to relating an alleged offence not even on the face of the sworn information it is nowhere recorded. With great respect, all of these matters and concerns are indicative of chaos and confusion.

175. In giving oral evidence before this Court, Ms. Schneider confirmed that she had acted according to the instructions received from her Assistant Director, Ms. Tina Campbell. She also pointed out in cross examination by Mr. Austin-Smith that she could not speak of meetings which she did not attend prior to the time of the Search Warrant.

176. On 10 September 2019 Ms. Schneider was instructed by Ms. Campbell to investigate Doctors Express. She said that CBC set about detaining the cannabis products in question after the Cease Notice was issued.

177. Ms. Schneider denied that CBC has requested that the Cease Notice be issued. She had in fact been on leave until 10 September 2019.

178. Ms. Schneider asserted that CBC had reasonable grounds to suspect that Doctors Express was still dispensing cannabinoids based on the advertisement *"and we did not see a retraction"*.

179. She also admitted to making an error on the Search Warrant. She accepted that on seeking entry the search party were allowed into the premises and that the Warrant was not necessary, but she did not know beforehand if entry would be allowed.

180. The Warrant application had been prepared not by Ms. Schneider but by another Customs Officer, Mr. Leonard Hydes. The information alleging that the Applicants were in possession of a controlled drug, by way of the suspected offence, was an error and a mistake.

181. Ms. Schneider's explanation was that she had read over the documentation *"very quickly"*. She read it in a vehicle when she was doing errands for her Department, having been instructed by her senior officer to obtain the warrant: *"I read it quickly when we were driving"*.

182. She added that she swore the application in relation to section 14 because she trusted her colleagues, and that it was not a lie. She accepted however that section 14 does not create an offence under the Misuse of Drugs Act. As to whether entry could be granted without a warrant, she stated that the Justice of the Peace *"did not ask"*.

183. Ms. Schneider accepted that she had a duty of full and frank disclosure. She said that she showed the advertisement to the Second Respondent *"as a text message."*

184. She did not recall telling the Second Respondent that Doctors Express had a licence. If the Second Respondent had asked her, she would have said that, but she did not tell her about licences and permissions, or that the Deputy Director had granted permission to import the products. She was not "*concealing anything*" from the Second Respondent or misleading her. The fact was that the advertisement had not been withdrawn even though that was not stated in the information.

185. Ms. Schneider agreed that she did not take a note of the Search Warrant application. She agreed that there was never grounds for an allegation of "*straight possession*" as an offence.

186. She accepted that no articles were identified as essential to the investigation. Then in relation to the respective dates of the advertisement and the Cease Notice, she stated "*I do not recall if I told her these dates.*"

187. Ms. Schneider said there was also a 5 - 10 minutes conversation with the Justice of the Peace, who asked about the reason for the Warrant and the Cease Notice. The Court then made the following note: "*I did not tell her the advertisement predated the Cease Notice.*"

188. At a later point in her testimony Ms. Schneider seemed implicitly to retract this statement, claiming that she did tell the Second Respondent that fact. The Court in due course will consider how it should approach and deal with these contradictory statements and with their weight if any.

189. Ms. Schneider also stated that she did not recall telling the Second Respondent that the CBC *"had been speaking to the HPC."*

190. Ms. Schneider went on to describe the execution of the Search Warrant once it was obtained, but she also added that after the search took place her specific investigation did not go much further. She had no role in public health and safety and no one *"at Doctors Express"* was ever arrested and no charges were brought.

191. The items seized were not brought to Court. No one had told her that on that day preceding the search arrangements had been made for the police to attend at the premises for an explanatory discussion, and that the police had then cancelled this arrangement. If she had known that they had been invited, she stated that she would have known that the warrant was unnecessary.

192. She affirmed that at all material times she was cognizant of her power of entry under section 6 of the Misuse of Drugs Act, but she felt it was in the CBC's *"best interests"* to have the Warrant.

193. Ms. Schneider said she did not recall telling the Justice of the Peace of this other option, and she confirmed that she could provide no evidence that she did inform the Justice of the Peace of these options. The Warrant was *"the way to go"*.

194. She stated that Mr. Clifford, the First Respondent, had suggested that CBC get a warrant, and that she believed he told this to Ms. Campbell, who in turn told it to Ms. Schneider.

195. Ms. Schneider said she had been on a few searches, but this was the first search warrant executed, meaning the first one for which she was in charge.

196. Ms. Schneider agreed that nothing in her Witness Statement dated 30 September 2019 which alluded to a reason for applying for the Search Warrant being that Doctors Express did not withdraw the advertisement. She also agreed that there was nothing to this effect in her Affidavit of 10 February 2020 either. She said she did not know that at the time that she needed to put it in any of the documents. She agreed that there was no evidence of sale or dispensing contrary to the Cease Notice, but her suspicion was based on the fact that the advertisement had not been revoked.

197. The Warrant had been sought as a safeguard, and she could not agree that safeguard was not a reason to apply for a warrant, but she agreed that there were things on the Search Warrant that were not correct.

198. In an Affidavit dated 9 October 2019, Mr. Samuel Banks described the Applicants at paragraphs 4-6:

"The Applicants

4. *Doctors Express has been in operation for just over 2 years. In that time, it has filled a critical gap in the healthcare of the Cayman Islands. We have served to alleviate some of the pressure placed on hospital A&E departments by caring for patients with urgent, but not emergency, issues such as cuts that need stitches, bad burns and simple fractures. Doctors Express is open extended hours from 9am - 9pm, 7 days a week and helps provide access to after-hours care for patients with medical issues after their primary care physicians' offices have closed.*

5. *Doctors Express was founded with 3 principal objectives:*

   i. *To provide true patient-centered care by ensuring that everything we do is approached from the patients' point-of-view.*

   ii. *To be responsible stewards of antibiotics, ensuring that these critical medications are not over-prescribed which can lead to the emergence of drug-resistant super-bugs.*

   iii. *To do our part to ensure that the opiate epidemic that is presently ravaging the United States and elsewhere, ruining lives and inflicting untold suffering, addiction and death does not reach Cayman's shores. At Doctors Express, our physicians view the*

prescribing of powerful, addictive opiates as a last-resort to be explored only when alternative treatments are either not available or have proven ineffective.

6. *It is this last point that led the physicians at Doctors Express to consider medical cannabis as an alternative to the prescription of opiates for pain, benzodiazepines for anxiety and insomnia as well as for other, hard-to-treat conditions."*

199. Mr. Banks described the circumstances of the execution of the Search Warrant at paragraphs 23-25:

"The Raid of our Medical Facility and Offices

23. *At around 4.30pm on 17 September 2019 approximately 15 Customs and Police Officers raided the Applicants' medical facility and offices, purportedly executing a search warrant* ***("the Warrant").*** *A true copy of the Warrant is at page 8.*

24. *I was extremely shocked and embarrassed that the medical facility was overrun with Police and Customs Officers whilst the staff and doctors were trying to treat injured and ill members of the public. I was concerned that important medical treatment may be compromised by the disruption that was caused. Patients were also frightened and began asking what was happening; several left.*

25. I was also shocked that the Warrant alleged that we were in [presumably unlawful] possession of controlled drugs because, as set out above, we were in completely lawful possession of all the many prescription drugs on the premises."

200. In his Third Affidavit dated 29 May 2019, Mr. Banks makes the following important point at paragraph 9:

"Medical Cannabinoids Previously Available in the Cayman Islands

9. As I detailed in my first affidavit, the team at Doctors Express was not satisfied with the quality or the consistency of the medical cannabis products that were available on the market from other pharmacies. For this reason, we made the decision not to stock any products until we were certain that they were pharmaceutical-grade. When we realised that pharmaceutical-grade products were not available on the market, the decision was made to assemble a team of experts from around the world to formulate the highest-quality cannabis medications possible. From this ideal, Kaiser Day Cannaceuticals was founded in partnership and collaboration with industry experts in Canada, the USA and Israel. I believe the medical cannabis products that were formulated from this partnership are pharmaceutical-grade and are the most scientifically-advanced of their kind, free of any additives or adulterants, as evidenced by their certificates of analysis, attached hereto as Exhibit "SB-4"."

201. In the view of the Court the statement is important in two respects. First, it is entirely consistent with the comments made by the CMO in his email dated 14 September 2019. Secondly, at the time when he made the Statement Mr. Banks was completely unaware of the contents of the CMO's email, as they had at that point never been disclosed by the CMO.

202. The Court finds Mr. Banks throughout to be a reliable and credible witness.

203. Mr. Banks states at paragraph 19 the now uncontested fact that the law does not in any way restrict methods of administration of prescription medical cannabinoids and that vapourisable medical cannabis is lawful.

204. He describes the Applicants' informal receipt of the Cease Notice requirement in this way at paragraphs 21-22 of his first Affidavit:

"The CMO's Notice of 14 September 2019

21. Attached at page 5 is a true copy of a memo issued by the CMO on 14 or 15 September 2019 headed: "Cease Notice - Vaporisable Medical Cannabinoids" ("the Cease Notice"). Although the Cease Notice indicates that it was sent to "All Registered Health Care Providers" the Applicants did not receive it from the CMO or the Health Practice Commission ("the HPC") it until several days later. I cannot say why this was, however, since the Applicants are the only entities in the Cayman Islands prescribing vaporisable

medical cannabinoids it is regrettable that the CMO and the HPC did not send the Cease Notice to us. This is particularly so where they knew our email address, as evidenced by their decision to send the memo to us, presumably by coincidence (3 days later) half an hour after the execution of the search warrant at our medical facility and offices on 17 September 2019. Attached at pages 6 & 7 is a true copy of the email sending the Cease Notice to us.

22. In fact, although we did not get the Cease Notice from the CMO or the HPC, we did receive it from another source on 15 September 2019. As a result, in compliance with it, we did not prescribe or dispense any vaporisable medical cannabinoids thereafter."

205. In relation to the specific offence Mr. Banks states at paragraph 25:

"25. It should be noted that, when CBC and RCIPS showed up at our offices to serve the search warrant, the warrant specified that they had reasonable suspicion that we were in "possession of controlled drugs". As Doctors Express operates a fully-licenced pharmacy, there are a number of controlled drugs in which we were in lawful possession and it was certainly not clear which of those controlled drugs Ms Schneider and her team were there to seize. When I asked for clarification, she simply replied: "The THC vapes that were advertised in the text message." Accordingly, I escorted Ms Schneider to the pharmacy

and instructed the pharmacist to give all of the vape products that were locked in the controlled drugs locker to Ms Schneider."

206. As we should note, a principal reason for identifying the suspected offence is to inform the party affected as to what is the crime alleged as distinct from what is not the crime alleged. Here it was frankly done the other way around.

207. Mr. Banks the deals with entry at paragraph 30 of his third Affidavit:

> *"30. In section (e) of the Search Warrant Application, Ms Schneider has indicated "that entry to the premises will not be granted unless a warrant is produced;". This suggestion is simply wrong As I detailed in paragraph 20 of my First Affidavit, one of the first things we did after introducing the vaporisable THC products was to reach out to the RCIPS Drugs Task Force ("DTF") to ensure that they were aware of these products were on-Island so that there were no difficulties caused for patients with prescriptions. I personally spoke with DC Simpson (who was present at the raid) and had scheduled a meeting for him and his team to visit Doctors Express so that we could familiarise them with the THC vape products and the protocol for their prescription and dispensing. DC Simpson did not show up to this meeting and told me on the day of the raid that his superiors had informed him that the meeting had been cancelled. This was never communicated to us, so we were left wondering why the DTF did not show up to the meeting. It is, therefore, difficult to*

understand how Ms Schneider could have formed the belief that entry to the premises would not be granted in the absence of a warrant since her colleagues in the DTF had been invited for a tour only the day before the raid."

208. Finally Mr. Banks reiterates the effect of the Search at paragraphs 69-70 of his third Affidavit:

"69. As a result of the raid, the staff at Doctors Express experienced a serious loss of confidence in the management of the facility. The staff began questioning whether, due to the actions of, and comments made by, the CBC and the RCIPS and the defamatory articles that had been published by Cayman Marl Road, they had unwittingly been complicit in criminal activities. These are perceptions that are not easily overcome and are ones that we continue to battle to this day.

70. Finally, it is impossible to overstate the stress and hardships that I have endured as a result of the raid and the CMO's cease notice. I have personally suffered a loss of reputation as both a businessman and an officer of the court. My family and social life have both suffered due to the stress, embarrassment and hardships caused by these events."

209. The Court also notes that the Second Respondent, whose attorney Ms. Fosuhene attended for the latter part of the hearing, produced two Affidavits dated 27 October 2020 and 5 November 2020. Notwithstanding requests from both Mr. Gayle and Mr. Austin-Smith that she be available for cross-examination, unfortunately because of health issues it was not possible for the Second Respondent to comply with their requests. In the circumstances therefore although the Court has reviewed the sworn material the Court does not intend to give any weight to the matters therein set out.

210. There is however further a document to which the Court will refer before leaving the events comprising the Search.

211. It consists of a note made by Acting Chief Inspector Sean Bryan in relation to the obtaining of the Search Warrant. It is likely to have been recorded on or about 21 September 2019, judging by where it appears in a series of documentary disclosures. It provides some important insights into the events which have unfolded and in some significant respects it is a matter of regret that the Third Respondent did not pay a greater degree of heed to the concerns being articulated by Mr. Bryan.

212. The note reads as follows:

"Search at Dr's Express September 17 2019

1. What was the premise for the obtaining of a search warrant and pro-active actions taken?

Appears from warrant information that adverts via text may have been sent after the 14th of Sept when the CMO cease and desist order was issued.

When was the advertisement placed (before 14th but only came on line after?) was anything done to confirm if they appeared to be breaching the instruction? Was there any evidence on entering the premises at Dr's Express to suggest that they were still providing customers with Cannabinoid based Vapes in contradiction of the CMO memo?

Was the belief at the time of putting the operation in place that they were continuing to sell / provide prescribed vapes and seizure was only means to prevent the continued breach? If so can you evidence this?

2. *Search warrant, obtained under S14 of the MODL not s6 why?*

3. *Was s6 not the appropriate act and section?*

4. *What was the Offence being investigated?*

5. *What was the offence suspected of being committed?*

Need to compile a report urgently to address information received, rational for actions taken, rational for proceeding by means of search warrant (was speaking to the owners/operators considered (as they appear to have all the relevant licences to be in lawful possession on the THC/CBD vapes))

The application for the warrant was made in good faith though may have used the incorrect act and section, the application appears not to have been signed as approved by the appropriate officer. (Administrative issue or legal issue?) No named officer on the warrant is this administrative error and if so is it now a legality issue?)

<u>Need legal guidance regarding the following:-</u>

1. *A copy of the information laid before the Justice of the Peace at the application for the Purported Warrant.*

2. *The identity of the individual who made the application for the Purported Warrant.*

3. *A complete note of the evidence given on oath in support of the application for the Purported Warrant.*

4. *Copies of all materials placed before the Justice of the Peace at the application to grant the Purported Warrant.*

5. *A copy of the Justice of the Peace's written record of the application for the Purported Warrant.*

My understanding is that if this were a criminal investigation that resulted in charges then the defence would be entitled to ask to see all of the above as disclosure and the crown would potentially argue various PII issues as to why the information would not be revealed or otherwise.

At present Campbell's are speaking to a civil action, so would need guidance from legal as to how to) word refusal to provide requested items at this time

If no specific offence now appears to be committed can the urgent restoration of the seized goods be) considered with a proviso that they are stored and not dispensed in accordance with the CMO memo.

Would respectfully suggest someone from senior management team at CBC needs to respond to the Campbell's letter having full knowledge of all of the above."

213. While the Court does not necessarily accept the accuracy or validity of all the points being made by Mr. Bryan, whose knowledge of events was inevitably incomplete, nonetheless he identified some serious technical concerns which if they had been prudently acted upon might well have alleviated the consequences of this unfortunate history.

214. There were express concerns articulated as to why section 14 was invoked, why section 6 was not invoked, the nature of the offence suspected of being committed, the availability of notes and written records and perhaps most perceptively of all when was the advertisement placed and was it apparently placed in breach of the Cease Notice.

215. In light of these issues having been raised, it seems to this Court to be somewhat surprising that the Third Respondent continued seemingly to adopt the same arguments put forth respectively by the First Respondent when there have already been internally expressed and recorded these significant distinctions of perspective and enquiry.

The Formal Application for the Search Warrant and the Formal Grant of the Search Warrant

216. The Court will now set out the terms of both Ms. Schneider's sworn Application for the Search Warrant and the Search Warrant itself. The formal aspects of these documents which have been criticized by the Applicants will be identified, and the relevant governing principles of law will be considered and such legal defects as there are evaluated.

217. The text of the sworn Application reads as follows:

Application for a Search Warrant – Information

**delete as applicable*

(a) Application is today made before me the undersigned by ~~Senior~~ Customs and Border Control Officer CARO H. SCHNEIDER

for the issue of a search warrant under:

*Section 35 of the Firearms Law 2017 (Revision)

*Section 6 of the Misuse of Drugs Law 2017 (Revision)

*Section 45 of the Misuse of Drugs Law 2000 (Revision)

*[Section 262 – stolen property] of Penal Code (2013 Rev)

*[Section 111 *[Section 45] of Terrorism Law 2009 (Revision)

Other (please indicated which law and sections) [illegible]

The applicant says on oath that there are reasonable grounds for believing:

(b) that an offence, namely **possession of a controlled drug under Section 14 of the Misuse of Drugs Law (2017 Revision)**

(c) that there is on premises at **Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd, and Kaiser Day Pharmaceutical, Ltd. – Units 1-4 Corporate Plaza Block 13D Parcel 421, 281 Godfrey Nixon Way, George town, Grand Cayman, Cayman Islands**

(d) Items namely:

Cannabinoids which will be based by vaporisation

material that is likely to be relevant evidence and be of substantial value to the investigation of the offence and does not consist of or include items subject to legal privilege, excluded material or special procedure material, namely *(identify, as far as is practicable, the material sought):*

Depts containing THC extracts not approved , documents and electronic equipment

(e) **delete whichever of (i) to (iv) is NOT applicable:*

*(i) that it is not practicable to communicate with any person entitled to grant entry to the premises;

*(ii) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

*(iii) [illegible]

*(iv) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them; *AND*

(f) [illegible] that the warrant authorises entry on [illegible]

(continue over)

Date: September 17th, 2019. Signature of Applicant: CARO Schneider

This application was taken and sworn before me

*Judge/Magistrate/Justice of the Peace CATHLEEN O'NEIL Justice of the Peace ID# CO26110

Form

20

FURTHER INFORMATION:

1. All applications: Why do you believe that an offence has been committed? / Explain why it is believed the material sought will be found on the premises to be searched? / Why do you believe the materials sought are likely to be substantial value to the investigation? (continue on a separate sheet if necessary)

As per the advert received by Digicel customers which is as follows: "Medical Cannabis THC Vapes now available in Cayman! Exclusively at Doctors Express-745-6000. Hurry! While supplies last. Kaiserday.com/now-available".

As per Section 14 of the Misuse of Drugs Law (2017 Revision)- Instructions issued by the Chief Medical Officer (CMO)

"All Healthcare Practitioners cease and desist from the issuance, processing, dispensing or selling of any Cannabinoid which will be used by vaporisation until further notice"

2. Has this application been heard by any other Justice of the Peace or Magistrate? * YES / NO

3. Other information

Date: 17 Sept 2019 Signature of Applicant: [signature]

This application was taken and sworn/affirmed before me

*Judge/Magistrate/Justice of the Peace.

Justice of the Peace

ID# CO2611

For Customs Use

Application for search warrant approved by Assistant or above:

(name and rank)

Date: ..... Signature: .....

Search Warrant
Section 26 Criminal Procedure Code (2014)

*delete as applicable

Section 28

Whereas I/ the court am/is satisfied by information on oath that there is reasonable suspicion of the commission of the offence of possession of a controlled drug and it has been made to appear to this court/me that the production of the following article(s) is/are essential to the inquiry into the said offence:

possession of a controlled drug

This is to authorise and require you to enter upon and search the premises of Cayman Islands Urgent Care Ltd. T/A Doctors Express, Kaiser Day Cannaceuticals, Ltd. and Kaiser Day Pharmaceutical, Ltd, and if discovered to take possession of the said article(s) and produce the same forthwith before a court;

Returning this warrant with an endorsement certifying the manner of execution. Given under my hand (and the seal of the court) this 4 September 17th, 2019 at any time

*~~Judge/ Magistrate~~/ Justice of the Peace CATHERINE O'NEIL Justice of the Peace J.P. ID# CO26116

Form 2

COURT COPY - (return to the courts when executed)

Date/Time of Entry: .....

218. As the Court has previously remarked, until the closing stages of the hearing counsel for the First, Third and Fourth Respondents has declined to concede that any errors appear on the face of these documents, other than a minor error in relation to the stated address of the Applicants, a matter which the Applicants have consistently denied was an actual error in any case. Ultimately Mr. Gayle and Ms. Rambarran changed their position, to concede that there were unspecified errors on the face of the documents but that the errors themselves did not render the documents unlawful.

219. It is necessary therefore to identify and to rule upon these principal areas of contention as identified by the Applicants.

220. The first point related to paragraph (a) of the information and the statement of Ms. Holly Schneider that Application is made today for the issuance of a Search Warrant under Section 14 Misuse of Drugs Act (2017 Revision).

221. This statement is of course wrong because section 14 is not concerned directly or indirectly with the issue of a search warrant.

222. Ms. Schneider's application then states that there are reasonable grounds for believing an offence namely possession of a controlled drug under section 14 of the Misuse of Drugs Act (2017 Revision).

223. It is not even a matter of dispute that the Applicants had lawful authority for possession of a controlled drug, in the form of cannabinoids, by virtue of the licensing permissions which they held, and therefore this allegation is entirely false, nor as far as one can see is this even actually disputed by the First, Third and Fourth Respondents.

224. It is then alleged that there are items, namely cannabinoids, which will be used by vapourisation, material that is likely to be relevant evidence and to be of substantial value to the investigation of the offence (previously described as possession of a controlled drug). No further detail or specification is provided, other than to reference items containing THC extracts not approved, documents and electronic equipment.

225. It is then alleged at (e) iii), which is highlighted, that entry to the premises will not be granted unless a warrant is produced. This statement is wrong as well as misleading for two reasons.

226. First, as Ms. Schneider has sworn in her Affidavit dated 30 January 2020 at paragraph 16 that "*at all material times when I acted*" she was cognizant that the CBC, pursuant to the Misuse of Drugs Act (2017 Revision) has the power of search under section 6 of that Act. Paragraph 17 then states:

> *"17. As per section 6(1) of the MDL, the CBC may search premises without a warrant in circumstances where a CBC officer has reasonable grounds to suspect that a person is in possession of controlled drugs in contravention of the law, and the drugs are stored at the*

particular location. Further section 6(3) of the MDL allows the CBC to enter and search any premises with a warrant for the enforcement of the MDL and the Customs and Border Control Law 2018."

227. Secondly, apart from this extraordinary contradiction, the Court fully accepts the evidence of Mr Banks that he had invited a group of police officers to the premises for the day prior to the search. As Mr. Banks points out the Respondents had no grounds to believe entry to the offices or medical facility would not have been granted without a warrant.

228. This patently wrong proposition that entry will not be granted unless a warrant is produced is then compounded by the proposition at (f) that to achieve the purpose for which the Warrant is being applied it is necessary that the Warrant authorises entry to and search of the premises at any time. Once again, the Court finds the assertions to have no factual basis.

229. Then in a section headed *"Further Information"* Ms. Schneider sets out the text of the Digicel advertisement and restates an excerpt from the Cease Notice *"as per section 14"*.

230. Nowhere in the information is it expressly stipulated that the advertisement was published before the Cease Notice was issued or that the Cease Notice had even been served on the Applicants at the time of the application for the Search Warrant.

231. In the course of the hearing as a result of an exchange between the Court and Mr. Gayle, Mr. Gayle made clear that the sole evidential basis for believing that an offence had taken place was that the advertisement had not been retracted or revoked after the Cease Notice was issued. In those circumstances, if Ms. Schneider was seeking to set out the facts it was critically important to make clear that the advertisement came first in time, and that it did not come into existence after the Cease Notice and in breach of its explicit terms. On its face therefore the content of the section headed "*Further Information*" was dangerously misleading.

232. The Warrant itself follows and it confirms that the Justice of the Peace was satisfied by information on oath that there was reasonable suspicion of the commission of the offence of possession of a controlled drug. The Warrant goes on to state that it has been made to appear to the Justice of the Peace that the production of the following article(s) is/are essential to the enquiries into the said offence. The offence is then repeated, but no articles or items at all are listed.

233. The Warrant does not identify who is thus authorised and required to enter the premises. It does however require the authorised person to take possession of the said articles, "*and produce the same forthwith before court*". As far as is known, that requirement had not been complied with, and in any event Mr. Gayle argues that it is a formality only. The Court would only comment that ultimately these cumulative breaches of formality could undermine the rule of law itself.

234. However, these matters represent merely part of the landscape because Ms. Schneider states at paragraph 18 of her Affidavit dated 29th January 2020 that she had reasonable cause to suspect that the Applicants were in unlawful possession of a controlled drug with intent to supply in breach of the Misuse of Drugs Act. This reasonable cause for suspicion appeared to be that the Digicel advertisement had not been retracted or revoked following the issuance of the Cease Notice. This can only be based on the implicit assertion that the Applicants unknown to Ms. Schneider had accidentally become aware of the Cease Notice at a point before a copy of it was officially even sent to them.

235. Ms. Schneider has explained to the Court that the more serious offence was explained to the Second Respondent in the course of a 5 – 10 minutes conversation of which no record was made by either of them. The Court has already noted that Ms Schneider initially said that she did not tell the Justice of the Peace that the advertisement predated the Cease Notice, and later in her testimony she apparently stated the precise opposite.

236. Based on the weight to be attached respectively to her two competing accounts on this point, the Court concludes that Ms. Schneider's testimony is not reliable and persuasive, and that there is no evidence before the Court from which it can conclude on a balance of probabilities that Ms. Schneider discussed the offence of possession of a controlled drug with intent to supply and that she told the Justice of the Peace that the advertisement predated the Cease Notice.

237. In other words, in the absence of any reliable evidence to the contrary the Court accepts as a fact that the summary references in the information to both the advertisement and then to the Cease Notice amount to either a statement of or an alleged irresistible inference by Ms. Schneider to the Justice of the Peace that the Cease Notice came first and that the advertisement then constituted a breach of it.

238. The Court is unable to accept the sweeping assumptions which Mr. Gayle invites it to make. Ms. Schneider's information contains a series of false particulars. Even if she were telling the truth in some aspects, it would still be the case that a Warrant was issued which informed the world that it was for one offence when in fact it was meant for an entirely different one.

239. Then quite apart from the statements that Ms. Schneider did make there is the separate issue of the statements that she did not make. The Applicants submit that these omissions amount to material non-disclosure and a failure to put the evidence fairly to the Justice of the Peace.

240. The Applicants summarise their submissions in this regard at paragraph 68 of their Skeleton Arguments:

"Material non-disclosure and failure to put the evidence fairly to the JP

68) The Respondents claimed that the Applicants were in unlawful possession of drugs with intent to supply. This is an extremely serious allegation to level against members of the public

of good character, even more so against medical professionals with ethical responsibilities. The OIC's non-disclosure was extensive. Amongst other things, crucially, she failed to tell the JP that:

a) The CMO had issued the Applicants Import Certificates permitting the importation and possession of cannabinoids.

b) The Applicants had a Trade and Business Licence, authorising the carrying on of business as "an agent importer of cannabis extracts ... for medical purposes".

c) The Applicants had a certificate of Operation of a Healthcare Facility and Pharmacy which allowed them to possess, prescribe and dispense controlled drugs.

d) That HM Customs themselves had, through their request to the HPC, procured the Cease Notice.

e) That HM Customs wanted the medications detained (cf. were seeking them for evidence).

f) <u>That the text message advertisement referred to in the Information was sent before the Cease Notice was issued.</u>

g) The RCIPS had permission to enter the premises by appointment and consent the previous day.

h) That there was no basis to believe that the Applicants, aware of the Cease Notice, would go from working as doctors and pharmacists to drug dealers risking imprisonment for up to 15 years by breaching the terms of the Cease Notice."

241. The Court at this juncture will defer final consideration of these numerous arguments until it has identified and considered the relevant principles of law.

<u>The Law relating to Search Warrants</u>

242. The fundamental principle of law which is applicable to this case is found in *R. v. Ebanks Ex Parte Henderson* [2009 CILR 57] where Cresswell, Ag. J. states at paragraph 81:

"The function of a court or justice on an application for a search warrant

81. The purpose of the requirement that a search warrant be issued by a court or a Justice of the Peace is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorize a police officer to enter upon a person's premises, search his belongings and seize his goods, the function of the court or justice is to satisfy itself/himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The

law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing a police officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met (see Lord Hoffmann in Att.-Gen. (Jamaica) v. Williams (3) ([1998] A.C. at 358))."

243. It follows that where these high standards have been departed from, as the circumstances in this case show, the Warrant is rendered unlawful and invalid.

244. The learned Judge adds at paragraph 82 that it is for the court or the justice to identify the prescribed circumstances and to satisfy itself/himself that they exist. He then states:

> *"It is elementary that the identification of the prescribed circumstances will tum on the true construction of the particular statutory provision in question. In the present case, it is necessary to identify the prescribed circumstances on a true construction of s.26 of the Criminal Procedure Code (2006 Revision).*"

245. Both possession of a controlled drug and having in one's possession a controlled drug, whether lawfully or not, with intent that it be supplied to another person are offences set out in Section 3(1) of the Misuse of Drugs Act. The statutory provision governing neither offence is set out in the Warrant issued on 17 September 2019 as we have seen.

246. Cresswell, Ag. J. also addresses in detail the duty of full disclosure at paragraphs 90 - 95:

"The duty to make full disclosure

90. As to applications for injunctions or freezing orders, there is a duty upon an ex parte applicant for an injunction or freezing order to make full disclosure. In R. v. Kensington Income Tax Commrs., ex p. de Polignac (Princess) (17), Warrington, L.J. said ([1917] I K.B. at 509):

"It is perfectly well settled that a person who makes an ex parte application to the Court-that is to say, in the absence of the person who will be affected by that which the Court is asked to do-is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

91. In Bank Mellat v. Nikpour (6), Donaldson, J. said ([1985] F.S.R. at 90):

"This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law."

92. He then quoted the passage of Warrington, L.J. above and stated (ibid., at 91-92):

" ... [T]he court will be astute to ensure that a plaintiff who obtains an injunction without full disclosure-or any ex parte order without full disclosure-is deprived of any advantage he may have derived by that breach of duty.

The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Pillar order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked."

93. As to ex parte applications for search warrants, Feldman in The Law Relating to Entry, Search & Seizure, para. 4.53, at 90 (1986) states (in my opinion correctly) that-

"there is a duty on an officer who applies ex parte for a warrant authorising an invasion of property rights and privacy to put all material facts before the magistrate. This is analogous to the duty on applicants for ex parte orders in the courts. It includes a duty to raise all matters going to the foundation of the issuing authority's jurisdiction. It also includes a duty to put before the authority all matters relevant to the exercise of the discretion to refuse a warrant."

94. In Rea v. Gibbs (21), Collett, J.A. referred (1994-95 CJLR at 611) to the need to ensure that the facts are placed before the judge asked to grant a search warrant "fully and fairly." In doing so, he employed the language of Lord Coleridge, C.J. in Hope v. Evered (11) (L.R. 17 Q.B.D. at 340).

95. In Att.-Gen. (Jamaica) v. Williams (3), Lord Hoffmann referred ([1998] A.C. at 360) to the duty of the officer to disclose to the justice "all that the latter needs to know in order to discharge his duty."

247. In relation to the numerous areas of concern identified early in this Judgment it is only open to the Court to conclude that full and frank disclosure never took place.

248. For example, it was not explained to the Justice of the Peace that the Applicants were licensed to possess cannabinoids, that section 14 only prescribed the making of rules by the CMO, that up to that point in time no rules had even been made, that entry to the premises was available either by consent or under section 6 of the Misuse of Drugs Act (or both), that it was not necessary (whether desirable or not), that the Warrant authorised entry to and search of the premises at any time and that the advertisement of which complaint was made was published before the Cease Notice was issued. This is not intended to be an exhaustive list of the problems which have been reviewed in these proceedings. But it is a sufficiently long list to illustrate that the application for a Search Warrant was based upon false and misleading information, wrongly asserting that entry would not be granted unless a warrant was produced and that it was necessary, and

purporting to be on its face in respect of one alleged offence when in fact it is alleged to have been made for an entirely different one.

249. From beginning to end, when the law is applied to the facts, this was a complete failure to follow the law.

250. A practice which might have alleviated and arrested the development of these problems is identified by the learned Judge at paragraph 112:

> *"112. In my opinion, these extraordinary applications for search warrants should have been made to the Grand Court and not to a Justice of the Peace. Mr. Bridger knew that the complexity of the issues in the earlier applications for warrants in respect of three other persons had required several hearings and led to reasons extending to 51 typewritten pages. How could a Justice of the Peace be expected to deal with similarly exceptional and complex applications on police premises in a short space of time? The Chief Justice's approach on February 22nd demonstrates that, had he been asked to appoint a judge (if necessary, a visiting judge) to hear the applications, he would have done so. If Mr. Bridger's affidavit is to be read as suggesting that the Chief Justice would not have acted professionally had he been approached to allocate a judge to hear the matter, such a suggestion is in my opinion wholly unwarranted."*

251. Most unfortunately this operation was entrusted to a customs officer who had no relevant previous experience of taking charge of a search warrant and who by her own admission only read the relevant documents quickly and, it would seem, relatively superficially.

252. This application by Ms. Schneider was exceptional and complex. It gave rise to a variety of legal questions and factual questions which were never properly defined or elaborated. In addition, even if Ms. Schneider were to be believed on the issue, an application was being made in respect of an offence not even stipulated in the Warrant. As in the case of *Ebanks*, the Application should not have been made in the way it was and had it been made more appropriately it is likely that these accumulations of errors and misrepresentation would have been wisely avoided irrespective of whether the application succeeded or not.

253. A further perspective on the need to comply with recognised legal standards is found in *R. (Redknapp) v. Commissioner of the City of London Police* [2009] 1 WLR 2091 DC, where Latham LJ states:

> *"Turning then to the grounds upon which it is said that the warrant was unlawfully issued, the first thing that has to be said is that the failures that I have already referred to are wholly unacceptable. This court has complained in the past about slipshod completion of application forms such as this, the last occasion being the judgment of Underhill J in R (C) v Chief Constable of "A" Police [2006] EWHC 2352 (Admin). The obtaining of a search*

warrant is never to be treated as a formality. It authorises the invasion of a person's home. All the material necessary to justify the grant of a warrant should be contained in the information provided on the form. If the magistrate, or the judge in the case of an application under section 9, does require any further information in order to satisfy himself that the warrant is justified, a note should be made of the additional information so that there is a proper record of the full basis upon which the warrant has been granted. In the present case, the only evidence, apart from the information itself, was contained in the witness statement of DC Driscoll. He accepted that the description of the material sought was essentially the same as that sought in the earlier warrants, except for the words excluding from the search documents which attracted legal privilege or excluded material. His explanation for the fact that the same categories of documents and material were identified was that the July applications related to business premises in which excluded material and special procedure material might well be found, so that a warrant under section 9 and Schedule 1 was appropriate, whereas the sets of premises identified in the application with which we are concerned in general related to private addresses where such material was unlikely to be found. In any event, he said, any such excluded or special procedure material and any material subject to legal privilege would be properly treated, in other words separated and appropriately bagged. Nowhere did he say that he identified

to the magistrate which of the conditions in section 8(3) was the one upon which he was relying to justify the warrant."

254. This Court has already commented on the text of the Application form, and indeed the concession of Ms. Schneider and of the Respondents that there were deficiencies. This inevitably placed these Respondents in considerable difficulty, because if the obtaining of a search warrant is never to be treated as a mere formality, on what justifiable basis was this one even obtained?

255. Latham LJ provides helpful guidance on this point also stating at paragraph 16 that it is wholly unsatisfactory, where the validity of such a warrant is in issued, to rely on anything other than the application itself, and if necessary, a proper note or record of any further information given orally to the magistrate.

256. As we have seen, there is no note compiled in this case by either Ms. Schneider or the Justice of Peace and if one simply looks at the information it can only be relied on to show that the Warrant ought not to have been granted.

257. The Court now turns briefly to the broader proposition of the Applicants that in relation to whether there were grounds reasonably raising suspicion (presumably of possession of a controlled drug with intention to supply) there could only be and in the instant circumstances was the absence of any grounds for suspicion having been provided by the Application.

258. For example, the Applicants did not prescribe or dispense any cannabinoids vapes contrary to the Cease Notice and once aware of the Notice they complied with it fully. Indeed, no criminal investigations appear to have taken place after the Warrant was executed, and as we learn no one was ever charged with any offence.

259. In *Gibbs v. Rea* [1998] A.C. 786 Gault J. for the majority in the Judicial Committee of the Privy Council states at page 800 D-H - page 801 A-B:

> *"In the absence of any suggestion of possession by the police of information from any other source, the evidence of the absence of any grounds for suspicion having been provided by the plaintiff himself must be accorded weight. When all of the factors mentioned are knitted together they form a circumstantial case of the absence of any grounds upon which a person could reasonably suspect him of trafficking in drugs or benefiting therefrom. Having regard to the consideration that when the plaintiff has to prove a negative in relation to matters which were within the knowledge of the defendant, slight evidence will suffice to require an answer from the defendant, Mr. Rea's case called for an answer. Moreover a person alleging invalidity, indeed malicious procuring, of a warrant should be entitled to expect to be informed of the grounds for its issue unless there are good reasons for withholding such information. That the defence did not offer any reason or take any step to explain the grounds relied on to secure the warrants is the*

more surprising considering that, had there been concern that disclosure might prejudice drug investigations, the courts would have ensured all necessary protection by allowing public interest immunity. Any challenge to that could have been dealt with in such a way as to protect the information and its sources.

The silence of the defence was maintained when some answer was called for. The absence of any answer supports the inference that there was no satisfactory answer and the detective inspector had no sufficient grounds, even though all that were required were grounds reasonably raising suspicion.

If the detective inspector had no sufficient grounds for suspicion yet satisfied a judge that he did, in light of his subsequent conduct, it can be inferred that he knew the true position at the time. To procure the warrants in that state of mind was to employ the court process for an improper purpose (such as simply a fishing expedition). The further inference of improper purpose similarly called for answer, yet none was given. The further finding of malice therefore also was open to the Court of Appeal.

As these conclusions are matters of inference from primary facts on which there was no dispute, their Lordships accept that they were no less open to the members of the Court of Appeal merely because, unlike Harre C.J., they did not hear and see the plaintiff give evidence.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The defendants must pay the plaintiff's costs before their Lordships' Board."

260. Applying these considerations to the present case, it is impossible to conclude that there were or are any grounds for suspicion that the Applicants have committed any offence at all.

261. The Court specifically enquired of Mr. Gayle as to how failure to retract or to revoke the advertisement could in itself amount to any reasonable suspicion of the trafficking of drugs or even possession of drugs unlawfully. He indicated to the Court that there was a duty to withdraw the advertisement. When pressed as to whether that duty for example was fiduciary, contractual, statutory or otherwise, he suggested that it was statutory. However, he failed to identify any statute where the duty which he relied upon is actually set out.

262. In the opinion of the Court there is no such duty. It does not exist.

263. With regard to the principles of law governing specificity in identifying the material to be seized there are two further connected issues to consider, the description of items and the offence or offences to which the items in question appear relevant.

264. To begin with the items themselves, some general guidance is found in *Lees et al v. Sulihull Magistrates' Court and the Commissioner for HM Revenue & Customs* [2013] EWHC 3779 (Admin), Tracey LJ states at paragraph 41:

"41. It is clear that the parameters of the material identified to the Magistrates was by reference to specific offences under investigation and connection to the three named companies. Given the vague and general terms contained in the four bullet points and the absence of precision in contrast to the information provided to the Magistrates, I am satisfied that there was a failure to identify, as far as was practicable, the articles sought. Whilst the officers executing the warrant may well have understood the basis which underlay their search, that is nothing to the point. The occupiers of the affected premises were not in a position to know from the warrant itself the extent of the powers of search and seizure available to the officers. It is an essential part of the citizen's safeguards that he or she can learn of the scope of the authorised search from the warrant rather than from the warrant as interpreted by the executing officers."

265. We see therefore that the scope of the material identified is to be so identified by reference to specific offences.

266. Another way to put this proposition is that the material being sought is likely to be relevant evidence. This is illustrated in *Archbold Criminal Pleading, Evidence and Practice* 2020, paragraph 15 – 98, where it is stated:

> *"A justice issuing a warrant under s.8 must be satisfied that there are reasonable grounds for believing that the material sought "is likely to be relevant evidence" (s.8(l)(c)); warrants authorising search for "all material deemed relevant" (R. (Superior Import/Export Ltd) v HMRC: and Birmingham Magistrates' Court [2017] EWHC 3172 (Admin); [2018] Lloyd's Rep. F.C. 115) or "any other items which appear relevant to the offences under investigation" (R. (Cheema) v Nottingham and Newark Magistrates' Court [2013] EWHC 3790 (Admin)) are impermissible, because they delegate to the executing officer the decision as to relevance."*

267. Mr. Gayle's contention is that the Warrant was not granted in relation to the offence of possession of a controlled drug but in relation to the unstated offence of possession with intent to supply. Clearly there was no basis for claiming as the information did that the items were likely to be relevant and of substantial value to the investigation of the offence of possession in that the Applicants were fully and lawfully licensed to possess the items in any event. Alternatively, in relation to the offence of possession with intent to supply, no evidential basis has been made out

to show reasonable grounds for suspicion that the items themselves provided any evidence of that intent, especially as they were themselves items held entirely lawfully.

268. At no point have the First and Third Respondents attempted in any way to establish an evidential connection between the specified items and the offence now seemingly upon which their reliance is placed. If the possession was indisputably lawful, in what way could the mere possession of the items in any conceivable way give rise to any suspicion of intent to supply?

269. Quite apart from that difficulty, if the sole basis for suspicion is the advertisement alone, preceding as it did the Cease Notice, how could these specific items be of any probative value in relation to showing a criminal intent at all? No basis was ever made out for entering the premises to search for these items when simply they would not have assisted the Crown in any respect whatsoever.

270. Both in practical terms and in conceptual terms the execution of this Search Warrant was completely pointless.

271. This lack of purpose, or perhaps for sake of argument, apparent lack of purpose was never put to the Justice of the Peace as it should have been put.

272. The applicable legal principles are illustrated in *R. (Rawlinson & Hunter Trustee and others) v. CCC and R. (Robert Tchenguiz and R20 Limited) v. Director of the SFO and others*, [2012] EWHC 2254.

273. The President of the Queen's Bench Division stated the duty of disclosure at paragraph 81- 82:

"(iii) The SFO's duty of disclosure

81. It is common ground that the Director must put before the judge not only all the necessary material so that the judge can satisfy himself that the statutory conditions for the grant of the warrant are fulfilled, but there must be full and complete disclosure to the judge, including disclosure of anything that might militate against the grant: see Bingham LJ in R v Lewes Crown Court ex p Hill (1991) 93 Cr App R 60 at 69 and Kennedy LJ in R (Energy Financing Team) v Bow Street Magistrates Court [2006] 1WLR 1316 at 1325. The last obligation was elegantly phrased by Hughes LJ in Re Stanford [2010] 1 WLR 941 at paragraph 191 in stating that the advocate must

> *"put on his defence hat and ask himself, what, if he was representing the defendant or a party with a relevant interest, he would be saying to the judge."*

82. All of this was made very clear in the SFO manual. The judge must be given information to make an informed, balanced and fair decision. There was "a particular duty to disclose to the court all known material facts which may be relevant to the Judge's decision, including matters which indicate that the issue of a warrant might be inappropriate".

274. Regrettably in this regard as in so many others the Third Respondent in particular has fallen far short of that standard.

275. The learned President also provided valuable insight into the need to record a clear summary of what transpired:

> *"(i) The need for a clear summary of the case*
>
> *92. The task faced in making a fair presentation to the judge in the present case was formidable, as the background we have already set out makes clear. We regret that we have concluded that the Information and oral evidence provided to the judge failed properly (1) to present the matter in a manner which fairly set out the background, (2) to set out the chronology, (3) to make clear in an analytical and fair manner what the allegations were and (4) to set out the matters which weighed against the issue of the warrants."*

276. The same criticism is entirely applicable in the present case. Not only was there no fair and rational presentation but there was also no summary of any kind that would allow for transparency and scrutiny.

277. It is not the duty of an applicant for a search warrant either to hide the truth or to enable the truth to be hidden, and the latter failure which happened here can be just as serious as the former one.

The Legal Basis for a Search Warrant

278. In the course of his Submissions Mr. Gayle sought to draw a contrast between the power of search set out in section 6(1) of the Misuse of Drugs Act, which refers to a constable or customs officer having *"reasonable grounds to suspect that any person is in possession of a controlled drug or scheduled substance in contravention of this Law"*, and the language used in section 26 of the Criminal Procedure Code.

279. Section 26 states:

"Search warrants

26. Where a court or a Justice of the Peace is satisfied by information on oath that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, ship, vehicle, box, receptacle or place, such court or Justice of the Peace may, by warrant (called a search warrant), authorise a police officer or other person therein named to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in

the warrant) for any such thing and, if anything searched for is found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law."

280. As the Court understood Mr. Gayle's submission, it was that the language employed under the Criminal Procedure Code permitted a lesser standard for satisfaction then that required of a Customs Officer. In other words, "*reasonable suspicion*" would be a proper basis for issuing a search warrant even if reasonable grounds to suspect have not been made out. He then submits that reasonable suspicion in instant case had at least been made out.

281. As this Court has already emphasized, there was no basis for suspicion of any kind. However even if there was such suspicion, the Court is firmly of the view that in the case of a warrant sought under section 6(3) of the Misuse of Drugs Act there must first be established actual reasonable grounds to suspect.

282. The Court would only add its view that in the case of a Criminal Procedure Code Warrant, unrelated to the Misuse of Drugs Act in the Cayman Islands, even a reasonable suspicion cannot be found without reasonable grounds to do so.

Was the Decision to seek and to obtain the Search Warrant motivated by an improper purpose which was itself unlawful?

283. A number of relevant features emerge from the background which provide both individual and collectively a broad understanding of how these most unfortunate circumstances may have come about.

284. The CBC became aware of the advertisement published on 10 September 2019. CBC then contacted the Health Practitioner Commission with a view to ask if that body could request that the product, *viz.*, the cannabinoid vapes advertised by the Applicant be detained until a decision of an unspecified matter had been reached.

285. By 13 September 2019 this request had been communicated to the HPC and the HPC had agreed to a draft Cease Notice which was then sent to the CMO.

286. It is also known that on 13 September 2019 the CMO conveyed orally to Mr. Banks the statement that the text message had ruffled quite a few feathers and that a lot of people were expecting the CMO to do something about it. There is no indication that the CBC contacted the CMO in person, although it appears from paragraph four of Ms. Schneider's Affidavit dated 29 January 2020 that attempts were made to contact the CMO and the Chief Pharmacist.

287. Although the CMO's Cease Notice does not itself articulate cannabinoid vapes as the explicit cause of concern, nonetheless the draft notice Warrant having been sent to the CMO did in fact refer to the investigation of vaping products by the Center for Disease Control and the Ministry being concerned about the serious health risks associated with the use of vapourisable medical cannabis.

288. It is a strong inference that this consideration as presented was intended to be the justification for issuing the Cease Notice, as distinct from any other justification that has come to light in the meantime.

289. This concern should be viewed in combination with the statement of Ms. Schneider at paragraph 12 of her Affidavit dated 29 January 2020 that there was no record which indicated that approval was given for the importation of "*the vapes pens (e- cigarettes) and or cannabinol containing e-liquids*" in the name of the Applicants.

290. The Court accepts as a fact that the CBC was ultimately responsible for moving this matter forward and for successfully ensuring that the Cease Notice was issued.

291. That was not of course the end of the story but certainly it was the beginning.

292. In light of the object of the CBC to detain the items themselves, the next question was as to how that could be done or should be done.

293. This is set out in paragraph (d) of the application for the Search Warrant by way of identifying the items searched in the following terms "*items containing THC extracts not approved, documents and electronic equipment.*"

294. The nature of this description reveals that the CBC continued to be concerned with whether items "*containing*" THC extracts were not approved, as distinct from items simply comprising THC itself.

295. In the view of the Court, this history when carefully considered explains why the CBC was primarily if not exclusively concerned with issues other than whether offences under the Misuse of Drugs Act had been believed to have been committed.

296. Unfortunately instead of pursuing its investigation in a more orthodox way and invoking the powers lawfully open to it the CBC chose to proceed by way of seeking a Search Warrant.

297. The problem which then arose was as to the conceptual basis for seeking the warrant, and given the chaos which ensued it appears that this dilemma was never fully resolved either in law or in fact. Ms. Schneider applied for one form of Warrant on its face and then acted as though she had been granted another one entirely.

298. Where as here the CBC sought and obtained the Search Warrant for an improper purpose, then it was necessarily obtained without reasonable grounds to do so, and accordingly it ought to be quashed.

Legal Submissions in relation to the Search Warrant

299. The Applicants submit in their Skeleton Arguments that the Search Warrant was not lawfully issued because there was no evidence before the Justice of the Peace to demonstrate reasonable grounds to suspect the Applicants committed the offence of possession of a controlled drug with intent to supply or possession of a controlled drug unlawfully. It is accepted that the Applicants had permission to possess a controlled drug and that permission had not itself been revoked.

300. There is also a series of critical technical deficiencies on the face of the Warrant and a further series of criticisms as to material non-disclosure on the part of Ms. Schneider. These matters have been set out earlier in this Judgment and it is unnecessary to recite them in detail.

301. The Applicants also submit that there is no evidence that entry would not be granted without a warrant.

302. A troubling aspect is summarised at paragraph 67 of the Skeleton Arguments:

"67) Damningly, the OIC admits that a warrant was unnecessary. She claims in her own sworn affidavit:

> *"<u>At all material times when I acted, I was cognizant</u> that, the CBC, pursuant to [the MDL] has the power to search under section 6 of that law ... <u>the CBC may search premises without a warrant</u> in circumstances where a CBC officer has reasonable grounds to suspect*

that a person is in possession of controlled drugs in contravention of the law, and the drugs are stored at the particular location." (emphasis added)

This sworn statement is completely inconsistent with the evidence given on oath in support of the Warrant. Either the OIC believed she needed a warrant or she didn't - both statements cannot be true. Either her evidence to the JP was untruthful or her evidence to this court is. In either case the Warrant application is irretrievably damaged by the OIC's own admission. Equally, the OIC's credibility as a witness is, on the most charitable analysis, very seriously damaged. The Applicants submit that this is evidence that can equally be construed as a willingness by the OIC to lie on oath to achieve her objectives. It is evidence of bad faith."

303. Finally the Applicants set out their principal submission as to non-disclosure at paragraph 81:

"81) The judgment in Henderson was damning in the extreme about the extensive disclosure and procedural failures by those applying for the search warrant and the actions of the JP granting it. The Court concluded:

"Material facts and matters were not set out fully and fairly in the information or the oral statements. The [JP) was not told all that he needed to know to discharge his duty. He was not given full assistance. Matters that militated against the issue of a warrant were not drawn to his attention. The jurisdiction was (to borrow the words of Laws, L.J. in Jennings

v. CPS [2006] 1 W.L.R. 182, at para. 56)) " ... conscripted to the service of any arbitrary or unfair action ... " by the police officers concerned. The failures and misrepresentations individually and collectively evidenced and reflected the gravest abuse of the process. I have no hesitation in granting the relief sought..."

This passage could have been drafted with the instant case in mind."

304. This passage is particularly helpful as it draws together the recurrent themes of procedural failure, material non-disclosure, misrepresentation and abuse of the process of the Court. In a sense therefore it is a concise collective summary of the Applicants' case.

305. In their Supplemental Skeleton Argument dated 4 November 2020 in relation to the Search Warrant the First, Third and Fourth Respondents repeat the fundamental contentions at paragraph 16 that it was the responsibility of the Applicants (despite any error on the Warrant) to have provided CBC Officer Ms. Schneider with evidence that they no longer intended to supply contrary to their advertisement to all Digicel users, prior to her execution of the Warrant and this was not done.

306. This statement, which reappears in numerous contexts, contained a number of features. First, there is no legal basis for the responsibility to be imposed. As a matter of law, there is neither a responsibility nor a duty to provide the evidence described. Furthermore at no time was there any evidence that the Applicants intended to supply a controlled drug unlawfully either by reason of the advertisement or for any other reason.

307. This is consistent with the comparable submission made at paragraph 8:

"8. CBC Officer Schneider, in seeking to enforce the process Cease and Notice obtained (which amounted to a temporary ban), initiated the process and obtained a warrant -on the basis that the advertisement, which had not been retracted (nor was an issuance via the same medium or similar scope made by the Applicants that they did not intend to stand by their advertisement), is evidence of the continued intent to supply."

308. Once again, it is a fallacy to assume that the Applicants must provide evidence of lack of intent as distinct from Ms. Schneider having to prove some evidence of intent in the first place.

309. The alleged presumption that there are reasonable grounds for suspicion of an offence unless the party suspected provides evidence to the contrary is both false and dangerous.

310. The advertisement itself having been published before the Cease Notice is no evidence which could support a reasonable suspicion of either unlawful possession or possession with intent to supply.

311. Even if this extraordinary assertion were valid, in any event no evidence has been adduced which establishes on a balance of probabilities or at all that Ms. Schneider explained to the Justice of the Peace that the lack of a retraction was the reasonable grounds for suspicion. There is no evidence that this happened, and even if it did happen it would still amount to an allegation which was of no probative value whatsoever.

312. Again, the Court notes with concern the terms of paragraph 24:

"24. The letter /correspondence sent by the Applicants after the fact stating that they did not intend to dispense (that is after the execution of the warrant) was too late. It should have been sent before the execution of the warrant to negative or remove suspicion from Officer Schneider/Crown that the Applicants intended to stand by their advertisement to supply vaporizable cannabinoid despite the Cease Notice."

313. At no time have the Applicants either supplied vapourisable cannabinoids despite the Cease Notice or given the slightest indication that they intended to do so. If it is being suggested as it is that failure to allay suspicion or remove suspicion is itself the sole cause of suspicion arising then the Court can only describe the submission as unfairly prejudicial, completely circumstantial and contrary to the public interest. Here there is either evidence or no evidence. There is no scope for anything in between.

314. With regard to formality, the First, Third and Fourth Respondents submit at paragraph 49 of the original Skeleton Argument, dated 5 August 2020 that the common formalities for a valid search warrant as outlined in Schedule 2 of the Criminal Procedure Code (2019 Revision) have been satisfied.

315. More particular, it is alleged in paragraph 51 that a defect in the Warrant does not necessarily or at all make the Warrant invalid for the purposes for which it was issued, in the overall width of the case.

316. All that the Court can usefully state about these broad generic statements is that in relation to the facts and circumstance outlined in this case they are clearly inapplicable. Both the gravity and the number of the technical deficiencies are overwhelming and in all likelihood are without precedent in the Cayman Islands. The contention that they do not render the Warrant void or invalid nor render the entry and search unlawful is highly implausible and very surprising.

317. The Court would add that at no point in their presentation have the First, Third and Fourth Respondents addressed or indeed sought to come to terms with the breadth of the case made against them, in particular that the Cease Notice and the Warrant were both procured and executed for improper purposes and that the allegations of suspicion of criminal conduct directed at the Applicants were at all times baseless and unjust.

318. It is now necessary to consider a number of matters set out in the Revised Skeleton Argument of the Second Respondent dated 6 November 2020.

319. As the Court has already made clear, it is unable to see its way to giving any weight to the two Affidavits sworn by the Second Respondent in light of the fact that for health reasons she was unfortunately unable to attend for oral cross examination.

320. Nonetheless, on her behalf Ms. Fosuhene has submitted a comprehensive set of legal submissions of which the Court makes careful note. It is unnecessary and indeed impractical to set out the full content of these submissions but among the comments made are a number which pertain to not only the Second Respondent's defence, but also to the wider merits which the Court is required to evaluate and determine. Bearing in mind that no weight will be given to the Second Respondent's evidence itself, it is also appropriate to set out these submissions in some depth.

321. Ms. Fosuhene set out an important preliminary observation at paragraph 7:

"7. It is has not been suggested on behalf of the 1st, 3rd and 4th Respondents that the application for the warrant was made under s3(1) (m) of the Misuse of Drugs Law. Importantly, the information on the warrant application and the unsigned first statement of Officer Schneider clearly state the contravention of the Law fell under S14 and not S3. The unsigned statement suggests that the contravention was a failure to make a truthful statement. It is important to cite sections 13, 14 and 15 of the Law, for a full appreciation of the powers of the officer. The relevant sections read as follows:-

13. The Cabinet may make regulations -

(a) amending Schedule 1 or 3 (whether by addition or deletion, or by transfer from one Table in a Schedule to another);

(b) for the control of the import, export, transport and storage of controlled drugs; and

(c) prescribing anything required to be prescribed under this Law or any regulation,

and may thereby make provision for penalties consequent upon any contravention thereof and for contravention of any rules made under section 14,

which penalties shall not be limited to the provisions of paragraph (b) of section 27 of the Interpretation Law (1995 Revision).

14. The C.M.O. may make rules for inspection, keeping of inventories, and general control and distribution of controlled drugs in the hands of persons authorised under this Law to be in possession of the same, and every such person shall, at the request of the C.M.O. or of any constable, give full information as to the controlled drugs in his possession and the whereabouts of the same and account for the distribution of all such drugs as have passed through his hands.

15. A person who resists any lawful arrest or search or gives to any constable, customs officer or the C.M.O. any information of a kind required to be given under this Law in the truth of which he does not believe (the onus of proof of his belief being upon him) commits an offence.

322. At this juncture it is important for the Court to remind itself of the unsigned statement of Ms. Schneider, wrongly dated 25 September 2019 and later adopted by her as oral evidence. The final a numbered paragraph states:

- *It was the belief of CBC that Doctors Express failed to make a truthful declaration, and if a search was not conducted as per Section 14 of the Misuse of Drugs Law, a true account of the quantity and products would not have been obtained."*

323. In effect, Ms. Fosuhene has very skillfully pointed out the way in which the justification for the Search Warrant had radically evolved overtime. Under section 15 of the Misuse of Drugs Act a person who gives to any customs officer, *inter alia*, any information of a kind required to be given under the Law in the truth of which he does not believe the onus of proof of his belief being upon him commits an offence. It is of course confined to information of a kind required be given under the Law as distinct from information at large.

324. The point is developed at paragraph 9:

"9. The Cease Notice specifically sites S14 of the Misuse of Drugs Law as the power being exercised by the CMO to issue the notice. It is accepted that S14 does provide the CMO with the power to make rules as distinct from regulations. However, S14 does not provide a penalty for the contravention of the rules made by the JP. The ability to provide any penalty for contravention of the rules lies in S13 and S15 of the same Law. S13 gives Cabinet the power to set penalties for a breach of rules under S14 and S15 specifically has a number of pre conditions which must be satisfied before an offence is committed. A simple contravention of S14 therefore may not be an

offence without Cabinet making the relevant regulation. At the time of the application for the warrant there was no breach of S15."

325. At paragraph 11 the submission is made that even if they were a contravention under section 14 there is no punishment under section 14 without the Cabinet having provided a penalty.

326. Then at paragraph 13 the position of the Second Respondent is defined in this way:

*"**Officer Schneider's Reasonable Suspicion***

13. It clearly is a matter for the representatives for the 1st, 3rd and 4th Respondent to argue whether or not Holly Schneider had a reasonable suspicion of an offence in contravention of the Law and further to satisfy the court that she had jurisdiction to investigate such an offence and further whether the sufficiency of the investigation could have left her with a reasonable suspicion of the commission of an offence. No matter the answers she gave, it is obvious that on the face of the application placed before the JP that the JP was given a very clear impression by Officer Schneider that:-

- *Officer Schneider had a reasonable suspicion that an offence had been committed and*
- *A warrant was necessary, despite the powers which existed under the Misuse of Drugs Law to search without a warrant.*

Importantly it would have been open to officer Schneider, if she had a reasonable suspicion that anyone had been in contravention of S14 and attempted to conduct a lawful search, that a refusal to permit her entry to conduct a lawful search, of it self, would have been an offence under S15 of the Law. In any event so long as the JP was of the belief that officer Schneider had a reasonable suspicion that an offence had been committed and that a warrant was necessary to secure evidence, then she would have had a proper foundation for believing a warrant should be issued. Irrespective of the failure by Officer Schneider to make proper disclosure."

327. It is then submitted that there was a material failure to disclose very important information to the Second Respondent.

328. This is elaborated in an important passage at paragraph 15:

"15. It is clear that at the beginning of the document, the JP is informed that the search was for a contravention of S14 of the Law. That would clearly indicate that the contravention was contrary to the Cease Notice. There is further support for this proposition because the S14 is not only quoted in the heading it is also quoted in the further information on the Application and the Cease Notice cited. The Contravention which is indicated is the advertising though Digicel of the sale of Cannabinoids. It is noted that nothing in the information placed before the JP suggests that the advert was sent out 4-5 days prior to the Cease Notice. The application on the face of it alone would give anyone the clear impression that the advert was in contravention of the Cease Notice.

It must be, otherwise there would be no need for the inclusion of both the advert and the Cease Notice on the warrant application. Officer Schneider failed to tell the JP that the Cease Notice was post the advert. Indeed one might have thought that prior to asking for a warrant, officer Schneider might have either had a complaint that a sale by Doctors Express was made after the Cease Notice was issued or someone with authority would have enquired of Doctors Express whether or not they were dispensing the restricted medication. It appears that no such investigation was conducted. However, the JP would not and could not know."

329. In paragraph 16 a direct question is raised as to Ms. Schneider's credibility, bearing it in mind her statement as to Doctors Express' failure to make a truthful declaration:

"16. On behalf of the second Respondent concern is raised by the unsigned statement of Officer Schneider. It would appear that contained at the very end of that statement is her reasoning for the search, which was not based upon the advert but in fact upon an untruthful declaration. The JP was never told that the search was on the basis of an untruthful declaration but as per the application before the court, it was based upon the advert which was in contravention of the Cease Notice. More troubling for those representing the 2nd Respondent is the fact that it has now been suggested on behalf of the 1st 3rd and 4th Respondent that there was an error on the face of the Application for the warrant and that the search was for possession with intent to supply. It is submitted that the information between Officer Schneider's first

unsigned statement, the second signed statement and the representations at court are at odds with each other and ultimately cannot be relied upon."

330. Ms. Fosuhene returns to the issue of access to the premises at paragraph 21, and once again she juxtaposes the issue with that of Ms. Schneider's credibility:

> *"21. The fact remains, on the face of the application at paragraph e and f, the officer has indicated to the JP that a warrant was NECESSARY to gain access to the premises. The face of the warrant suggests that access would not be gained without the warrant. It is submitted it is not for the JP to go behind every single line of the warrant to ascertain what is and what is not the truth. The fact that the warrant is on oath presupposes that the officer is telling the truth on the information submitted in the application. The JP is entitled to rely upon that. It is the duty of the officer to provide all and any relevant information to the JP particularly if there is anything which might undermine the content of the application. However, if there is evidence which is capable of undermining the basis of the application, then it should be disclosed to the JP because in such cases the information could result in the warrant being refused. Moreover in this instance if the information was disclosed it is more likely that the JP would have questioned the necessity for the warrant. It is only with the benefit of hindsight that we can see the JP was simply not put in a position to properly consider the application because of the non- disclosure of by the officer, nothing was*

presented to the JP which would suggest she should not issue the warrant or that showed that there was evidence which might sway her decision to the issue the warrant. Naturally, had the JP been provided with the correct information and a proper chronology of events particularly with regards to the dates of the advert and the warrant, it is argued that she would not have issued the warrant."

331. At paragraph 27 it is submitted that in terms of the Second Respondent's belief and the information which had been given to her, she would have had no reason to doubt the credibility of Ms. Schneider providing the information to her:

"Ultimately, each case will tum on its own facts and it is a matter for the court if the defects on the face of the warrant render the warrant unlawful. However, it is submitted on behalf of the JP that the information provided to her was sufficient on the face of the application for her to believe a warrant was required for the offence contained on the face of the warrant. Moreover, the JP could have properly issued the warrant on the basis of the information gleaned from the face of the application alone which clearly gives the information that a warrant was necessary in order to gain access to the premises, whether or not this was in fact the case and whether or not the information provided by the Officer was true. "

332. The Court has some reservations about these submissions, especially in light of the dictum by Cresswell, Ag. J. as to the duty of an issuing authority being of high constitutional importance and the law relying upon *"the independent scrutiny of the judiciary."*

333. However, if an application is presented on a series of false and misleading premises intended to be acted upon, and then is acted upon, the conduct of the justice of the peace must be viewed in a light that subject to the unrecognized obstacles to scrutiny which have been placed in that justice of the peace's path. To that extent at least the point made in paragraph 27 is a valid and significant one.

334. A similar point is made at paragraph 31:

> *"31. The fact remains that in this case the 2nd Respondent had in her own mind sufficient information presented to her which allowed her to issue the warrant, such information having been based upon her own assessment of that information. No matter how incorrect the information presented to her was, it if was presented to her and if in good faith she acted upon it, the JP would not be at fault for issuing the warrant."*

335. With great respect, this statement is of an exclusively exculpatory nature, and given the comments of the Court above as to the need for judicial scrutiny, it must be said that reliance on good faith alone is clearly not enough. Enquiry is also still called for even when one is presented with misrepresentation and evasions.

336. In all the circumstances the Court is unable to find that there was sufficient credible and reliable evidence to conclude that the Second Respondent had any reasonable and probable cause to believe that an offence adequately identified and described had been committed and that the evidence of that offence would be found at the specified premises. Equally, the Second Respondent was unfairly placed in an invidious position and despite her lack of scrutiny and inquiry the Court had no reason to doubt that she acted both honestly and in good faith at all material times.

337. Because of the unusual and complex background to this judicial review application it was extremely important that the background should be conscientiously set out. The fact that the offence identified on the application bore no relation to the stated offences prescribed in the Misuse of Drugs Act and that the items identified could not provide evidence of the offence or offences alleged should have given the Justice of the Peace reason to pause and to ask what precisely was going on.

338. Finally, the Second Respondent draws her submissions to a conclusion at paragraph 36:

"REMEDIES

36. The court has also been asked to quash the warrant. The application is based upon a number of assertions made by the Applicant. It is submitted in this instance that the warrant could be quashed on the basis that the information which was provided to the JP was plainly misleading. The advert/ adverts had not be current at the time of the Cease Notice. Nothing was done to inform the JP that the Cease Notice post dated the advert contained in the application. Moreover, despite the evidence on oath that it was necessary for a warrant to be issued in order to conduct the search, the officer plainly had no basis for highlighting that on the application. There had been no request made no request of Doctors express to warrant a search on the basis that Doctors Express made a false declaration. There had been no penalty imposed by Cabinet under s13 for the contravention of S14. Doctors Express also had no requests made of them which would place them in contravention of S14 or S15, as such it is questionable as to whether there was any offence which was being properly investigated by the officer in contravention of the Misuse of Drugs Law. However, without clear and honest evidence from the officer the JP would not and could not have gleaned any of this from the application placed before her. In all the

circumstances the court could properly quash the warrant on the basis that the Officer failed to disclose pertinent material to the JP. Alternatively if the officer was incorrect about an offence being disclosed then the JP would have been mislead, whether inadvertently or otherwise by the officer as to an offence having taken place at all."

339. The Court finds this summary to be very helpful, reducing the case to elemental facts and principles and bringing rational perspective to a host of confusions and obscurities.

Conclusion as to the Validity of the Search Warrant Application and its Issuance

340. The Court finds that a significant number of formal errors and deficiencies have now been identified in relation to the Search Warrant.

341. In summary they may mainly be set out as follows:

1) An application was formally sought in respect of possession of a controlled drug under section 14 of the Misuse of Drugs Act even though there is no such offence created by that section.

2) A false and misleading assertion was made that entry to the premises would not be granted unless a Search Warrant was produced.

3) A false and misleading assertion was made that to achieve the purpose for which the Warrant was being applied it was necessary that the Warrant authorised entry to and search of the premises at any time.

4) An assertion was made unsupported by any evidence and/or any reliable evidence that there were reasonable grounds for believing that there was an offence of possession with intent to supply.

5) In relation to possession of a controlled drug, the Applicants had in fact lawful authority to possess it.

6) In relation to possession with intent to supply, the only basis identified by the First and Third Respondents was the advertisement itself, even though as a matter of fact the advertisement preceded the Cease Notice and there was no evidence as to whether that Cease Notice had been disobeyed.

7) There was and still is no explanation as to how or why the items specified in the application would or could provide evidence likely to be relevant evidence and/or of substantial value to the investigation of either offence in any conceivable way.

8) The Warrant itself only identified the offence of possession of a controlled drug, failing to specify any of the items to be seized, and moreover the items in fact seized were not produced before the Court as stipulated in the Warrant.

9) There were material non disclosures as to the sequence of events, the overriding objective of the CBC to detain the items in question and the CMO's lack of jurisdiction and justification for issuing the Cease Notice.

10) No note whatsoever was taken in circumstances where a note was absolutely critical.

11) Nothing was brought to the attention of the Justice of the Peace that mitigated against the issuance of the Search Warrant.

12) The items sought were of no evidential probative value.

342. This list is not intended to be exhaustive of the defects, but individually and collectively they provide ample and indeed overwhelming grounds for which this Warrant must be found to be invalid.

343. In addition, there arises the broader question as to whether the Warrant was sought and obtained for an improper purpose, once again rendering the Warrant invalid, due to the lack of any reason for which a properly constituted authority could issue it.

344. It is known that the CBC wanted the items in question to be detained from 13 September 2019 and initiated a series of events which persuaded the CMO, apparently against his better judgment and expressed opinion, issue the Cease notice.

345. It is also known that as matters evolved so did a number of different allegations evolve as well, that Doctors Express had failed to make a truthful declaration, that dispensing of cannabinoid vapes was unlawful *per se*, that there were reasonable grounds for believing that an offence of possession had been committed and finally that there was reasonable grounds for believing that an offence of possession of a controlled drug with intent to supply has been committed.

346. The Court finds that none of this was true. In addition the advertisement itself provided no grounds for alleging an intent to supply in breach of the Cease Notice nor did the absence of a retraction or revocation of the advertisement itself provide any basis for such reasonable grounds for belief.

347. In other words, the Court finds that the entire enterprise was baseless and that it was conducted for an improper purpose, *viz.*, to detain the items by any means under which they could be detained. Instead of proceeding lawfully, as they could have done, the CBC injudiciously chose to proceed in an unlawful and misconceived manner.

The Status of the Search Warrant

348. The First, Third and Fourth Respondents have submitted that even if the Court concluded, as indeed it does, that the Search Warrant was unlawfully issued nonetheless beyond granting formal declaratory relief it is not open to the Court to order the quashing of the Warrant.

349. The reasoning is based upon their construction of Section 28 of the Criminal Procedure Code (2019 Revision). Section 28 states:

*"**Search warrants-further provisions***

28. (1) Every search warrant shall be in the form set out in Schedule 2 and under the hand of the person issuing the same and, when issued by a court, shall bear the seal of such court.

(2) Every search warrant shall remain in force until it is executed or until it cancelled by the person or court issuing the same.

(3) A search warrant may be directed to one or more persons and may be executed by all or any one or more of them;

(4) A search warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

(5) A search warrant may be executed at any place in the Islands."

350. Mr. Gayle has drawn Section 28(2) to the attention of the Court and he submits at paragraph Di, page 11, of his Supplemental Skeleton Arguments that the Warrant in question has already been executed and so for the Applicants to seek an order of *certiorari* to quash the Warrant is nugatory.

351. The Applicants address the proposition in their Skeleton Argument In Reply at paragraphs 34 - 35:

"34. The s.27 Defence was comprehensively dealt with by the Cayman Islands Court of Appeal in Rea v Gibbs, Commissioner of Police and Attorney General. Gibbs was also a case involving a search warrant under the MDL. The Court of Appeal dismissed the attempt to use the s.27 Defence in the manner sought by the AG Respondents in such utterly clear and robust terms that it was not even raised by the defendants in Henderson 15 years later.

35. The AG claims that once a warrant is issued that is the end of the matter and no adverse consequences can flow against HM Customs or the RCIPS. This is wrong as a matter of law. Per Kerr JA:

"In my view, the constable who procures the warrant maliciously and without reasonable and probable cause would have imputed knowledge of its invalidity and could not seek the protection of the statute for his tortious acts which were directly consequential to his original delict. <u>To interpret the provisions of s.27(1) of the Police Law in the way urged by the respondents' counsel would enable the first defendant to</u>

use the warrant so wrongfully obtained to legitimize what would otherwise be an impertinent trespass to the first defendant's premises. Such an interpretation would be contrary to principle and beyond the contemplation of the statute. On the basis that the provisions of s.27(1) would offer no protection to the first defendant, I would hold that the action for trespass was well founded."

Zacca P and Collett JA both issued concurring judgments addressing the point."

352. The broad mischief identified is that statutory provisions must not be interpreted in a way that legitimises or seeks to legitimise action which would otherwise be unlawful. That approach in effect would be contrary to principle and beyond the contemplation of the respective statute.

353. As the Court understands it, the definition set out under section 27 of the Police Act (2017 Revision) is not a shield against an order of *certiorari* being available. Regardless of whatever other purpose for which it may be invoked the fundamental tenet of construction adopted by Kerr JA applies equally to the interpretation of Section 28(1) of the Criminal Procedure Code as it does to Section 27(1) of the Police Law.

354. Indeed, in the *Ebanks* case at page 57 the italicised headnote reads in part *"quashed if failure and unjust in circumstances to allow to stand"*.

355. Finally it is significant that paragraph 102 of the *Ebanks* Judgment the learned Judge asks the following question:

> *"102. In my opinion, where there is a failure to disclose material facts and/or misrepresentation of material facts on an application for a search warrant, the court should ask itself the question - given all the circumstances, is it just that the search warrants should stand?"*

356. In relation to both the Cease Notice and the Search Warrant the Court considers the quashing and setting aside of each of them both an available remedy and in the circumstances of this case an entirely just and appropriate one.

<u>The Late Filing of the Applicants' Amended Application</u>

357. In the course of writing this Judgment the Court became aware that the Amended Application for Leave to Apply for Judicial Review had not been formally filed with the Court.

358. The Applicants were granted Leave to Amend the Notice of Motion/Application for Judicial Review against the CMO on 19 February 2020. The CMO had previously been added as the Fourth Respondent in the proceedings by Order dated 9 November 2019.

359. Notwithstanding the technical irregularity as to the filing the Respondents fully engaged in the hearing on the basis of what was set out in the Amended Application and they were not in any conceivable way prejudiced or inconvenienced by doing so.

360. Following the notification to counsel of the filing issue the documentation was subsequently filed by the Applicants on 4th December 2020.

361. That was not however the end of the matter. There then followed unsolicited and extensive Written Submissions on behalf of the CMO dated 22 December 2020. The Submissions were not accompanied by a summons or motion of any kind.

362. The CMO appeared to argue that due to an irregularity in the filing and service the time limit set out in GCR O.53, r.5(1) and (2) had not been met.

363. Insofar as it is relevant O.53, r.5 states:

"Mode of Applying for Judicial Review (O.53, r.5)

5. (1) In any cause or matter, where leave has been granted to make an application for judicial review, the application shall be made by originating motion to a judge sitting in open Court, unless the Court directs said it shall be made to a Judge in Chambers. Any such direction shall be without prejudice to the Judge's power under Order 32, Rule 13.

(2) Within 7 days of being granted leave, the applicant shall serve copies of -

(a) the notice of motion;

(b) the supporting affidavits;

(c) the order from leave; and

(d) the Form 53 application

upon the defendant and all other persons directly affected."

364. The point seems to be not that the CMO was not served and notified at all, but that the filed version of the relevant documentation was not served and notified to him.

365. The CMO's argument is accordingly summarised at paragraph 6 of the Submissions:

> "6. *The issue of the failure to file Notice of Motion/ Application for Judicial Review, in keeping with the Mode of such application under GCR O.53, r.5(2), within 7 days of receipt of leave to so file and to so add the Chief Medical Officer as the 4th Respondent, thereby bringing a claim for Judicial Review against the CMO (for the first time), has severe legal implications."*

366. In other words, the complaint is that the CMO was not served with the perfected document notwithstanding full knowledge of what the perfected document would contain.

367. Had the point been taken at the relevant time, no doubt the appropriate arguments could have been made, but having been made fully aware of the Applicants' case the CMO proceeded on that basis with no embarrassment or detriment ever having been alleged by him.

368. There are several reasons to reject Mr. Gayle's contention.

369. First, no one was misled in any way as the CMO in paragraph 5 of his latest Submissions contends. The Court has no difficulty in concluding that the lapse in question in the circumstances of these proceedings has created no nullity of any kind and further that to pursue the matter at this time is entirely unreasonable.

370. The Court considers itself to be properly seized of the proceedings concerning the CMO and on that basis it grants leave retroactively to the Applicants formally to file the documentation itself.

371. Secondly, Mr. Austin-Smith has pointed out at paragraph 2 of his letter Submissions dated 23 December 2020, non-compliance itself is by no means fatal to proceedings under the Grand Court Rules, and there is no basis, in terms of allowing and upholding an amendment as such to render an irregularity as somehow dispositive of these proceedings against the CMO.

372. GCR O.2, r.1 states:

"EFFECT OF NON-COMPLIANCE

Non-compliance with rules (O.2, r.1)

1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

373. There has been no irregularity here which in the circumstances of these proceedings has rendered them a nullity, and in addition to the extent that further leave was requested to facilitate a late filing leave has now been granted in the interests of justice.

374. GCR O.53, r.5(2) exists to discourage dilatory and potentially improper judicial review proceedings. It should not be used to stifle or suppress applications which in the face of sustained and wide ranging opposition from the First, Third and Fourth Respondents have been pursued both expeditiously and thoroughly by the Applicants.

375. The Applicants state their position at paragraphs 4 and 5 of the letter submissions:

> *"4. For the foregoing reasons the proceedings are not a nullity and Attorney General's argument completely misconceived. The argument is also completely without substantive merit: There has been absolutely no prejudice caused to any party as a result of the late filing of the Amended Motion. The Respondents have had the terms of the Amended Notice of Motion since February 2020. Equally, <u>the Attorney General consented to the grant of leave</u> for the addition of its client the Chief Medical Officer to these proceedings. It is not only quite extraordinary but impermissible to now suggest that that consent (and the Court's Order from 13 February 2020) be revoked and to avoid this case being determined on its merits.*

5. *More importantly, these judicial review proceedings have uncovered extensive evidence of conspiracy, misfeasance and perjury in senior public officials, including even before the Grand Court itself in an attempt to pervert the course of justice. Based on his own (eventually disclosed) email admissions the Chief Medical Officer is one such official. To attempt, weeks after the evidence was concluded, to rely on a highly technical (and legally misconceived) argument to avoid a determination of this hugely important public law case on its merits is not merely an act of desperation; it is completely contrary to the Attorney General's duty to the public and a breach of Order 2 and the Overriding Objective of the Grand Court Rules."*

376. With all due respect to Mr. Gayle's arguments the Court agrees with and adopts the general principles duly identified in paragraphs 4 and 5. Judicial Review proceedings should be both fair and transparent.

377. Thirdly, in relation to GCR O.2, r.1(1) in respect of the power of the Court to treat a failure as an irregularity and therefore to not nullify the proceedings the Court notes carefully and with approval the following statement at Note 2/1/3 of the Supreme Court Practice 1999 Edition, Volume 1, as it pertains to identical English provisions:

"Defective service of proceedings, however gross the defect, and even a total failure to serve, where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the court by the exercise of discretion under O.2, r.1

(Golden Ocean Assurance Ltd and World Mariner Shipping SA v. Martin, The Golden Mariner [1990] 2 Lloyd's Rep. 215. See too, Fielding v. Rigby [1993] 1 W.L.R. 1355; [1993] 4 All E.R. 294, service of writ after death of plaintiff but before personal representative appointed did not render proceedings a nullity but was an irregularity which might be cured under O.2, r.1."

378. It is made clear in the Editorial Introduction to O.2 that the former distinction between nullity and mere irregularity has disappeared. It states in relevant part:

"As a result of r.1., in relation to "a failure to comply with the requirements of these rules", the distinction between nullity and mere irregularity disappears (the summaries of the cases falling on either side of the line made their final appearance in The Annual Practice 1965, pp.11-13). The timely objection and waiver rules stated in the old 0.70 survive in r.2."

379. Moving on to GCR O.2, r.2(1) and (2) these provide as follows:

"***Application to set aside for irregularity (O.2, r.2)***

2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is

made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."

380. As the Court has already made clear, the CMO's contentions were only raised at an extremely late stage and with no regard at all to doing so within a reasonable timeframe.

381. Raising the point at this stage is not merely unreasonable and untimely but in the circumstances of these proceedings it is also unconscionable.

382. The opportunity to take this point was not exercised at the relevant time or at any available time, and it is the opinion of the Court that the opportunity is gone and that any merit which it may purport to have had is gone as well.

383. Fourthly, in support of his arguments Mr. Gayle relies upon *Orrett Bruce Golding, The Attorney General of Jamaica v. Portia Simpson Miller* Jamaica Supreme Court Civil Appeal No. 3/08 and upon *The Minister of Finance and Planning & Public Services at al. v. Viralee Bailey Latibeaudiere* Jamaica Supreme Court Appeals No. 76 and 87/2013, as dealing with the enforcement of Judicial Review time limits.

384. However in the former case of *Golding* it is clear that under the relevant Civil Procedure Rules leave to apply is *"conditional"* on the applicant making a claim for judicial review within 14 days of the order granting leave (Rule 56.4 (12)), a specific provision which does not appear in the Grand Court Rules. In addition, in the latter case of *The Minister of Finance and Planning & Public Services* the relevant submission as to time limits was taken as a *"preliminary objection"* (paragraph 22); and it was taken as a threshold ground (paragraph 26). No preliminary or threshold ground has been taken in the present proceedings.

385. In other words, the manner in which these authorities fall to be distinguished provides no support for Mr. Gayle's arguments.

386. Fifthly, on this subject a separate but related consideration arises. Because the Cease Notice was essential and integral to the application for the Search Warrant then irrespective of whether the CMO has been joined or served it is open to the Court to declare the Cease Notice unlawful and to set aside the Cease Notice in any event.

387. The Court has reviewed all of the relevant evidence, including having the advantage of evidence from the CMO himself, and it has also been addressed on a number of factual and legal issues. In light of all of this material, even if for some reason the CMO were removed from the proceedings, the proceedings could and should still proceed on the merits and be determined without him.

Conclusion

388. The Court fully recognizes that the Respondents individually and collectively have at heart the interest of the public of the Cayman Islands. All of them are engaged on duties that are important and valuable and which should be suitably appreciated. Errors of judgment from time to time are unfortunately both inevitable and regrettable. However, where they occur as they have done in the circumstances of this case it imperative that they be recognized, addressed and mitigated as soon as is practicable. Allowing them to persist as the First Respondent and the Fourth Respondent have done can increase the injustice to which such errors give rise in the first place.

389. Judicial Review is concerned essentially with the fairness and the lawfulness of procedures rather than with the substance or merit of decisions themselves. In this case the procedures which were adopted were the wrong procedures and therefore they led to what were clearly the wrong outcomes. These are important and elementary principles, the primacy and simplicity of which have to some extent been obscured by the length and the complexity of the present proceedings. If the decisions of public officials are arrived at in the right manner they can then become the right resulting decisions but if as here they are arrived at in the wrong manner they can never be the right resulting decisions.

390. For the reasons stated in the course of this Judgment the Court finds that the Cease Notice is unlawful and it is set aside. In addition for the reasons stated in the course of this Judgment the Court finds that the Search Warrant is unlawful and it is set aside.

391. The Court shall hear submissions from the parties as to whether damages should be awarded to the Applicants in these judicial review proceedings and if so the scope of such damages.

392. The Court shall also hear submissions as to costs at an appropriate time.

Robin McMillan

MR. JUSTICE ROBIN MCMILLAN

HONOURABLE JUDGE OF THE GRAND COURT