

As publication of the full Judgment has been prohibited, the Court deems it appropriate for a public version to be made available. Material which the Court has determined to be subject to Privilege has been redacted from the Public Judgment.

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**
3 **CIVIL DIVISION**

5 **CAUSE NO. 486 OF 2011**

6 **BETWEEN:**

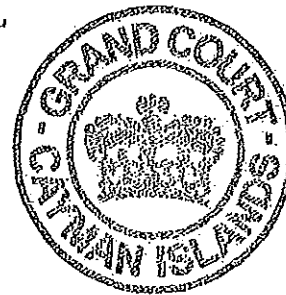
7 **THE ATTORNEY GENERAL**

8 **Plaintiff**

9 **AND:**

10 **MARTIN BRIDGER**

11 **Defendant**



12

13 **Appearances:**

Mr. Martin Griffiths Q.C. and Mr. Douglas Schofield of
the Attorney-General's Chambers for the Plaintiff

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19 **Before:**

Hon. Justice Richard Williams

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21 **Heard:**

11th, 12th, 13th September 2012 and 12th July 2013

22

23 **Draft Leave Application**

24 **Judgment Circulated:**

30th July 2013

25

26 **Written Submissions on**

27 **Draft Leave Judgment:**

3rd August 2013, 15th August 2013, 16th August 2013
& 19th August 2013

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30 **Leave Judgment Delivered:**

21st August 2013

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32 **Draft Judgment circulated:**

25th October 2013

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34 **Date of Judgment:**

8th November 2013

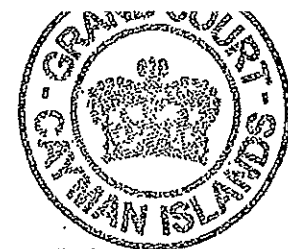
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JUDGMENT

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1 **Application**

2 1. This is an action brought, pursuant to GCR Order 8, rule 3 in a Notice of
3 Originating Motion dated 28th of October 2011, by the Attorney General, the
4 Plaintiff, against Mr. Martin Bridger, the Defendant, for a prohibitory injunction
5 restraining him from permitting

6 *“any party, including but not limited to the Plaintiff in Cause No,*
7 *255 of 2009 (“the Kernohan proceedings”) and his attorneys to*
8 *inspect the documents referred to in the Defendant’s final*
9 *disclosure list in the Kernohan proceedings dated 19 October*
10 *2011”.*

11
12 The Plaintiff also invites the Court to make a determination as to whether the
13 Defendant

14 *“should be obliged to deliver up all copies of such documents in*
15 *his possession.”*

16
17 Mr. Griffiths Q.C. in his opening remarks made clear that from the Originating
18 Motion only paragraph 4 was left for determination, which includes a claim for
19 continuation of paragraph 1.

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21 2. At the outset of the hearing, primarily the Attorney General also invited the Court
22 to rule on the question of ownership, which had been raised in proceedings in
23 London shortly before the September hearing. By a Summons dated 31st August
24 2012, the Commissioner of the Royal Cayman Islands Police Service (“RCIPS”)



seeks to be joined, also, as Co-Plaintiff in the present proceedings. However, in this judgment I am minded to concentrate solely on the more pressing matters for determination raised in the Notice of Originating Motion.

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5 3. At paragraph 36 of Mr. Bridger's Amended Defence in the Kernohan
6 proceedings, he makes it clear that at that time he was not intending legal
7 professional privilege over the content of advice received by Operation Tempura
8 to be waived when he pleads:

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"...The First Defendant further avers that all decisions on the issuance of the notice of investigation would be taken in good faith and after careful and conscientious consideration and deliberation. The First Defendant acted at all times with the benefit of appropriate legal advice. For the avoidance of doubt privilege in respect of this legal advice has not been waived."

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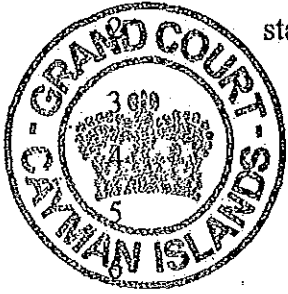
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4. However, Mr. Bridger is now of the view that, "all things being equal", Mr. Kernohan should have the opportunity to inspect the documents. Mr. Bridger has indicated he is of the view that, if the Attorney General succeeds in this application, it will have "far-reaching consequences" on his ability to successfully defend the misfeasance of office claims brought by Mr. Kernohan against him. It is submitted that the effect of granting such an injunction will be to "severely damage" Mr. Bridger's defence in the Kernohan proceedings. Mr. Bridger contends that, with this in mind, a large number of the documents at issue



1 had been provided to him by Mr. Schofield to enable him to prepare his defence
statement. Mr. Bridger indicates at paragraph 10 of his first affidavit that:

7 *"I am obliged to defend myself by resorting to documents that were*
8 *recorded by me in the course of my independent investigation and*
9 *by reference to legal advice I received from Special Counsel*
10 *appointed to advise me independently as the investigator into the*
11 *circumstances underpinning Operation Tempura."*

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9 It is contended by Mr. Englehart Q.C. that a Government body should not be
10 permitted to use privilege *"shielding the Plaintiff and others from the*
11 *embarrassment that disclosure"* would generate and in a way sought to stifle Mr.
12 Bridger from relying upon material that he contends is integral to his Defence,
13 especially in a case where it is submitted there is a wider public interest in the
14 disclosure.

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16 5. Mr. Bridger states at paragraph 27 of his first affidavit:

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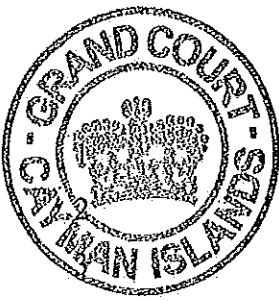
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"I would respectfully invite the court to consider whether, as a
matter of fairness, and irrespective of the issue of entitlement to
privilege and the issue of waiver, I am to be prevented from
defending myself against an allegation of bad faith,

and that I was scrupulously
deliberate in my conduct of the Operation Tempura investigation."

Mr. Bridger continues:



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"I would further, respectfully, invite this Honourable Court to consider, whether acceding to the injunction set out in the Plaintiff's Notice of Originating Motion dated 28 October 2011, is a proportionate response to a disputed right claimed by the Plaintiff and detrimental to my ability to defend myself."

6. Mr. Bridger draws to the Court's attention the Plaintiff's Contribution Notice dated 27th February 2012. In that Contribution Notice the Attorney General indicates that if the Second Defendant is found to be liable for the torts of Mr. Bridger, he will claim contribution and/or indemnity from Mr. Bridger, which he contends should be at 100%. The Attorney General in the Notice contends that Mr. Bridger is primarily liable and wholly responsible for any damages ordered, having acted "*maliciously*" and "*with reckless indifference.*" Mr. Bridger asks the Court to consider whether the Attorney General seeking to prevent him from relying on legal advice obtained from Special Counsel is, in the circumstances where he vigorously defends the Kernohan proceedings including the Contribution Notice, "*a proportionate outcome.*"

7. Mr. Schofield indicates that the Notice does not amount to what Mr. Bridger refers to as being a "*cutthroat defence.*" He reiterates the wording of paragraph 3 of the Notice, which contains a denial that Mr. Bridger is liable to the Plaintiff. The Attorney General's case is that he continues to support both Defendants in their Defence, especially as a failure by Mr. Kernohan in his case against Mr. Bridger will then mean that any claim for vicarious liability will fail as well as the

1 question of contribution not arise. Mr. Schofield concedes that if Mr. Bridger
2 wishes to refer to privileged documents in relation to any contribution
3 proceedings, then that may be done at a subsequent hearing at which Mr.
4 Kernohan would not be in attendance. Mr. Schofield rightly says that the
5 Contribution Notice is not a basis for seeking to disclose privileged documents to
6 Mr. Kernohan at this time.

7

8 8. Mr. Englehart Q.C. in his written submissions invited the Court, if the privilege is
9 asserted, to order that the Kernohan proceedings should not proceed to trial on the
10 basis that without such advice Mr. Bridger could not fairly defend himself as he
11 would be prevented from "*presenting a full and fair explanation of his actions.*"
12 He relied upon Article 6(3) (Right to a Fair Trial) European Convention on
13 Human Rights and Fundamental Freedoms, Article 10 Right to Freedom of
14 Expression as well as the authority of *Carnduff v Rock* [2001] EWCA Civ 680.
15 If there is any merit in such an application in this case, this is not the time to
16 consider it, especially in the absence of Mr. Kernohan. To his credit, Mr.
17 Englehart Q.C. accepted at the outset of his oral submissions that he would not
18 expect the Court to strike out the claim against his client in the absence of Mr.
19 Kernohan.

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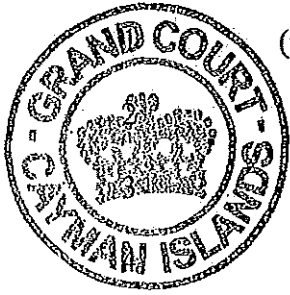
1 **Issues**

2 9. Although making some submissions on the issue of whether certain documents
3 are subject to legal professional privilege, Mr. Englehart Q.C.'s main arguments
4 revolve around his invitation to the Court to consider whether or not legal advice
5 Mr. Bridger claims was received by him in his capacity as Senior Investigating
6 Officer to Operation Tempura ("SIO") is his to waive. Mr. Bridger states that he
7 took the legal advice from Special Counsel to Operation Tempura concerning
8 *"preliminary steps on the relevant law and procedure and substantive steps in*
9 *connection with the investigation"* at each stage of the investigation, that such
10 advice was directed to him and, as a consequence, contends that legal professional
11 privilege, and the right of waiver rests with him. In addition, Mr. Bridger
12 contends that the Legal Department of the Government provided him with copies
13 of documents, without clearly setting out the basis upon which they were
14 provided and that this amounted to a waiver of privilege.

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16 10. Mr. Englehart Q.C, has very helpfully highlighted in a list the issues he submits
17 the Court should address, namely:

- 18 (i) Which of the documents are subject to legal professional privilege in that
19 they recorded legal advice?
20 (ii) To the extent that documents, or copies of such documents in Mr.
21 Bridger's possession are privileged, is the privilege that of Mr. Bridger or
22 the Attorney General?





(iii) If the privilege would otherwise be that of the Attorney General rather than Mr. Bridger, has privilege been lost or waived for the purpose of Mr. Bridger's defence of Mr. Kernohan's misfeasance claim by the voluntary provision of documents to Mr. Bridger in the preparation of his Defence?

5 (iv) If the Attorney General is entitled to assert privilege, should the Court in
6 its discretion prevent Mr. Bridger from defending himself by reference to
7 the documents against Mr. Kernohan's misfeasance claim and the Attorney
8 General's contribution claim against him?

9

10 11. Mr. Griffiths Q.C. has also helpfully listed the issues he submits the Court should
11 consider. The following list of suggested issues, although differently worded,
12 greatly overlap with those suggested by Mr. Englehart Q.C.:

- 13 (i) Are the documents privileged?
14 (ii) If so, who was the client in whom the privilege is vested?
15 (iii) If the document is itself privileged are references to the privileged advice
16 also privileged?
17 (iv) Was privilege retained during circulation of the legal advice at the time
18 Mr. Bridger was in post?
19 (v) Was privilege retained when Mr. Bridger was shown the legal advice in
20 the course of the Kernohan Action when he was still represented by the
21 Attorney General's Chambers who were on the record for all the
22 Defendants?



- (vi) If the documents are privileged, and privilege has not been waived, is there some other basis upon which Mr. Bridger is entitled to disclose them?
- (vii) Are the Justice Henderson documents disclosable?
- 5 (viii) Is Mr. Bridger entitled to retain possession of the documents in Tables 1, 2
6 and 3¹ and/or any other documents which he has removed or copied from
7 the files of Operation Tempura?
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9 **Delay**

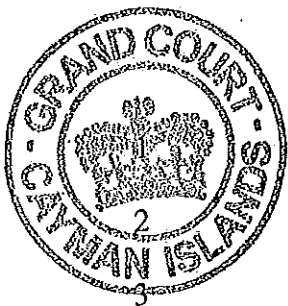
10 12. By Rule 1.1 of the Preamble to the Grand Court Rules, the purpose of the
11 overriding objective is to enable the Court to deal with every case in a just,
12 expeditious and economical way. I remind myself of the impact of delay between
13 hearing and the delivery of a judgment as expressed by the Privy Council in
14 *Cobham v Frett* [2001] 1 WLR 1775.

15

16 13. As a direct consequence of the unsuccessful application made by Mr. Bridger²
17 seeking leave to file additional affidavit evidence after the close of the case but
18 prior to the delivery of this reserved judgment, there has been a considerable
19 delay in my being in a position to prepare this long overdue judgment. This has
20 left me in the unsatisfactory position of having to write this judgment over ten
21 months after receiving the submissions from the parties. The reasons for the delay

¹ See paragraph 35 below.

² Heard on 12th July 2013.



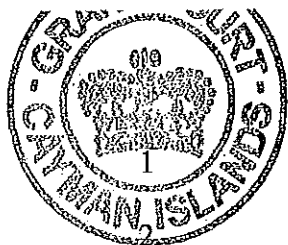
3 have been set out in great detail in my judgment resulting from the leave
4 application which was circulated to the attorneys on 30th July 2013 for comment
5 prior to release. Thereafter, there has been further delay in my being able to
6 prepare this judgment as both parties wished to make further submissions
7 concerning the Defendant's objection to the inclusion of certain material in the
8 judgment.³ A number of written submissions were submitted, with the last being
9 received on 19th August 2013. Shortly thereafter, the judgment dealing with the
10 leave application was eventually delivered on 21st August 2013. I do not intend to
11 again rehearse that detail herein.

12 14. When considering delay in the wider Kernohan proceedings, I also note that the
13 original Defences were filed on 3rd July 2009 and that, following the close of
14 pleadings, Mr. Kernohan did not at that time, seek to move the matter forward
15 expeditiously, having to issue a Notice of Intention to Proceed over a year later on
16 7th October 2010, which was then served on 26th October 2010.

17 **The Background**

18 15. In my Written Ruling delivered on 27th January 2012 in relation to the
19 unsuccessful application made by Mr. Stuart Kernohan for leave to intervene and
20 be joined as the Second Defendant in these injunction proceedings, I set out the
21 background of the case in order to put that application into context. Due to the

³ Defendant's written submission dated 16th August 2013, Plaintiff's written submissions received 15th August 2013.



passage of time since the earlier ruling I see merit in repeating that detail in this judgment.

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4 **The Kernohan Proceedings - Cause No. 255 of 2009**

5 16. Mr. Kernohan was appointed as Commissioner of the RCIPS, pursuant to a
6 written contract dated 29th September 2005, to commence on 15th October 2005. It
7 was a fixed term, renewable contract, due to expire on 14th October 2009. On 18th
8 November 2008, Mr. Kernohan was summarily dismissed from the RCIPS.

9

10 17. A Writ of Summons was issued by Mr. Kernohan on 25th May 2009. At that time
11 the Attorney General represented all of the Defendants in the proceedings.

12

13 18. Mr. Bridger made a formal confidential complaint to the Governor concerning
14 what he perceived to be unfair treatment by the Courts of the Cayman Islands. He
15 also made a complaint, together with Mr. Martin Polaine, to the Overseas
16 Directorate of the Foreign and Commonwealth Office about the conduct of the
17 Attorney General's Chambers in relation to Operation Tempura.

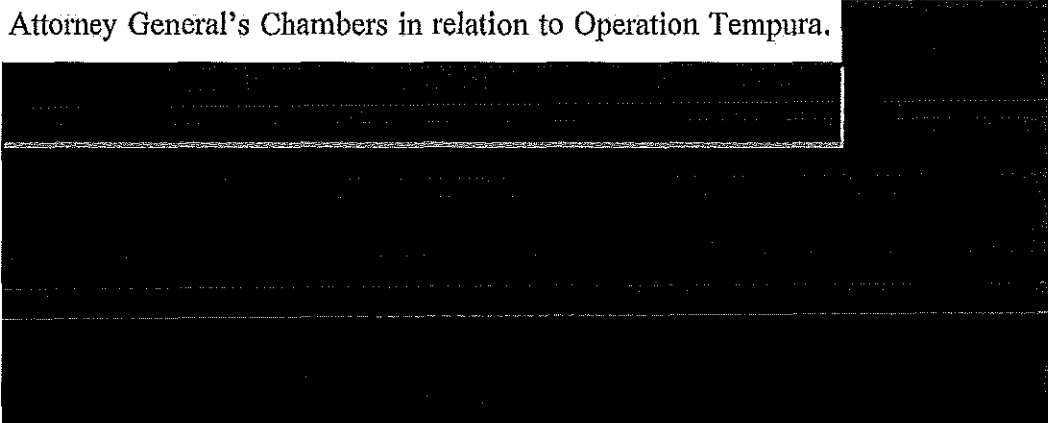
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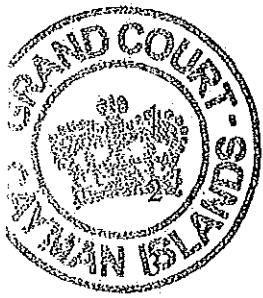
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Mr. Englehart Q.C. submits that this is

4 *"indicative of the lack of a common interest in the defence to Mr. Kernohan's*
5 *action."*

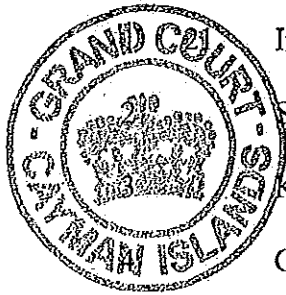
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7 19. It is important to note that in the concluding paragraph of the letter dated 29th
8 October 2010, Mr. Schofield clearly expressed to Mr. Bridger the position of the
9 Attorney General in relation to legal professional privilege when he wrote:

10 *"Please remember that all our previous communications are*
11 *subject to common interest legal privilege, and must not be*
12 *disclosed to anyone except your own legal advisers without the*
13 *consent of the other Defendants. Should you, or anyone on your*
14 *behalf, wish to disclose material subject to common interest*
15 *privilege to any third party, please let me know what it is you wish*
16 *to disclose, to whom and why, so that I can see if the necessary*
17 *consents can be obtained."*

18

19 20. On 20th January 2011 Quin J. considered an ex-parte application on notice to Mr.
20 Bridger concerning whether joint representation should continue. Mr. Bridger did
21 not attend the hearing. Quin J. ordered that the Cayman Islands Government
22 Legal Department, on behalf of the Attorney General, had ceased to be the
23 attorney acting for Mr. Bridger, and that he was removed as the attorney of record
24 for him. The law firm of Stuart Walker Hersant is now retained by Mr. Bridger.



In his Amended Writ of Summons⁴ re-issued on 17th June 2011 and Amended Statement of Claim re-dated 17th June 2011 in Cause No. 255 of 2009, Mr. Kernohan makes a claim for wrongful dismissal. This is denied by the Attorney General, as Second Defendant, in his Amended Defence dated 28th July 2011. Mr.

5 Kernohan claims that Mr. Bridger is liable to him for damages for the tort of
6 misfeasance in public office. This is denied by Mr. Bridger, as First Defendant, in
7 his Amended Defence dated 1st August 2011. Mr. Kernohan also alleges that the
8 Government of the Cayman Islands (represented by the Attorney General) is
9 vicariously liable for misfeasance in public office and that this is also denied in
10 the said Amended Defence filed by the Attorney General. The Attorney General
11 in his Amended Defence resists all of the claims made by Mr. Kernohan,
12 importantly including the allegations made against Mr. Bridger.

13
14 22. Mr. Schofield stated that in late 2009, a time when he was representing all of the
15 Defendants in the Kernohan proceedings, he wished to obtain initial proofs of
16 evidence from potential witnesses, including Mr. Bridger. Mr. Schofield indicates
17 that in May 2009 Mr. Bridger was not able to produce a full statement and
18 emphasised to him the importance of documents in helping him recall events. Mr.
19 Schofield says that as a consequence, at their meetings in September 2009 and
20 February 2010, which ran over six full days, he supplied Mr. Bridger with
21 photocopies and scanned electronic copies of documents which had been taken

⁴ Amending the Writ of Summons issued by Mr. Kernohan, on 25th May 2009.



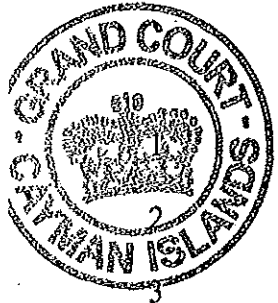
from the Operation Tempura files. Mr. Schofield contends in his second affidavit that on a number of occasions during that period he made it clear to Mr. Bridger that the documents were privileged and that the privilege had not been waived in relation to them. Mr. Schofield indicates that Mr. Bridger has improperly retained this documentation, copies of legal advice presented in relation to Operation Tempura and other documents which the Attorney General was not aware were in his possession.

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9 23. Mr. Schofield said that the initial draft that had been prepared was not intended to be the final statement for filing. The draft document was intended to contain the full facts and background and would be subject to editing. At paragraph 12 of his second affidavit, Mr. Schofield stated that he did not intend to serve a statement containing any references to the content of legal advice. He intended to rely, in the statement, upon the fact that legal advice had been taken, but not disclose the content of that advice, in support of Mr. Bridger's Defence. Mr. Schofield indicated that the most recent version of the statement deleted all references to privileged content. He stated that a copy of that version had been provided to Mr. Bridger's attorneys, but they had failed to exhibit that version in addition to the earlier version to Mr. Bridger's affidavit.

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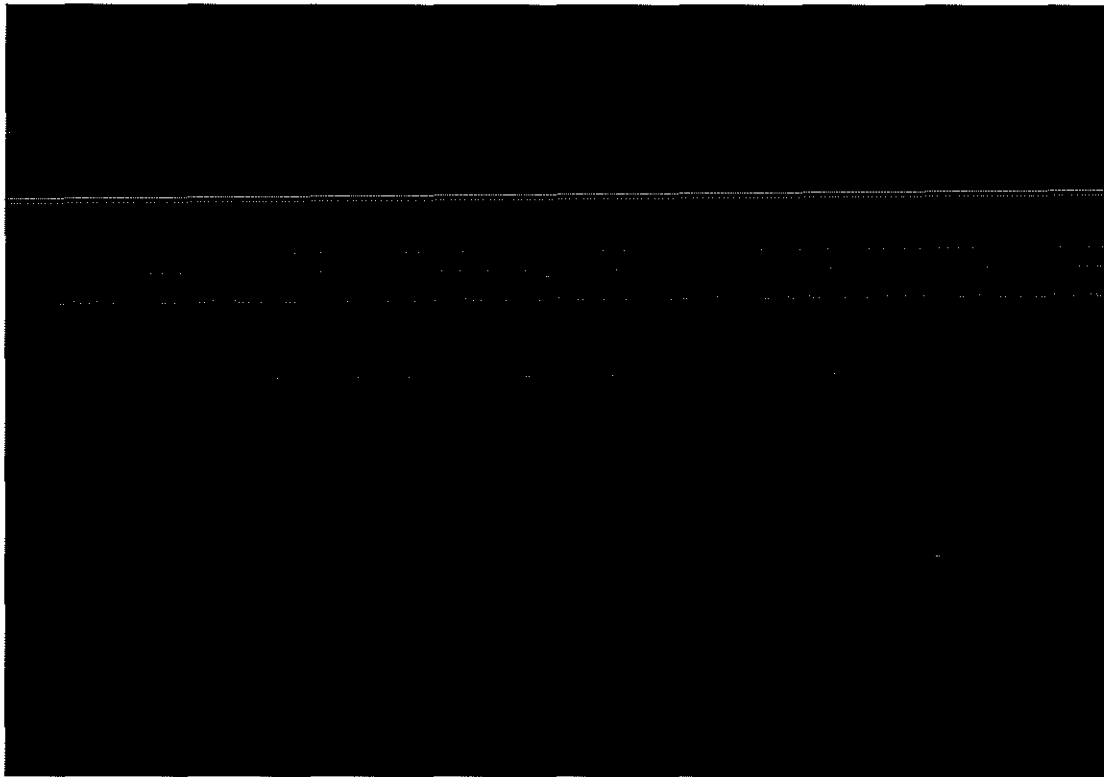
24. Mr. Schofield reiterated that he still intends to rely upon the fact that legal advice was taken in support of the Plaintiff's Defence in the Kernohan proceedings,



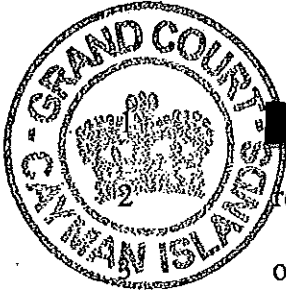
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pointing out that both the fact of legal advice being taken and the dates of that advice are set out in the Attorney General's Amended Defence.⁵ Mr. Schofield said that he had at no time intended to use the references to privileged documents at the trial and reiterated that he emphasised to Mr. Bridger, that privilege would not be waived. He said that the privileged documents were used, in order to construct an initial full proof of evidence.

25. Mr. Bridger felt that Mr. Schofield was preparing his statement, and he referred to a letter dated 8th September 2009 from Mr. Schofield, which both parties signed⁶



⁵ See paragraphs 81 to 86, and paragraphs 88 to 93 of the Amended Defence with details of occasions when legal advice was given, making it clear that legal professional privilege on the content of the advice had not been waived.



Mr. Schofield

reiterated that Mr. Bridger was aware of the Attorney General's position because on a number of occasions he had expressed to Mr. Bridger that privilege was not waived.

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6 26. Mr. Bridger in his first affidavit refers to 283 documents set out in a sixteen page
7 Index of Documents which he says were obtained by or supplied to him in the
8 context of the independent investigation which he had conducted. Mr. Bridger
9 confirms that the documents were provided to him by the Plaintiff in late 2009, as
10 they were relevant to the preparation of his statement to be filed in support of his
11 Defence in the Kernohan proceedings. Mr. Bridger submits that the fact that the
12 documents were provided to him is an indication that the Plaintiff recognised they
13 were necessary to counteract the misfeasance claim.

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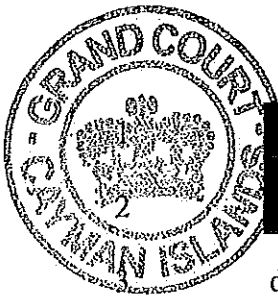
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[REDACTED]

Mr. Bridger questions why, if these

documents were at the time considered necessary for his Defence by the Plaintiff,
the Attorney General now feels it appropriate to prevent their use by pleading
privilege in relation to them. Mr. Schofield replies that it is not disclosure of the
content of the documents that is required for the Defence, but merely evidence of
the fact that legal advice was regularly received.

[REDACTED]

[REDACTED]

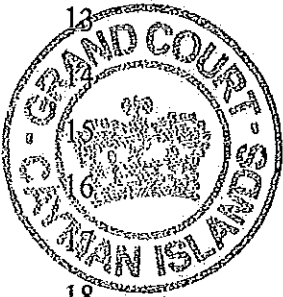
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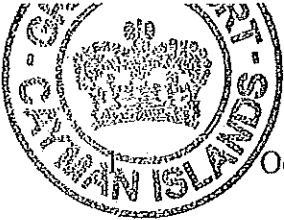
1 29. The sharing of this information by the Attorney General who was representing all
2 of the Defendants does not mean that privilege was waived. Although Mr. Bridger
3 had retired from his position in the Operation Tempura team by this time, it is
4 clear that a number of the documents provided to him were documents he had
5 already seen when he was the SIO. Accordingly, the privilege remains vested in
6 the client and not Mr. Bridger, if he is found not to be the client. Mr. Griffiths
7 Q.C. refers to the following extract from Hollander on Documentary Evidence
8 (10th Edition) at 19-05:

9 *"As a matter of English law, a person who shows a privileged*
10 *document to another does not necessarily debar himself from*
11 *claiming the privilege. In Gotha v Sothebys [1998] 1 WLR 114*
12 *Staughton L.J. cited the following passage of the then current*
13 *edition of this book with approval:*

14 *"If A shows a privileged document to his six best friends,*
15 *he will not be able to assert privilege if one of the friends*
16 *sues him, because the document is not confidential as*
17 *between him and the friend. But the fact that six other*
18 *people have seen it does not prevent him claiming privilege*
19 *as against the rest of the world."*

20
21 30. It is important to note that Mr. Bridger at paragraph 36 of his Amended Defence
22 filed on 2nd August 2011 by his current attorneys wished to make it clear that the
23 legal advice received was privileged and that he did not waive it. It is clear that
24 the Government Legal Department shared this view as Mr. Schofield made
25 extremely clear in the final paragraph of his earlier letter to Mr. Bridger dated 29th





October 2010.⁸ It cannot be argued that it was implicit that Mr. Bridger could
2 waive privilege against Kernohan, in fact, it was explicit that he could not.

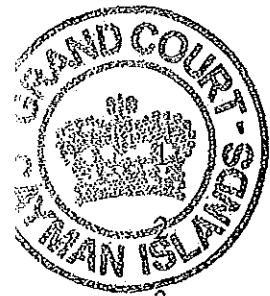
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4 31. On 28th May 2011, Sir Alan Moses (Ag) made various orders including striking
5 out the claims against the Governor of the Cayman Islands and the Acting
6 Commissioner of the RCIPS and gave comprehensive directions in the Kernohan
7 proceedings. The claim for the tort of misfeasance in public office made against
8 Mr. Bridger remained. The parties were ordered to exchange disclosure lists by 7th
9 October 2011 with inspection of documents to follow within seven days
10 thereafter. The ordered exchange did not actually take place until around 17th
11 October 2011.

12

13 32. Mr. Bridger served his List of Documents around 19th October 2011, in which
14 Schedule 1, Part 1 detailed all the documents that he would make available for
15 inspection by the other parties. It is suggested that Mr. Bridger retained copies of
16 these documents comprising legal advice that was presented in relation to the
17 investigation, some of which were given to him at a time when both he and the
18 Attorney General were jointly represented by members of the Attorney's
19 Chambers. The Attorney General, upon reviewing the list of documents
20 mentioned in the Schedule, formed the view that a number of them were subject
21 to legal professional privilege and that Mr. Bridger had made a deliberate decision

⁸ See paragraph 19 above.



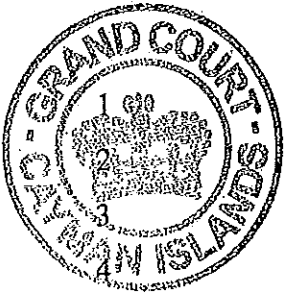
to disclose them to all parties. It is claimed that the documents contain legal advice from:

- 3 (i) the Attorney General and his Chambers,
- 4 (ii) Mr. Andre Mon Desir (who was appointed by the Governor to act as
5 independent Special Counsel to the investigation from November 2007 up
6 to 17th May 2008); and
- 7 (iii) Mr. Martin Polaine, who took over that role when his company was
8 appointed to do so by the Ministry of Internal and External Affairs.

9
10 The expenses incurred in the investigation, including for the services of the
11 Special Counsel, were paid for from that Ministry's budget.

12
13 33. Upon receiving Mr. Bridger's list of documents, in a letter dated 20th October
14 2011, Mr. Schofield wrote to the Defendant's attorneys seeking an undertaking
15 not to disclose certain documents and stating:

16 *"We are concerned that your client's List of Documents includes*
17 *many documents which are privileged, and which must not be*
18 *disclosed to the Plaintiff without our client's consent. The privilege*
19 *in question is not your client's, and your client has no right to*
20 *waive or breach it. Your client is well aware that privilege has not*
21 *been waived. That point is made explicit, for example, in your*
22 *client's Defence. We note that you gave no advance notice of your*
23 *intention to include such documents, although we had given you*
24 *sight of our client's List of Documents which clearly indicated that*

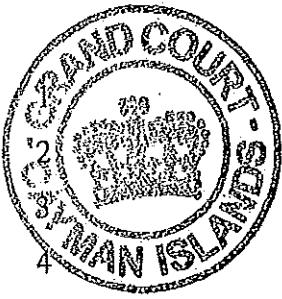


5 *privilege applied and was asserted. Please explain the basis, if*
6 *any, on which your client claims to be entitled to include such*
7 *documents in Schedule 1, Part 1 of his list. ...It is also apparent*
8 *that there are irrelevant documents, notably in connection with*
9 *Justice Henderson, in Mr. Bridger's list. While it might not*
10 *ordinarily matter if the irrelevant documents were disclosed, it*
11 *does matter when they are not only irrelevant, but concern a*
12 *-serving Grand Court Judge in relation to other legal proceedings*
13 *which have since been settled on confidential terms."*

11 34. The Attorney General claimed, and still claims, legal professional privilege over
12 documents detailed as follows in Part 2 of Schedule 1 of his list dated 17th
13 October 2011;

14 "1) Confidential correspondence, instructions, opinions,
15 memoranda, notes and other communications and documents
16 passing between the First Defendant, the Strategic Oversight
17 Group, the Governor and/or others concerned with
18 Operation Tempura; and their legal advisers; including, Mr.
19 Andre Mon Desir, Ms. Arvinder Sambei, a colleague of Mr.
20 Polaine, the Second Defendant, and other members of the
21 Cayman Islands Attorney General's Chambers and/or the
22 Cayman Islands Government Legal Department; for the
23 purposes of giving or obtaining legal advice, which are
24 subject to legal professional privilege, and copies, notes,
25 extracts, summaries and discussion thereof and other
26 references thereto.

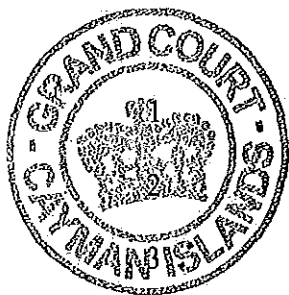
27 2) Confidential correspondence, instructions, opinions,
28 memoranda, notes, drafts of pleadings, affidavits and



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statements, and other privileged documents passing between
and/or in the possession, custody or power of the Second
Defendant and other members of the Cayman Islands
Attorney General's Chambers and/or the Cayman Islands
Government Legal Department and/or counsel made in
contemplation and/or during the conduct of these
proceedings for the purpose of information, evidence and
advice in connection therewith, which are privileged, and
copies, notes, extracts and summaries thereof and other
references thereto.

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3) Confidential correspondence, instructions, opinions,
memoranda, notes and other communications and documents
passing between the parties or former parties to this action
or their attorneys or counsel for the dominant purpose of
informing each other of the facts, or the issues, or advice
received, or of obtaining legal advice in respect of
contemplated or pending litigation, which are subject to
common interest privilege."

35. Exhibited at "DSS1" in the first affidavit of Douglas Schofield sworn on 6th
August 2012, one can see the Plaintiff's disputed list laid out in three tables of
documents. Mr. Griffiths Q.C. invites the Court to read these tables as the best
introduction to the documents in dispute. The Tables show the three categories of
the documents which the Plaintiff says should not be disclosed. In Table 1 the
Plaintiff lists the documents which he claims are entirely privileged and should
not be disclosed at all. In Table 2 the Plaintiff sets out the documents that require
redaction as, although not otherwise privileged, they contain explicit reference to



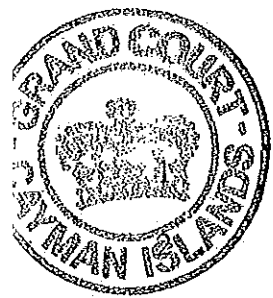
privileged material. Table 3 identifies documents which, whether privileged, or not, the Plaintiff submits to be wholly irrelevant to the Mr. Bridger's Defence in the Kernohan proceedings as they relate to the investigation and arrest of Justice Henderson. There are separate core bundles, one bundle for the documents in Table 1, another for the documents in Table 2 and finally one for the documents in Table 3. The Tables and the documents in dispute are contained in the core bundles.

36. Mr. Griffiths Q.C. breaks down the claim for privilege into four categories:

(i) The first is what he terms "*the primary documents*", namely "*confidential correspondence, instructions, opinions, memoranda, notes and other communications and documents...*";

(ii) The second is termed "*the privileged context*", namely "*...passing between the First Defendant, the Strategic Oversight Group, the Governor and/or others concerned with Operation Tempura and their legal advisers; including, Mr. Andre Mon Desir, independent special counsel to Operation Tempura, Mr. Martin Polaine, the Second Defendant, and other members of the Cayman Islands Attorney General's Chambers and/or the Cayman Islands Government legal Department; for the purposes of giving or obtaining legal advice...*";

(iii) The third is termed "*the claim for privilege*", namely "*...Which are subject to legal professional privilege...*"; and



3 (iv) The fourth is termed "*the derivative documents in respect of which*
4 *privilege is also claimed: "...and copies, notes, extracts, summaries and*
5 *discussion thereof and other references thereto."*

6 37. Mr. Bridger has filed a document-by-document response to the contents of Table
7 1, which can be found in his first affidavit dated 28th October 2012 at exhibit
8 "MB7". Some entries in the response are extremely brief. A similar response in
9 relation to the documents at Table 2 can be found at exhibit "MB8" of the same
10 affidavit. Mr. Bridger has not responded to the contents of Table 3 in this way and
11 his opening skeleton argument did not address those documents.

12 38. Mr. Englehart Q.C. claims that the abovementioned Tables illustrate a failure by
13 the Attorney General to distinguish between documents he regards as being
14 covered by legal professional privilege, and those which he may wish to contend
15 to be covered by confidentiality. The Defendant submits that a failure to address
16 these issues is a "*significant omission*" and is "*an incurable defect in the*
17 *Plaintiff's claim.*"

18
19 39. Mr. Griffiths Q.C. contends that Mr. Englehart Q.C.'s submission is
20 misconceived. Mr. Griffiths Q.C. rightly submits that, save for some of the
21 documents in Table 3, the Plaintiff's claim is based upon the existence of legal
22 professional privilege and that all privileged documents are confidential. He refers

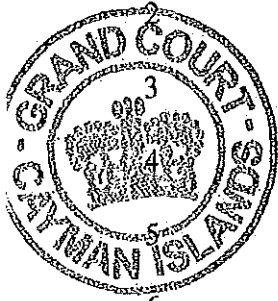
1 to Passmore on Privilege, 2nd Edition (2006) paragraph 1.001, where the author
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1 41. Due to his contentions concerning the privileged nature of the documentation, the
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Plaintiff issued the Notice of Originating Motion which is before me. Various exchanges took place between the Attorney General and Mr. Bridger's attorneys, which resulted in the ongoing holding position, namely an undertaking from Mr. Bridger not to permit inspection of the documents until the Court's determination of the Notice of Motion. Regrettably, the Kernohan proceedings have not been able to move forward until the Attorney General's Notice of Originating Motion has been determined by the Court.



11 **The Factual Background – Operation Tempura**

12 42. The background is set out in some detail in the previous decision of the Chief
13 Justice in the matter of *Operation Tempura* [2008] CILR 111, and *R v Ebanks,*
14 *ex parte Henderson* [2009] CILR 57 as well as the in the Ruling of Lord Justice
15 Moses made on 28th May 2011 in the Kernohan proceedings. I have regard to the
16 content of those judgments.

17 43. It is alleged by Mr. Kernohan that at a meeting held on 27th August 2007
18 involving amongst others himself, the former Governor of the Cayman Islands
19 and Mr. Larry Covington, Her Majesty's Police Representative for the Caribbean
20 and other nearby Territories and the Law Enforcement Adviser of the Foreign and
21 Commonwealth Office ("FCO") based in Miami, Florida, USA, a discussion was
22 held concerning the investigation of allegations that Anthony Ennis, Deputy



Commissioner of Police, had passed confidential and sensitive information concerning police affairs to Desmond Seales, the Editor of the Cayman Net News newspaper. The allegation had emanated from Mr. McKeeva Bush, a member of the Legislative Assembly, and Mr. John Evans and Mr. Lyndon Martin, who were both employees at the newspaper. Mr. Kernohan's position is that it was agreed that Chief Superintendent Jones would assume the lead investigative role and report directly to the Governor. Mr. Kernohan also alleges that at the meeting the Governor authorised and instructed him to procure Mr. Evans and Mr. Martin to obtain copies of documentation from the officers at the newspaper. It is denied that the Governor gave this instruction, as pleaded at paragraph 51 of the Attorney General's Defence.

44. It is said, that at the meeting, it was agreed that these allegations would be investigated by an independent team comprised of overseas police officers. Mr. Kernohan alleges that, during the meeting, the Governor with the consent and approval of the Attorney General and Mr. Covington authorised and instructed him to procure Mr. John Evans and Mr. Lyndon Martin to obtain copies of relevant documents from the office of Cayman Net News, where they both worked. The Attorney General denies this allegation.

45. Mr. Covington approached Mr. Bridger and informed him about the background and stated that he was going to request the assistance of the Metropolitan Police



1 on behalf of Mr. Kernohan. Mr. Covington arranged for a letter to be sent through
2 Mr. Leigh Turner, his line manager at the FCO, to Sir Ian Blair⁹, the
3 Commissioner of the Metropolitan Police Service requesting a "*professional*
4 *standards investigation.*" Mr. John Yates, Assistant Commissioner in the
5 Metropolitan Police Service, stated that the request was for:

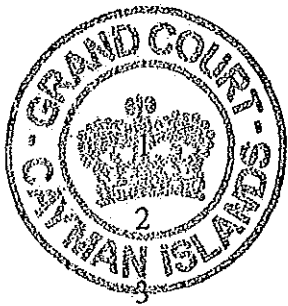
6 *"assistance in respect of concerns as to alleged corrupt*
7 *relationship between one of the two Deputy Commissioners of the*
8 *RCIPS, Anthony Ennis, and the Editor-in-Chief of the Caymanian*
9 *News, Desmond Seales."*¹⁰
10

11 Attached to the letter were the proposed terms of reference. I note with interest
12 that this reference to Lord Blair is relied upon in Mr. Bridger's first affidavit
13 when I remind myself that Mr. Bridger sought to seek belated leave to adduce
14 affidavit evidence from him after the close of the case.

15
16 46. On 3rd September 2007 Mr. Evans unsuccessfully searched the office of the
17 Cayman Net News for a box file which he thought contained the documents. The
18 Plaintiff contends that the initial focus of the operation was the investigation of an
19 allegedly corrupt relationship between Deputy Commissioner Ennis and Mr
20 Seales. Mr. Bridger contends that, following his appointment as the SIO, he was
21 greatly concerned with investigating the legality of the entry into and search of
22 these business premises, which he says was organised by Mr. Kernohan, Chief

⁹ Now Lord Blair.

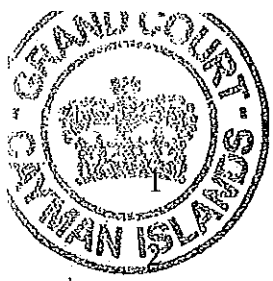
¹⁰ Paragraph 11 of the affidavit of John Yates sworn on 23rd October 2008.



Superintendent Jones and others. Mr. Bridger is of the view that, if police reporting procedures had been properly followed, it would have been clear that the suspicions which led to the search were baseless. Mr. Bridger states the view that the search of such journalistic business premises in England would be regarded as being plainly unlawful as a matter of public law and tortious. It is submitted by Mr. Englehart Q.C. that with this background, Mr. Bridger was right to investigate potential offences under s.95 and 21 of the Penal Code (2007 Revision).

47. Mr. Kernohan contends that at a meeting held on 29th August 2007 between himself, the Governor and the Attorney General it was agreed that he would stand down as officer with oversight of the operation and that the Governor would take his place.

48. In September 2007 Detective Chief Superintendent Bridger, as he was then, arrived as the SIO of a team of investigators made up of officers from the Metropolitan Police Service. Mr. Bridger was a very experienced and distinguished police officer, having joined the Metropolitan Police Service in 1977. It is evident from the positions he held, as well as the high level, sensitive



and demanding investigations¹¹ that he was involved in and led, that he is highly regarded in the Service.

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4 49. The police operation became known as Operation Tempura. Mr. Bridger and Ms.
5 Vicki Ann Ellis indicate that the operation was given this title by the Metropolitan
6 Police Service. Ms. Ellis also indicates that the expenses of the operation were
7 paid for from the budget of the Ministry of Internal and External Affairs of the
8 Cayman Islands. These expenses covered the advice provided by Mr. Mon Desir,
9 Mr. Polaine and Ms. Sambei. Ms. Anne Lawrence, who succeeded Mr. Bridger as
10 the SIO indicated that she received a salary in the normal way from the
11 Metropolitan Police Service, who then sought reimbursement from the Cayman
12 Islands. She said that she was provided with accommodation, vehicle, mobile
13 telephone and expenses directly from the Cayman Islands Government.

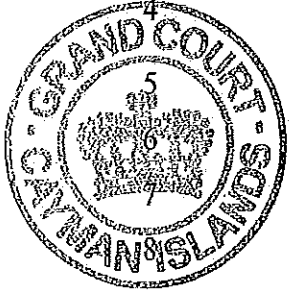
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15 50. Mr. Bridger contends that at all material times he reported to the Metropolitan
16 Police Service and that it was an independent investigation team. He contends that
17 any legal advice that he received in this capacity from Special Counsel to
18 Operation Tempura was directed to him and therefore legal professional privilege,
19 and the right of waiver is his.

20

¹¹ For example - see the affidavit of John Yates, Assistant Commissioner in the Metropolitan Police Service, sworn on 23 October 2008.

1 51. Mr. Yates in his affidavit sworn on 23rd October 2008 at the request of the then
2 Acting Commissioner of the RCIPS in the Judicial Review Proceedings
3 concerning Mr. Justice Henderson, which was placed before the Court by Mr.
4 Bridger in these proceedings, stated that:



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"Prior to the arrival of Mr. Bridger and Mr. Ashwin, agreement was reached between the Commissioner, Stuart Kernohan, and I that Larry Covington would provide 'on island' oversight and guidance and that I would provide periodic reviews of the investigation. Also agreed was that I would carry out such a review every six weeks or as often as circumstances required."

At paragraph 19 of the affidavit, Mr. Yates indicated that in February 2008, after the delivery of the ruling of the Chief Justice, he spoke to the Governor informing him that he was anxious to ensure the operational independence of Operation Tempura and that the investigation should be free to follow necessary and proportionate lines of enquiry. At paragraph 20 of the affidavit when referring to April 2008, Mr. Yates stated that at that time he maintained his "review role." It therefore appears that the Metropolitan Police viewed that their role was to review, advise and make recommendations, but that the immediate oversight and guidance would come from Mr. Covington.

52. Mr. Bridger has placed before the Court a typed transcript of a letter he contends was written to the Caymanian Compass newspaper by the Governor and which

1 was published on 29th September 2008. The transcript provides that the Governor
2 stated:



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"...the special investigation team carrying out independent¹² investigations. All operational decisions, for example to arrest someone, are taken independently by the team here in Cayman drawing on advice from their own independent expert legal counsel. Neither I nor anyone in London instructs them how to conduct their investigations or what conclusions they should reach."

11 The Attorney General concedes that Operation Tempura may have had
12 operational independence when carrying out their police enquiry, but he contends
13 that that is not the same as owning control of legal advice paid for by the Cayman
14 Islands Government and overseen by the Strategic Oversight Group ("SOG").

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16 53. The Plaintiff refutes Mr. Bridger's contentions. The Attorney General contends
17 that Mr. Bridger was initially on secondment from the Metropolitan Police
18 Service, but from 22nd May 2008 to 30th April 2009 he was under contract with
19 the Government of the Cayman Islands. It is agreed that after the expiration of his
20 last contract in April 2009 Mr. Bridger played no further role in Operation
21 Tempura.

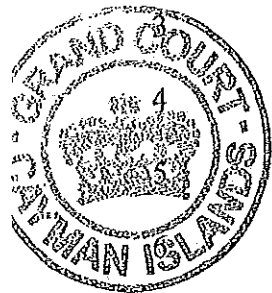
¹² Emphasis as in transcript.

1 54. Mr. Bridger was sworn in as a Special Constable with the RCIPS by Mr.
2 Kernohan on 17th September 2007. This status was not affected when Mr. Bridger
was later employed on a consultancy basis. In fact, all of the officers from
England who were brought in for the operation were sworn in as Special
Constables of the RCIPS. The Defendant contends that he was sworn in as a
Special Constable to provide him with coercive powers. Mr. Bridger states that
7 when sworn in as a Special Constable he was not an employee of the RCIPS, but
8 was an officer holding the office of Special Constable. Mr. Bridger submits that
9 the appointment does not disable him from asserting that the legal advice received
10 from Special Counsel, which he says he received in his capacity as independent
11 investigator, was his and he is entitled to waive privilege.

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13 55. The Plaintiff contends that Mr. Bridger, and those involved in the Operation, were
14 subject to the supervision of Assistant Commissioner Yates of the Metropolitan
15 Police Service as lead reviewing officer. Mr. Griffiths Q.C. refers to paragraph 72
16 of Mr. Bridger's Amended Defence, where Mr. Bridger makes the same assertion.

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18 56. Mr. Bridger refers to an email from Assistant Commissioner Yates to the
19 Commissioner of Police Kernohan dated 4th September 2007 in which he stated:

20 *"2. It is of paramount importance that appropriate reporting*
21 *lines and accountability for the team and the outcome of this*
22 *enquiry are established before any scoping study or full*
23 *investigation commences. We were both agreed that neither.*



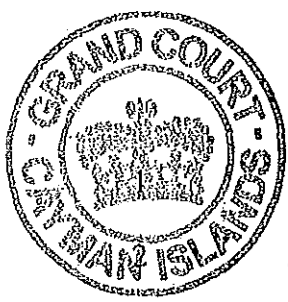


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you nor the Governor were appropriate to undertake this task due to potential conflicts around witness role (yourself) or future misconduct oversight (the Governor). We both recognise that the individual who is identified, undertake this role must be of sufficient seniority, experience and political acumen to be able to oversee the enquiry and manage whatever outcome emerges. He/she clearly must not have any conflict of interest.

3. *Once (2) above is resolved, an initial scoping will be undertaken as soon as possible by unidentified senior MPS (the SIO) who has appropriate experience etc, to undertake the role."*

14 57. The affidavit of Mr. Yates sworn on 23rd October 2008, which Mr. Bridger
15 appears to have had in his possession for a considerable amount of time, was filed
16 in these proceedings only two days before the hearing, in non-compliance with
17 agreed directions. Unopposed leave was given to file the affidavit evidence out of
18 time. The Second affidavit of Mr. Bridger was sworn and filed during the hearing.
19 Again, unopposed leave was given for the late filing of this affidavit, but only on
20 the basis that the Plaintiff had leave to submit a further affidavit to meet any
21 prejudice caused. As a consequence, the Attorney General filed an affidavit sworn
22 by John Yates on 9th October 2012. In order to ensure that primarily Mr. Bridger
23 could have the opportunity to comment on the contents of any further affidavit
24 evidence filed by the Plaintiff pursuant to the grant of leave, the Court also gave
25 leave for both parties to file written submissions upon the same. Mr. Bridger took

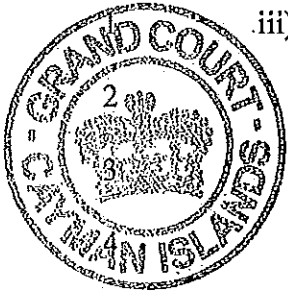


up that opportunity by filing written submissions on 19th October 2012, as well as additional written submissions dated 29th November 2012.

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4 58. Importantly, in his October 2012 affidavit, Mr. Yates confirmed the assertions in
5 paragraph 74 to 78 of the affidavit sworn by Mr. Schofield on 31st August 2012
6 dealing with information from the Metropolitan Police Service. In the first part of
7 the affidavit Mr. Yates confirmed the contents of the responses dated 19th
8 November 2008 made by Ms. Naz Saleh, Assistant Director, Directorate of Legal
9 Services, Metropolitan Police to the Government Legal Department's questions
10 contained in a memorandum dated 12th November 2008. Mr. Yates also agreed
11 with Ms. Saleh's statement in an email exhibited to Mr. Schofield's affidavit in
12 which she stated that he had seen and signed off on the responses. Mr. Yates
13 repeated the following significant responses which were contained in the affidavit
14 of Mr. Schofield served on Mr. Bridger in compliance with the Court's directions
15 and set timetable, consequently Mr. Bridger was well aware of them prior to the
16 privilege hearing:

- 17 i) Members of the special investigation team were all Special Constables and
18 they held the rank of detective constable;
- 19 ii) The immediate line management was to the SIO, who, through the
20 Strategic Oversight Group (SOG) reported and was responsible to the
21 Commissioner of the RCIPS;



5 iii) The Commissioner of RCIPS was responsible and accountable in law for overall management and outcome of investigations. The SIO was responsible for undertaking day-to-day operational matters, but all strategic decisions in relation to Operation Tempura were referred to the SOG, which was chaired by the Commissioner of Police;

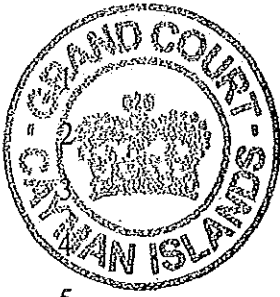
6 iv) In relation to the making of the final decisions concerning Justice Henderson's arrest and the searches, the SOG, the Governor and Mr. Yates were consulted and the Acting Commissioner of the RCIPS was informed.

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10 v) That the three serving Metropolitan Police Service officers at the time were engaged on temporary service to the RCIPS under section 26 of the Police Act 1996. He said that other members were either on personal contract to the Cayman Islands Government or members of the company which had a contract with the Cayman Islands Government.

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15 vi) “On 30th - August 2007, the Commissioner of Police of the Metropolis was requested by the Director Overseas Territories with the FCO, to provide advice and assistance to RCIPS under s.26 of the Police Act 1996. ...The initial request to the FCO had come from HE the Governor of the Cayman Islands.

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20 On 4th September 2007 AC John Yates, on behalf of the Commissioner, agreed to assist with the investigation. He recommended in accordance with good practice an element of “independent review” into the investigative set up...”

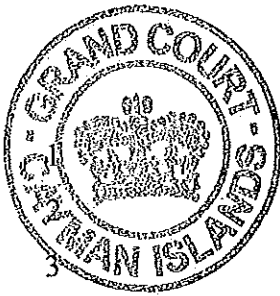
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24 On 4th September 2007 Stuart Kernohan confirmed to Larry Covington FCO, OTD that an “independent” would be essential to



protect the position of the Governor, the RCIPS and suspects themselves...

Accordingly, AC John Yates legal standing is as an independent reviewer who is not contracted to the CIG or the FCO. The Governor has also recently confirmed at a meeting on 13th November 2008 his understanding of AC John Yates's position as being "a resource person, a source of advice and a source of professional quality assurance, but not accountable for the overall management and outcome of the investigations."

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10 vii) "The MPS, the Commissioner of Police of the Metropolis and the
11 MPA do not bear any legal responsibility vicarious or otherwise
12 for the acts/omissions of the SIO or any member of the SIT. Each
13 MPS police officer is providing advice and assistance, pursuant to
14 s.26(1) and (2) of the Police Act 1996, authorisation, having been
15 given pursuant to s.26(3) of that Act. In the circumstances, the
16 vicarious liability of the Commissioner of Police of the Metropolis
17 created by s.88 of the Act does not extend to any tortuous acts and
18 omissions of the officers committed while they were engaged on
19 temporary service in accordance with the arrangements made
20 pursuant to s.26 of the Act. This is because: (i) by s.97(3) of the
21 Act, a member of a police force engaged on "relevant service"
22 [which phrase includes temporary service pursuant to s.26 of the
23 Act: see s.97(1) (a)] is to be treated as if he were not a member of
24 that (i.e. his home) police force during that service, (ii) s.97(3) of
25 the act is itself subject to ss.97(4)-(8) and s.97(8) makes express
26 provision, in relation to the treatment of some types of "relevant
27 service", for officers to be treated as constables of their home
28 forces-relevant service by reason of s.26 of the Act is not within
29 these categories, and (iii), it cannot be said that the officers were,



at the material times, under the direction and control of the Commissioner of police of the Metropolis for the purposes of s.88 of the Act.”

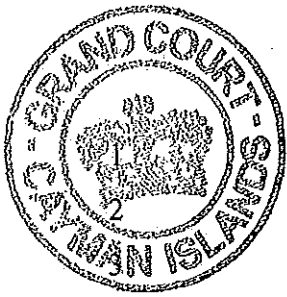
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4 viii) “The initial deployment of MPS officers to Operation Tempura
5 was negotiated on contract between MPS and CIG. This included
6 Martin Bridger (SIO), who at the time was still a serving MPS
7 officer. This later changed and contracts were negotiated direct
8 with members of the SIT and CIG.

9 Additionally, Martin Polaine was employed as an independent
10 lawyer providing legal service to the SOG.”
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12 59. Mr. Yates stated that the responses reflected the position not only as of November
13 2008, but throughout the period of Mr. Bridger’s involvement in Operation
14 Tempura. He understood that the independent legal advice provided to the
15 Operation by Special Counsel, Mr. Mon Desir was provided by him as Special
16 Counsel to the SOG, and that Mr. Bridger was only one of the members of the
17 Group. Mr. Yates stated that the SOG provided oversight to Operation Tempura
18 and he was the reviewing officer. This is highly consistent with Mr. Schofield’s
19 affidavit evidence.

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21 60. Mr. Yates reiterated that he felt that the operation should have operational
22 independence, but this did not mean that he expected or understood legal advice
23 to be under the control of Mr. Bridger or any SIO. He stated that:

24 *“It was not necessary to the operational independence of the*
25 *investigating officers that they should have control over the legal*



advice or that they should be entitled to make the decision about whether any legal privilege, should or would be waived."

4 Importantly Mr. Yates said that he understood that issues as to privilege and
5 waiver were matters for the SOG.

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7 61. Mr. Yates also indicated that operational independence did not mean that the SIO,
8 including Mr. Bridger, would have any right to

9 *"claim ownership of files or papers from Operation Tempura, or*
10 *to take copies away with him on retirement, or to retain copies in*
11 *retirement."*

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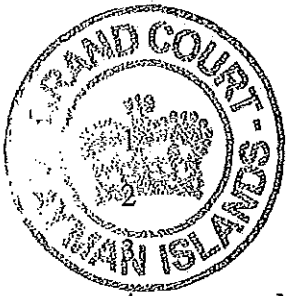
13 Mr. Yates stated his view from his experience that files and papers from police
14 investigations belong to the police force and not to individuals or groups of
15 individuals within the force, and therefore those from Operation Tempura
16 belonged to the RCIPS.

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18 62. In his first affidavit Mr. Bridger refers to extracts from emails at that time. He
19 referred to a letter from Mr. Covington to the Governor's ADC dated 5th
20 September 2007, concluding that this illustrated some measure of agreement in
21 relation to the reporting lines. In the letter, Mr. Covington stated that:

22 *"Stuart¹³ and I have discussed this at length and have mutually*
23 *concurred, and at Stuart's request, that I represent him in joint*

¹³ Mr. Stuart Kernohan.



oversight of the investigation with the Assistant Commissioner John Yates (or his representative) from the MPS.”

4 Mr. Bridger indicated that as the Operation moved forward, Mr. Covington was
5 removed from an oversight position and replaced by the Governor, who acted in
6 concert with Assistant Commissioner John Yates.

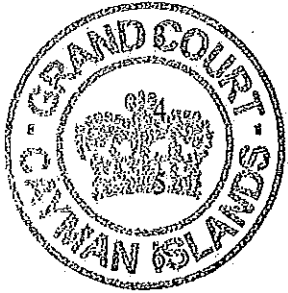
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8 63. Mr. Bridger reminds the Court that at the time he continued to receive a monthly
9 salary from the Metropolitan Police Service until his retirement in April 2008. Mr.
10 Bridger indicates that the three consultancy agreements entered into with the
11 Cayman Islands Government thereafter were very different to the agreements
12 entered into with Special Constables and the terms support his contention that he
13 was an independent investigator.

14

15 64. Mr. Bridger said that the other officers recruited by him to join the team had their
16 salary settled through United Kingdom agencies and that operationally, including
17 in matters of discipline, he was responsible without any involvement by the
18 RCIPS. However, Mr. David Baines, the current Commissioner of Police for the
19 RCIPS, in his affidavit sworn on 31st August 2012 indicated that the Metropolitan
20 Police regularly invoiced the Cayman Islands Government for recovery of the
21 salary costs of any serving Metropolitan officers who were deployed to the
22 Cayman Islands in respect of the Operation.

23



1 65. Mr. Bridger filed affidavit evidence from third persons to support his contention
2 that the inquiry was an independent one. Firstly, Mr. Richard Coy filed an
affidavit sworn on 22nd August 2012. Mr. Coy is also an experienced police
officer, having been a member of the Metropolitan Police Service from 1977 to
his retirement in May 2007. At Mr. Bridger's request, he was recruited as a
member of the team in Operation Tempura. In his affidavit Mr. Coy indicates that
7 throughout the investigation the chain of command remained consistent and that
8 the team was independent of the RCIPS. He said he received instructions and
9 advice from the independent team, but never from senior members of the RCIPS.
10 He stated that even after he was sworn in as a Special Constable he only received
11 directions from Mr. Bridger.

12
13 66. Mr. Ronald Kemp, a retired Metropolitan Police Officer with roughly 28 year's
14 experience with the Service has also prepared an affidavit filed on behalf of Mr.
15 Bridger, which he swore on 20th August 2012. He said that he was recruited into
16 the Operation Tempura team and initially worked closely with Mr. Coy. He said
17 that on 26th March 2008 he was sworn in as a special constable to the RCIPS to
18 enable him to have the same powers of arrest given to police officers in the
19 RCIPS. He indicated that he was of the belief that the investigation had an
20 independent nature.

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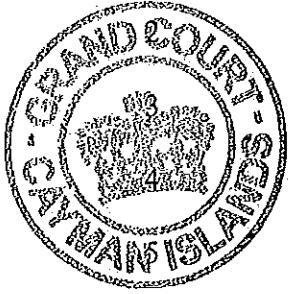


1 67. An affidavit sworn by Mr. John Azah on 22nd August 2012 was also filed on
behalf of Mr. Bridger. Mr. Azah has been the Director of Kingston Race and
Qualities Council since 1989. Mr. Azah stated that in the Fall of 2007 he was
invited by Assistant Commissioner Yates to advise the Operation Tempura team
and Mr. Bridger. As a consequence, he said that he travelled twice to the Cayman
6 Islands to give independent advice on issues of community engagement and the
7 impact on community confidence in the RCIPS, the Governor's Office and the
8 Government. Mr. Azah perceived his role to be one of adviser to an independent
9 Metropolitan Police Service investigation and the Senior Investigating Officer.

10

11 68. Mr. Timothy Thorne, an experienced Detective Sergeant employed as a forensic
12 computer examiner with the Metropolitan Police Service, swore an affidavit on
13 29th August 2012 in support of Mr. Bridger. He provided support to Operation
14 Tempura with three tours to the Cayman Islands between June and November
15 2008. He indicated that Assistant Commissioner John Yates had authorised his
16 involvement, pursuant to a section 26 Police Act 1996 request. He indicated that
17 he was sworn in as a Special Constable for the RCIPS to ensure that he had the
18 necessary authority to assist with an arrest and search of premises. He stated that
19 during his visits to the Islands he was working at all times for the Metropolitan
20 Police Service with Mr. Bridger as his SIO, and that at no time did he take any
21 instruction from or answer to the RCIPS

22



1 69. It is contended by the Plaintiff that from the outset, the Operation Tempura
officers reported to the SOG. Mr. Bridger, as the Senior Investigating Officer, was
a member of the SOG. Until November 2008, the SOG was chaired by Mr.
George McCarthy, the Chief Secretary. Mr. Schofield indicated in his affidavit
sworn on 31st August 2012 that, from a review of the documents between 20th
6 November 2008 until the time when Mr. Bridger left the jurisdiction around 1st
7 May 2009, all but one of the SOG meetings were chaired by either Acting
8 Commissioner George or Acting Commissioner Smith.

9
10 70. The Plaintiff relies upon a copy of the written terms of reference for the Operation
11 Tempura Strategic Management Group (which later became known as the SOG)
12 from around November 2007. The preamble and paragraphs 1, 2, 3 and 6 provide:

13 *"The Strategic Oversight Group exists to advise the Commissioner*
14 *of Police, on such related matters related to the conduct of*
15 *Operation TEMPURA, specifically:-*

- 16 1) *To oversee all matters and provide advice to the Commissioner*
17 *of Police and the investigating team in relation to operation*
18 *TEMPURA.*
19 2) *To advise to the Commissioner of Police on key strategic*
20 *decisions in relation to operation TEMPURA investigation.*
21 3) *To identify, and advise the Commissioner of Police and the*
22 *investigative team in relation to relevant political,*
23 *constitutional and community issues.*

24 (...)



6) *To provide a forum where legal advice can be discussed and provided to the Commissioner of Police.*"

3

4 71. The Plaintiff also refers to the terms of reference of the SOG which were
5 appended to an email from the Deputy Chief Secretary, Peter Gough, on 18th
6 November 2008. This, as well as the document referred to in paragraph 70 above,
7 are important as it sets out the intended framework for legal advice that is
8 requested, given and discussed. It goes to the issue of who is the client receiving
9 the said advice and detracts from a submission that it was Mr. Bridger in his
10 personal capacity. They highlight that the Operation Tempura Officers, who were
11 Special Constables in the RCIPS, were subject to oversight by the SOG. The
12 terms of reference included:

- 13 • *"To oversee all matters and provide advice to the investigative*
14 *team in relation to Operation TEMPURA.*
- 15 • *To be the accountable body for the key strategic decisions in*
16 *relation to Operation TEMPURA investigation.*
- 17 • *To identify, manage and advise the investigative team in*
18 *relation to relevant political, constitutional and community*
19 *issues.*
- 20 (...)
- 21 • *To ensure there is appropriate interaction between the*
22 *Investigation Team and any other relevant constitutional*
23 *bodies.*
- 24 • *To provide a forum where legal advice can be discussed and*
25 *provided.*



3

- *To provide the forum where independent advice can be sought.”*

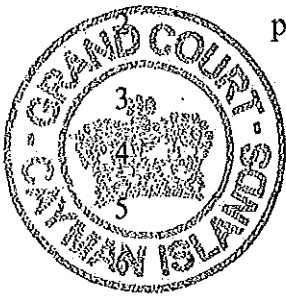
4 72. It is submitted by Mr. Englehart Q.C. that Mr. Bridger’s engagement was
5 evolutionary in nature as what started as a scoping study became an investigation
6 of Mr. Kernohan and into the arrest of Justice Henderson. It is submitted that
7 arrangements as to *“form, substance, process and responsibility were entirely ad*
8 *hoc”* and were only formalised around the time of the judicial review proceedings
9 in October 2008.

10

11 73. On 22nd February 2008, Special Constables Ali and Smith, both members of the
12 Operation Tempura team, unsuccessfully applied to the Chief Justice for a search
13 warrant against Mr. Kernohan. They were again unsuccessful in applications
14 made on 18th and 20th March 2008. The Chief Justice found in a detailed ruling
15 delivered on 4th April 2008 that there were no reasonable grounds for issuing a
16 search warrant on the basis of suspecting Mr. Kernohan of misconduct contrary to
17 statute. In the Kernohan proceedings, Mr. Kernohan contends that there was no
18 reasonable basis for continuing an investigation into him after the Chief Justice’s
19 rulings and that Mr. Bridger, when doing so, was either malicious or recklessly
20 indifferent to the legality of the investigation and the probability of injury to Mr.
21 Kernohan.

22

1 74. By a letter written by the Governor dated 27th March 2008 Mr. Kernohan was
placed on “required leave.” The letter stated:



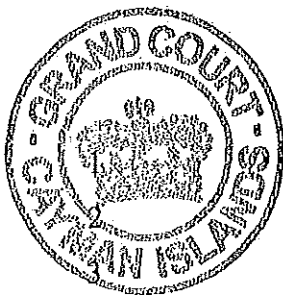
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“...after discussion with the Attorney General, it has been decided to place you on Required Leave in the public interest for an initial period of one month commencing immediately. This is to facilitate the enquiry into the events of the 3rd September 2007 and matters related thereof.”

9 The “required leave” was to be kept under review on “an ongoing basis” and Mr.
10 Kernohan was to be kept informed. The Governor stressed in the letter that the
11 “required leave” was not a disciplinary action, but that the breaking of the
12 expressed conditions of the “required leave” could result in disciplinary
13 proceedings.

14
15 75. On 10th April 2008, the Governor was informed by Campbells, Mr. Kernohan’s
16 attorneys, that his father was terminally ill and that he wished to travel to the
17 United Kingdom. Mr. Kernohan initially indicated that he wished to be out of the
18 jurisdiction until 23rd April 2008 and thereafter sought to extend that until 3rd May
19 2008. Permission was given for him to leave the jurisdiction by the Governor.

20
21 76. On 15th May 2008, Mr. Kernohan was given notice that, he was under
22 investigation for possible misconduct in public office. The allegation being that he

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25
“...failed to carry out a proportioned investigation by not undertaking reasonable lines of enquiry in relation to allegations made by Mr. Lyndon Martin against Deputy Commissioner of



Police Anthony Ennis and Mr. Desmond Seales the Editor in Chief of Cayman Net News which culminated in an unlawful act, namely – the unlawful entry into and search by John Evans of the office of Mr. Desmond Seales.”

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This allegation was exactly the same basis for the first unsuccessful application for a search warrant.

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77. Mr. Kernohan’s father passed away on 30th June 2008. Despite the Governor instructing him to return to the jurisdiction after the time for bereavement leave had expired, Mr. Kernohan refused to do so. Deadlines set by the Governor for Mr. Kernohan’s return on 19th July 2008, 4th August 2008 and 15th August 2008 were not adhered to. As a consequence, the Governor, issued formal disciplinary proceedings on 10th September 2008.

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78. On 18th November 2008, Mr. Kernohan was dismissed from the post of RCIPS’ Commissioner of the RCIPS. The Governor’s letter of dismissal dated 18th November 2008 did not contain any reference or did not purport to be on the grounds of the surrounding events being investigated in Operation Tempura. The dismissal was because:

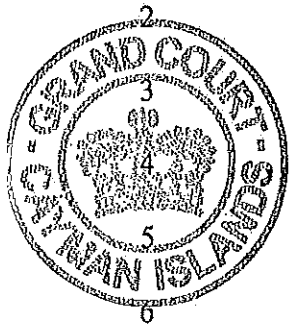
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- (i) he did not return to the Cayman Islands following a number of requests and then orders for him to do so by the Governor; and
- (ii) it was alleged he had made unsupported spurious allegations of potential impropriety against members of the Government.

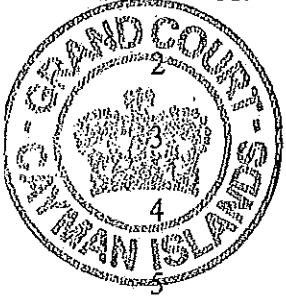


1 79. In the Kernohan proceedings, Mr. Kernohan contends that there had been no
2 reasonable or proper investigation conducted by Mr. Bridger and the Investigative
3 Team between January 2008 and 25th November 2008. He contends that as a
4 consequence, Mr. Bridger's advice to the Governor in March 2008 that he be
5 removed from his post was malicious or, alternatively, Mr. Bridger was recklessly
6 indifferent to the legality of his actions and the probability of injury to Mr.
7 Kernohan.

8

9 80. In April 2008, a "*Consultancy Agreement*" was reached with the approval of Mr.
10 Yates and the Governor that upon his retirement from the Metropolitan Police
11 Service, Mr. Bridger would remain as the Senior Investigating Officer until the
12 conclusion of Operation Tempura and that he would be paid on a consultancy
13 basis. The first formal contract with the Cayman Islands Government, which was
14 a six month contract, was dated 22nd May 2013 and signed by Mr. Bridger and
15 Mr. Donovan Ebanks, Chief Officer, Portfolio of Internal and External Affairs on
16 behalf of the Government of the Cayman Islands. Importantly, the contract
17 provided under the heading "*Nature of Work*":

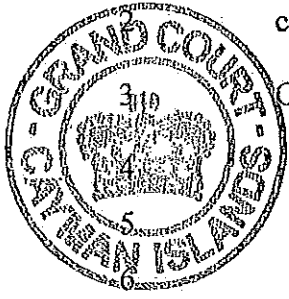
18 "1. *The client agrees to engage the consultant as Senior Investigating*
19 *Officer to provide services in the form of leading, overseeing and*
20 *managing Operation Tempura as agreed by the Metropolitan*
21 *police and the Governor's office. Accordingly the current*
22 *reporting relationships to His Excellency the Governor and Mr.*
23 *John Yates, Assistant Commissioner, U.K. Metropolitan Police,*
24 *will be unaltered."*



1 81. On 25th November 2008, Mr. Bridger entered into a further "*Consultancy*
2 *Agreement*" with the Cayman Islands Government, running from 22nd November
3 2008 until 31st January 2009, which contained almost identical terms as the May
4 Agreement. Under the heading nature of work, the new reporting relationships of
5 Mr. Bridger substituted the Commissioner of Police for the Governor. On 25th
6 November 2008, Mr. Donovan Ebanks again signed the contract on behalf of the
7 Government and Mr. Bridger signed on 26th November 2008.

8
9 82. The third "*Consultancy Agreement*" with the Government was made and signed
10 by both parties on 23rd March 2009. This Agreement covered Mr. Bridger's
11 employment for the period 1st February 2009 until 30th April 2009. Thereafter,
12 Mr. Bridger played no further role in the investigations. This contract, unlike the
13 previous two, was signed by Mr. James Smith, Acting Commissioner of the
14 RCIPS on behalf of the Government of the Cayman Islands. Under the heading
15 "*Nature of Work*" the agreement now provided:

16 *"The client agrees to engage the consultant as Senior Investigating*
17 *Officer to provide services in the form of leading, overseeing and*
18 *managing Operation Tempura. This agreement only covers*
19 *Operation Tempura as agreed by the Metropolitan Police and the*
20 *Cayman Islands Government, accordingly, the current reporting*
21 *relationships to John Yates, Assistant Commissioner, U.K.*
22 *Metropolitan Police, will be unaltered."*
23



1 83. Just prior to his retirement. Mr. Bridger drafted and submitted an updated report
concerning Operation Tempura to Acting Commissioner of Police James Smith.

On page 5 he wrote:

"The TEMPURA investigation and BGP are currently the custodians of all the material provided by those in the community who have come forward and spoken about wrongdoing."

7

8 Importantly, he then went on to say:

9 *"It is acknowledged that the material is ultimately the property of*
10 *RCIPS. However a deliberate decision was made that this material*
11 *should stay in the possession of the Investigation Team, at least*
12 *until we are all satisfied that there are appropriate systems and*
13 *processes in place to correctly manage such documentation."*

14

15 84. Upon Mr. Bridger's retirement Detective Inspector Anne Lawrence, who had
16 been sent to the Cayman Islands by the Metropolitan Police as Mr. Bridger's
17 deputy in January 2009, replaced him as the SIO.

18

19 85. In her affidavit sworn on 31st August 2012 Ms. Lawrence stated that she was the
20 SIO from 1st May 2009 until 9th October 2009. She said she was succeeded by
21 Richard Oliver and that Operation Tempura had concluded after the acquittal of
22 Lyndon Martin on or around 10th September 2009. Ms. Lawrence outlined what
23 she believed to be the reporting lines for Operation Tempura and the other
24 operations at the time. She stated that the Cayman Islands Government and



Governor Stuart Jack had the constitutional responsibility. She stated that the Commissioner of the RCIPS was in charge of key decisions taken by the team.

She said that when she was the deputy to Mr. Bridger, that she was aware that Mr.

4 Bridger reported to the Commissioner of RCIPS. Ms. Lawrence stated that when

5 she replaced Mr. Bridger she reported to the Commissioner by way of a weekly

6 meeting. She stated that the Commissioner of RCIPS chaired the Special

7 Investigation Advisory Group, which had been formally known as the SOG, and

8 which had oversight of the investigations. Importantly, Ms. Lawrence said that

9 Mr. Bridger had reported to the SOG. She said that the Metropolitan Police

10 Service provided support by deploying officers to assist with the investigations

11 but there was no requirement for her to report back to them. She said that she

12 reported back on administrative issues, but not on the running of the RCIPS

13 investigations. Ms. Lawrence said that she did not consider her deployment to be

14 *"on a Met operation."*

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16 86. Importantly, Ms. Lawrence stated at paragraph 19 of her affidavit that she

17 considered the documents and records generated as a result of Operation Tempura

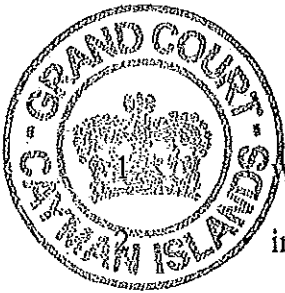
18 to be the property of RCIPS. This is consistent with the view expressed by Mr.

19 Bridger in his report to Acting Commissioner Smith on 28th April 2009. She said

20 that before she left the Cayman Islands she was responsible for ensuring that the

21 documents were boxed and scheduled and that everything was left. She said she

22 had no recollection of Acting Commissioner Smith or Commissioner Baines

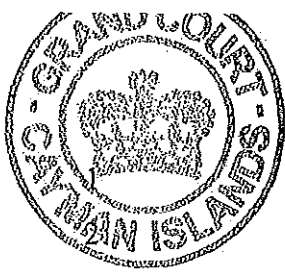


waiving legal professional privilege in respect of legal advice given to the investigation team. Ms. Lawrence said that from her experience, the policy in the Metropolitan Police Service is that material or documents that comes into police possession during a criminal investigation would be the property of the Police Service and that officers leaving the Service would not generally be entitled to retain the originals, or keep copies without the permission of the Service

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8 87. In his affidavit sworn on 31st August 2012 Commissioner of Police Baines stated
9 that upon his appointment in June 2009, he took charge and oversight of both
10 Operation Tempura and the related second phase Operation Cealt. He indicated
11 that that role had previously been one undertaken by the SOG. He said that he has

12 *“retained responsibility for, possession and control of all reports*
13 *and records created, and all statements and legal advice obtained,*
14 *during the conduct of those operations by the officers assigned to*
15 *the respective investigative teams, who were at all times acting*
16 *under their legal status as special constables of the Royal Cayman*
17 *Islands Police Service.”*

18
19 88. Commissioner of Police Baines stated that it was in April 2012 that he learned
20 that Mr. Bridger, following his departure in May 2009, had retained a very large
21 quantity of documents generated during the Operations as well as material
22 provided to him by Mr. Schofield. He expressed a concern that the documents



3 *"include sensitive information from named sources who face*
4 *personal danger and the risk of attack or death were such*
5 *confidential information to be leaked or otherwise made public."*

6 As a consequence he and the Attorney General instructed London solicitors, to
7 commence legal proceedings which were issued on 18th May 2012 against Mr.
8 Bridger in England and Wales.

9 89. On 30th April 2009, Mr. Kernohan was informed that any suggestion that he had
10 committed a criminal offence had been withdrawn.

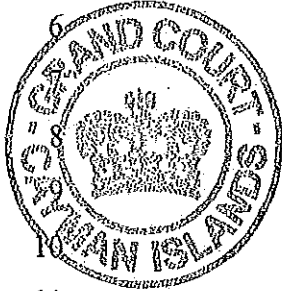
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12 **The Law**

13 90. The importance placed on legal professional privilege is reflected in the statement
14 of Lord Hoffmann at paragraph 7 in *R (Morgan Grenfell) v Special*
15 *Commissioners* [2003] 1 AC 563, who stated that:

16 *"Legal professional privilege was a fundamental human right long*
17 *established in the common law."*

18
19 Lord Hoffmann noted that the European Court of Human Rights has held that
20 such privilege was protected as an aspect of the right to respect for private life and
21 correspondence guaranteed by Article 8 of the European Convention for the
22 Protection of Human Rights and Fundamental Freedoms. It can be argued that
23 Article 9 of the Cayman Islands Constitution Order 2009 makes similar provision.

1 91. The importance of legal professional privilege comes from the public interest,
2 requiring full and frank confidential exchanges between a client and his attorney
3 once legal advice is being sought. In the long-established rule in the common law
4 was described by Lord Taylor of Gosforth CJ in *R v Derbyshire Magistrates'*
5 *Court ex p. B* [1996] AC 487 at 507-508:



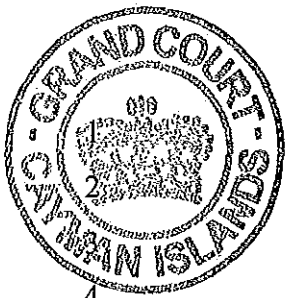
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"The principle...is that a man must be able to consult his lawyer, in confidence, since otherwise he might hold back of the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests....It is not for the sake of the applicant alone that the privilege must be upheld, it is in the wider interests of all those hereafter you might otherwise be deterred from telling the whole truth to their solicitors."

18 92. Lord Scott of Foscote, having reviewed the case law, went on to explain the
19 policy reasons justifying the presence of legal professional privilege, and
20 particularly legal advice privilege, in *Three Rivers District Council and Others v*
21 *Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at
22 649F para 34:

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"None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations,



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whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non- disclosure that the present law privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else..."

25 93. Lord Scott earlier stated in *Three Rivers District (No 6)* at 646D para 25:

26 *"...if a communication or document qualifies for legal professional*
27 *privilege, the privilege is absolute. It cannot be overridden by*
28 *some supposedly greater public interest. It can be waived by the*
29 *person, the client, entitled to it and it can be overridden by statute,*



but it is otherwise absolute. There is no balancing exercise that has to be carried out."

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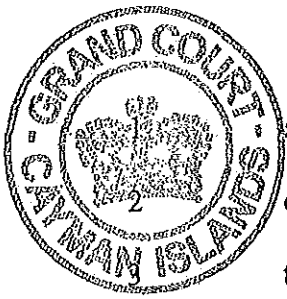
4 94. Having set out the background to the various proceedings and having commented
5 on the general principles underpinning the importance of and approach to legal
6 professional privilege, I now turn to the law in relation to issues raised by the
7 parties. Whatever the nature of the privilege claimed it is for the party refusing
8 disclosure to establish his right to refuse.¹⁴ The Attorney General bears the onus
9 to satisfy me on the balance of probabilities that each document is privileged,
10 either entirely or, at least, in part which results in redaction of the privileged
11 portion. Of course the privilege is that of the client and not of the attorney. I am
12 conscious that, although a document may bear an endorsement to the effect that it
13 is "confidential and privileged," I must still review the content to see if it is
14 subject to privilege. One the other hand just because a document does not contain
15 such an endorsement does not mean that is not privileged.

16

17 **Which of the documents are subject to legal professional privilege? / Are the**
18 **documents privileged?**

19 95. Although the brevity in the Defendant's written skeleton arguments on this issue
20 may make it appear, as suggested by the Plaintiff at paragraph 9 of his reply
21 skeleton argument, that Mr. Bridger does not dispute that the relevant documents
22 are privileged, the oral submissions suggest otherwise. Mr. Englehart Q.C.

¹⁴ Waugh v British Railways Board [1980] A.C. 521 at 541G.



submits that the Attorney General is making a "very wide" and "extravagant" claim for privilege covering an extremely large number of documents, although at the same time he concedes that some of those documents do record legal advice, and therefore would prima facie attract legal professional privilege. Mr. Englehart Q.C. submits that the mere fact that a document may contain passages or reference to legal advice does not make that document immune from discovery.

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96. In the past, legal professional privilege was thought to apply only when legal proceedings were being contemplated or ongoing. However, the case of *Balabel and Another v Air-India* [1988] 1 Ch 317 makes it clear that legal professional privilege extends beyond legal advice in regard to litigation.

97. Taylor L.J. stated at 330D in *Balabel* that:

"...the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. ...Where information is passed by the solicitor or client to the other as part of the continuum aimed



5 at keeping both informed so that advice may be sought and given
6 as required, privilege will attach. A letter from the client
7 containing information may end with such words as 'please advise
8 me what I should do'. But, even if it does not, there will usually be
9 implied in the relationship an overall expectation that the solicitor
10 will at each stage, whether asked specifically or not, tender
11 appropriate advice. Moreover, legal advice is not confined to
12 telling the client the law; it must include advice as to what should
13 prudently and sensibly be done in the relevant legal context.

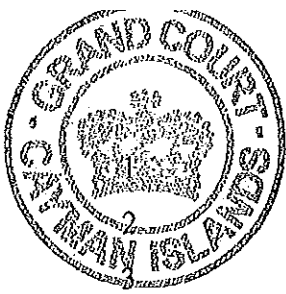
14 It may be that applying this test to any series of communications
15 might isolate occasional letters and notes which could not be said
16 to enjoy privilege. But to be disclosable such documents must be
17 not only privilege – free but also material and relevant. Usually, a
18 letter which does no more than acknowledge receipt of a document
19 or suggest a date for a meeting will be irrelevant and so on non-
20 disclosable.”

21 98. Taylor L.J. went on to state at 332D:

22 “...whether such documents are privileged or not must depend on
23 whether they are part of that necessary exchange of information of
24 which the object is the giving of legal advice as and when
25 appropriate.”

26 99. The approach of Taylor L.J. was approved by the House of Lords in *Three Rivers*
27 (No 6), Lord Carswell stated at 680B para 111 that:

28 “...all communications between a solicitor and his client relating
to a transaction in which the solicitor has been instructed for the
purpose of obtaining legal advice will be privileged,

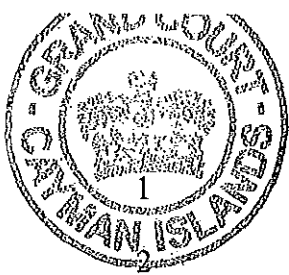


4 *notwithstanding that they do not contain advice on matters of law*
5 *or construction, provided that they are directly related to the*
6 *performance by the solicitor of his professional duty as legal*
7 *adviser of his client."*

6 100. In his schedule of issues, Mr. Englehart Q.C. suggests that legal professional
7 privilege is restricted to documents that record legal advice. However, in his oral
8 submissions Mr. Englehart Q.C. readily accepts that instructions to an attorney are
9 just as much privileged as advice from the attorney. Lord Scott of Foscote in
10 *Three Rivers (No 6)* summarises the position in relation to legal professional
11 privilege at 642C para 10:

12 *"The modern case law on legal professional privilege has divided*
13 *the privilege into two categories, legal advice privilege and*
14 *litigation privilege. Litigation privilege covers all documents*
15 *brought into being for the purposes of litigation. Legal advice*
16 *privilege covers communications between lawyers and their clients*
17 *whereby legal advice is sought or given."*

18
19 101. Litigation privilege, which arises when there is a prospect of litigation or it is
20 pending, is wider than legal advice privilege. It covers documents brought into
21 existence for the purpose of such litigation. It covers communications between the
22 client and an attorney or agent, or between one of them, and a third party, which
23 comes into existence for the sole or dominant purpose of either giving or getting
24 legal advice with regard to the litigation or collecting evidence for use in the
25 litigation. The idea is that a party or potential party to litigation, whether it be



actual or apprehended, should be free to seek evidence without being obliged to disclose the results to the other side.

3

4 102. The scope of litigation privilege was considered by Lord Rodger of Earlsferry at
5 654H para 52 in *Three Rivers (No 6)*:

6 *"Litigation privilege relates to communications at the stage when*
7 *litigation is pending or in contemplation. It is based on the idea*
8 *that legal proceedings take the form of a contest in which each of*
9 *the opposing parties assembles his own body of evidence and uses*
10 *it to try to defeat the other, with the judge or jury determining the*
11 *winner. In such a system each party should feel free to prepare his*
12 *case as fully as possible without the risk that his opponent will be*
13 *able to recover the material generated by his preparations."*

14

15 103. Legal advice privilege, as in this matter, attaches to all communications made in
16 confidence between a client and his legal adviser for the purpose of giving or
17 obtaining legal advice even if litigation is not contemplated. It does not matter
18 whether the communication is directly between the client and his legal adviser or
19 is made through an intermediate agent of either.

20

21 104. Importantly, Taylor L.J. stated in *Balabel* at 330G that for the purposes of
22 attracting legal advice privilege:

23 *"...legal advice is not confined to telling the client the law; it must*
24 *include advice as to what should prudently and sensibly be done in*
25 *the relevant legal context."*

1 105. Lord Scott in *Three Rivers (No 6)* at 651F para 38, when highlighting the
2 necessity for “*the relevant legal context*” stated that a judge when determining
3 whether a document is protected by legal advice privilege should consider:

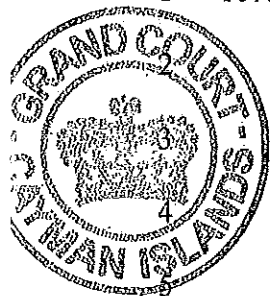


9 *“...whether the advice relates to the rights, liabilities, obligations*
10 *or remedies of the client either under private law or under public*
11 *law. If it does not, then, in my opinion, legal advice privilege*
12 *would not apply. If it does so relate then, in my opinion, the judge*
13 *should ask himself whether the communication falls within the*
14 *policy underlying the justification for legal advice privilege in our*
15 *law. Is the occasion on which the communication takes place and*
16 *is the purpose for which it takes place such as to make it*
17 *reasonable to expect the privilege to apply? The criterion must, in*
18 *my opinion, be an objective one.”*

15 106. Legal advice privilege applies to communications between attorneys and their
16 clients. As pointed out by Mr. Griffiths Q.C., Lord Rogers in *Three Rivers (No.6)*
17 at 656A para 54 made the position very clear when he stated:

18 *“So it is settled that, in the absence of waiver by the client,*
19 *communications between clients and their lawyers for the purpose*
20 *of obtaining legal advice must be kept confidential and cannot be*
21 *made the subject of evidence. Of course, this means that, from time*
22 *to time, a tribunal will be deprived of potentially useful evidence,*
23 *but the public interest in people being properly advised on matters*
24 *of law is held to outweigh the competing public interest in making*
25 *that evidence available.”*

26



1 107. The position Mr. Bridger takes in relation to whether the documents in Table 1
are privileged, is mixed. He accepts that instructions to an attorney can be just as
much privileged as advice from an attorney. It is contended in Mr. Englehart
Q.C.'s oral submissions that the documents fall into three categories. Firstly,
some of which legal advice privilege does not touch at all as the document makes
6 passing reference to advice taken or sought to be taken. Secondly, documents
7 which initially the Crown would have been able to rely on privilege, these include
8 written advices addressed to the Governor or the Attorney General. Thirdly,
9 documents which were addressed to Mr. Bridger, in his capacity as the SIO,
10 although it seems to be conceded that in this instance privilege existed, but he is
11 the person entitled to that privilege.¹⁵

12
13 108. Exhibit MB7 attached to Mr. Bridger's first affidavit sets out his document by
14 document response concerning the documents in Table 1. It is acknowledged that
15 a number of documents are prima facie privileged as the Mr. Bridger's entry
16 simply states "*my privilege to waive.*" Regrettably that general statement is not
17 elaborated on or justified in the narrative in the written comments. In fact a
18 number of the documents in the Plaintiff's schedule are not commented on. Mr.
19 Bridger's commentary on a large number of the documents tends not to deal with
20 the issue of why the particular document is not privileged and if privileged why

¹⁵ See paragraph 36 of the skeleton argument.



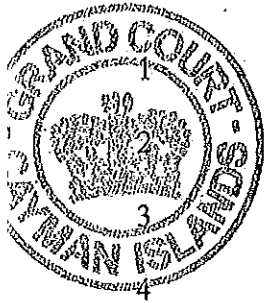
that would be his to waive, but more with the reasons why it is important for Mr. Bridger to be able to rely upon the document

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4 109. In his written skeleton argument, Mr. Englehart Q.C. does not make any
5 substantive submissions as to whether or not the documents in Table 1 are
6 privileged. However, in his oral submissions Mr. Englehart Q.C. characterises the
7 claim of privilege as being "*extravagant.*" In his oral submissions drew the
8 Court's attention to the documents at pages 38, 44, 45, 47, 56, 57, 62, 63, 81, 87,
9 91, 92, 105, 110, 121, 163, 181, 207, 208, 216-259, 263-273, 276, 278, 287, 289,
10 294, 295, 300, 304, 318, and 474.

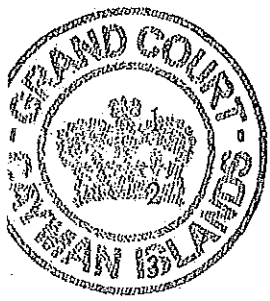
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12 110. During the hearing both parties only referred me to a selection of documents as
13 examples of and in support of their general contentions about whether the
14 documents listed in the Tables were privileged or not as well as to the issue of
15 who may waive privilege. Although the parties chose not to take me through each
16 and every document during the hearing, having carefully reviewed all of the
17 documents and the parties' summaries, including those in the list set out in
18 paragraph 109, I am satisfied that privilege can be claimed in relation to all of the
19 said documents, the Plaintiff having established that they relate to relevant legal
20 advice given, requested and discussed. I have herein adopted the approach of
21 Counsel in their written and oral submissions and therefore have not provided
22 individual reasons for the classification of every individual document with a



1 detailed description of each document as this would result in this long overdue
2 decision being delayed inordinately and the judgment being so large as effectively
3 to be unwieldy. I am satisfied that the adoption of the approach of Counsel by
4 setting out a selection of examples shows why a group of documents can be given
5 a classification. The Plaintiff's index and Mr. Bridger's schedule contain brief
6 descriptions (sometimes extremely brief) of the documents and summarises the
7 basis upon which privilege is asserted or opposed. I do not propose to attach the
8 schedules or index as schedules to this judgment; they are on the Court file and
9 may be referred to if necessary. I have found in particular the Plaintiff's
10 descriptions to be helpful in giving a general indication of the documents' nature.
11 Although adopting this approach in the judgment I wish to make it clear that
12 despite the parties' schedules I have then found it necessary to go on and
13 individually review each document with care to establish the precise nature of the
14 document. Having carried out that exercise I prefer the characterisation given to
15 the documents by the Plaintiff in the comments set out in the Index to Table 1.

16
17 111. In relation to document 56, 57, 63, 87, 91, 92, 105, 110, 121, 181, 207, 208, 276,
18 278, 287, 289, 294, 295, 304, and 474, these documents deal with minutes of
19 meetings. I am satisfied that the substance of the documents outlining what
20 happened during the meetings is privileged, in that they deal with and refer to
21 privileged advice given and communications seeking advice including discussions
22 and advice as to what should prudently and sensibly be done in the relevant legal



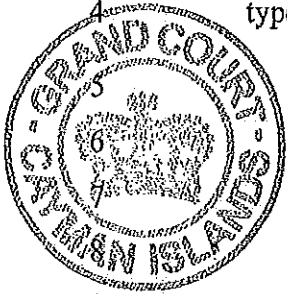
context. However, as accepted by Mr. Schofield, the fact that legal advice has been taken and the dates of the advice is something that both the Attorney General and Mr. Bridger should be entitled to rely on in the Kernohan proceedings,¹⁶ with this in mind, the parties may wish to prepare a schedule of the dates of the meetings and who was present at the meetings after which the documents mentioned earlier in this paragraph were prepared.

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112. Exhibited at "MB8" to Mr. Bridger's first affidavit are his comments in relation to the documents referred to in Table 2, the Table dealing with the documents not regarding as being fully privileged, but parts of which redaction is sought to remove references to privileged material. As with exhibit "MB7", the written commentary prepared on behalf of Mr. Bridger tends not to deal with the issue of whether and why parts of a document are privileged or not, but more with the reasons why the Defendant wishes to rely upon the document, namely his contention that disclosure of them is essential to his Defence in the Kernohan proceedings. Mr. Englehart Q.C. in his oral submissions makes reference to the documents at page 519, 520, 521, 525, 526, 528, 530, 531 to 536, 539, 543 to 548, 554, 557, 581, 604, 605, 616, 640, 644, 703, 772 and 786. However, Mr. Englehart Q.C. did not go into great detail in those submissions as to why each document should not be redacted.

¹⁶ Dates of advice set out in Amended Defence.

1 113. Mr. Griffiths Q.C. relies upon *Hellenic Mutual War Risks Association*
2 *(Bermuda) Ltd and General Contractors Importing and Services Enterprises v*
3 *Harrison (The "Sagheera")* [1997] Vol. 1 Lloyd's Law Rep 160. One of the
4 types of documents which were contended to be privileged were:



9 "documents embodying communications between the First Plaintiff
10 and Second Plaintiff and/or their respective agents which directly
11 or indirectly reveal the dates, provenance, authorship or content of
12 privileged material or information, or comment on the same;
13 internal documents, notes of memoranda of either Plaintiff or their
14 respective agents and/or documents embodying communications
15 between either Plaintiff or its respective agents which directly or
16 indirectly reveal the dates, provenance, authorship or content of
17 privileged material or information, or comment on the same."¹⁷

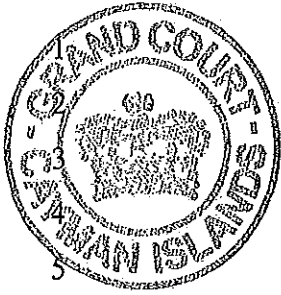
18 Rix J. stated that a solicitor may give advice to two parties in potential conflict,

19 He went on to state what he termed as "well established" principles at 165:

20 "Parties who grant a joint retainer to solicitors of course retain no
21 confidence as against one another: if they subsequently fall out
22 and sue one another, they cannot claim privilege. But against all
23 the rest of the world, they can maintain a claim of privilege for
24 documents otherwise within the ambit of legal professional
25 privilege; and because the privilege is a joint one, it can only be
waived jointly, and not by one party alone."

114. Importantly, after considering the case of *Balabel*, Rix J. went on to say at 169:

¹⁷ Page 163.



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"...if a lawyer-client communication falls within the principles set out in Lord Justice Taylor's judgment (that is to say, is covered by legal professional privilege) then internal documents, or part of documents of the client (or indeed the lawyer) reproducing or otherwise revealing those communications are also covered by the same privilege, whatever the purpose or motive (short of fraud), for which the document comes into existence."

115. Rix J. went on to affirm the approach of Saville J, in *The Good Luck* [1992] 2 Lloyd's Rep 540, that it was appropriate to cover up parts of documents that reveal privileged information, even though the rest of the document was, and had to be, produced for inspection. Rix J. went on to consider whether Saville J.'s approach extended to documents which do not reproduce or comment on the contents of otherwise privileged material, but which may only indirectly refer to or reveal the dates, provenance and authorship of such material. Although accepting that there were borderline decisions he, in principle, decided that it would.

116. When considering the above case law and applying it to the third issue Mr. Griffiths Q.C.¹⁸ contended should be considered at this hearing, namely:

"If a document is itself privileged, references to the privilege advice also privileged"

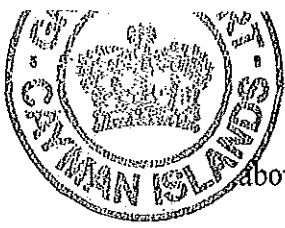
¹⁸ See paragraph 11 (iii) above.



I find that redaction may take place as references to legal advice in otherwise privileged documents may be regarded as being privileged.

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4 117. I have carefully reviewed all of the documents contained in Table 2, including
5 those specifically drawn to the Court's attention by Mr. Englehart Q.C. during the
6 hearing. For example, in relation to the document at page 519, the parts of which
7 redaction is sought plainly are dealing with the communication with lawyers and
8 legal advice. Therefore, the proposed redaction is appropriate. In relation to the
9 document at page 520, again the relevant part concerns legal advice from the
10 Attorney General, and in any event its relevance to the Kernohan case is
11 questionable. The document at page 521 refers to legal advice sought and given.
12 The relevant part of the document at page 525 deals with what the advice is about,
13 and therefore this communication with counsel is privileged. The relevant
14 paragraphs when read together on page 526 show what the advice was about. The
15 document at page 528 outlines a presentation to the Attorney General concerning
16 the Henderson J. case, and it is a communication to the Attorney General for the
17 purpose of advice and what should be done in that case. In relation to the
18 document at 530, the relevant part is not relevant to the Kernohan case and should
19 be redacted. In relation to the document at 531 the first redaction sought deals
20 with a note of advice that is given and the second part is a discussion of legal
21 advice, and it matters not that Mr. Bridger wrote it, as it discloses legal advice.
22 The email from Mr. Bridger to Mr. Covington at page 533 is privileged as it talks



about Mr. Mon Desir's advice. The chronology document at page 534, the

2 relevant part again refers to what the legal advice was.

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4 118. Having fully reviewed the documents in Table 2, it is evident that the Attorney

5 General has carefully gone through each document and given the reason for the

6 suggested redactions. The submissions made on behalf of the Attorney General in

7 relation to the documents are persuasive and the characterisation of the content set

8 out in the narrative in the index to the Table accurate. The parts which the

9 Attorney General submits should be redacted refer to privileged material, and I

10 would add that some are irrelevant to these proceedings. Mr. Bridger's brief

11 written responses countering this position do not convince me otherwise, and

12 therefore I find that the Plaintiff has established that the documents are open to

13 redaction. I do not accept the contention in the Defendant's reply submissions that

14 there should be no redaction based on his contention that:

15 *"the material is essential to his defence of the serious allegations*
16 *made by Mr. Kernohan against him."*

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18 I do not accept that the redactions sought are:

19 *"a disproportionate and unfair attempt by the Plaintiff to stifle his*
20 *Defence."*¹⁹

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¹⁹ See reference to Lord Rodger Three River DC – paragraph 103 above.

1 Who is the client in whom privilege is vested? Is Mr. Bridger, a person who would
2 now be entitled to waive the privilege?

3 119. These two important issues which require consideration to a degree overlap.

4 Having found that the documents in Table 1 are privileged and that parts of each

5 document set out in Table 2 refer to privileged material, I move on to try and

6 identify who is entitled to waive privilege over each document. It is important to

determine who actually is the client. Mr. Englehart Q.C. recognises this, as he

states in his written submissions that:

*“At issue in this application is the determination of whether or not
such legal advice obtained by Mr. Bridger is his to waive...or
whether it is covered by common interest privilege owed to the
Cayman Islands Government (the Plaintiff) in some form.”*

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14 120. Mr. Bridger’s principal argument is that Operation Tempura was not an RCIPS

15 investigation and he was the independent SIO of Operation Tempura and that any

16 legal advice that he received from Special Counsel to the operation was directed

17 to him. Mr. Bridger fails to adequately address what is the effect of his being but

18 one of the members of the SOG and what the role of the SOG was. It is submitted

19 that the bulk of such advice was in response to requests from Mr. Bridger or it

20 was shared directly with him. It is contended that such advice was given in

21 relation to preliminary steps on the relevant law and procedure to substantive

22 steps in connection with the investigation. In his first affidavit Mr. Bridger states

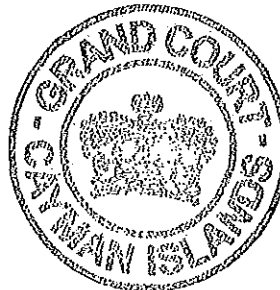
1 that two hundred and eighty three of the documents²⁰ which include minutes of
2 meetings, memoranda and emails were obtained and supplied to him in context of
3 the "*independent investigation*" as well as being provided to him by the Plaintiff
4 in 2009-2010 in his Defence of the Kernohan proceedings. It is submitted that, as
5 a consequence, legal professional privilege remains with him. It is submitted that,
6 having regard to the "*special circumstances*" that led to his appointment as the
7 SIO, the requirement for the independence, the terms of his consultancy
8 agreements and the evolutionary nature of the investigation as well as of the terms
9 of reference for Operation Tempura, there is no merit in the Plaintiff's contention
10 that his appointment as a Special Constable of the RCIPS made him an employee
11 and that as such the documents received by him in the course of employment
12 remained the property of the employer.

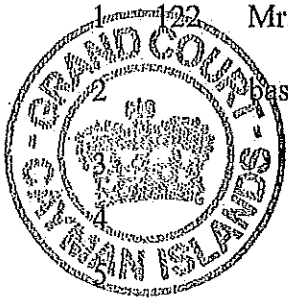
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14 121. I note that at page 37, line 6 of his Certified Ruling dated 28th May 2011 that Lord
15 Justice Moses stated that Mr. Bridger when sworn in as a Special Constable took
16 an oath of allegiance to the Queen. Lord Justice Moses makes clear in the ruling
17 that Mr. Bridger was not under the direction or control of the Executive in relation
18 to the investigation. In fact, he indicated that otherwise would be
19 "*unconstitutional and highly dangerous.*" However, Lord Justice Moses was not
20 referring to legal professional privilege resulting from legal advice.

21

²⁰ All listed in the Schedule at exhibit "MB1".





1 Mr. Griffiths Q.C. at paragraph 8 (2) in his reply skeleton argument spells out the
2 basis of the Plaintiff's case on privilege. It is based on

3 *"a detailed analysis of the relevant organisational relationships*
4 *(including between the investigating team of Operation Tempura,*
5 *the SOG, RCIPS, government legal officers and the Governor."*

6

7 Mr. Griffiths Q.C. highlights that Operation Tempura was an operation of officers
8 of the RCIPS. He submits that Mr. Bridger was one of those officers, as he was
9 sworn in as a Special Constable. He submits that as the legal advice from the
10 Special Counsel was funded by the Cayman Government by the budget of the
11 Ministry of Internal and External Affairs and the Attorney General's Chambers
12 from its own Chambers budget that Mr. Bridger was not the client. It is contended
13 that this is a

14 *"strong indicator that the advice belongs to the Crown as they*
15 *paid for it."*

16

17 Mr. Griffiths Q.C. contends that the advice that Mr. Bridger received was not in a
18 purely personal capacity, but was in his capacity as SIO, and therefore privilege
19 was not his to waive. This is supported by the evidence of Mr. Yates about his
20 understanding of the status of Mr. Bridger and the other officers involved in
21 Operation Tempura. Mr. Griffiths Q.C. adds, even if Mr. Bridger were able to
22 argue that he had authority to waive privilege, that would not continue after his
23 retirement from the Operation.

1 123. Mr. Griffiths Q.C., in his written submissions, highlights with reference to the
2 Tables who the communications were between. This written analysis has proven
3 to be extremely helpful when seeking to identify who the client is and to illustrate
4 I will comment on some herein.

6 124. The first group of communications are between the Attorney General and the
7 Governor. These are mentioned at pages 1 to 2 of Table 1, and can be found at
8 pages 1 to 34.

10 125. At page 1 to 24 is a Memorandum [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

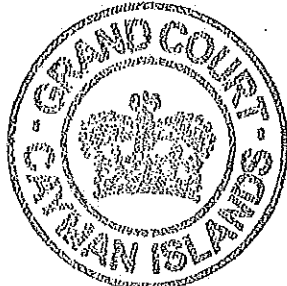
14 It is signed by Mr. Mon Desir as:

15 *“Special Counsel for H.E the Governor of the Cayman Islands &*
16 *Strategic Group – Operation Tempura.”*

18 Importantly, although the request came from Mr. Bridger, the concluding
19 paragraph states:

20 *“And I so advise H.E the Governor and the Honourable AG.”*

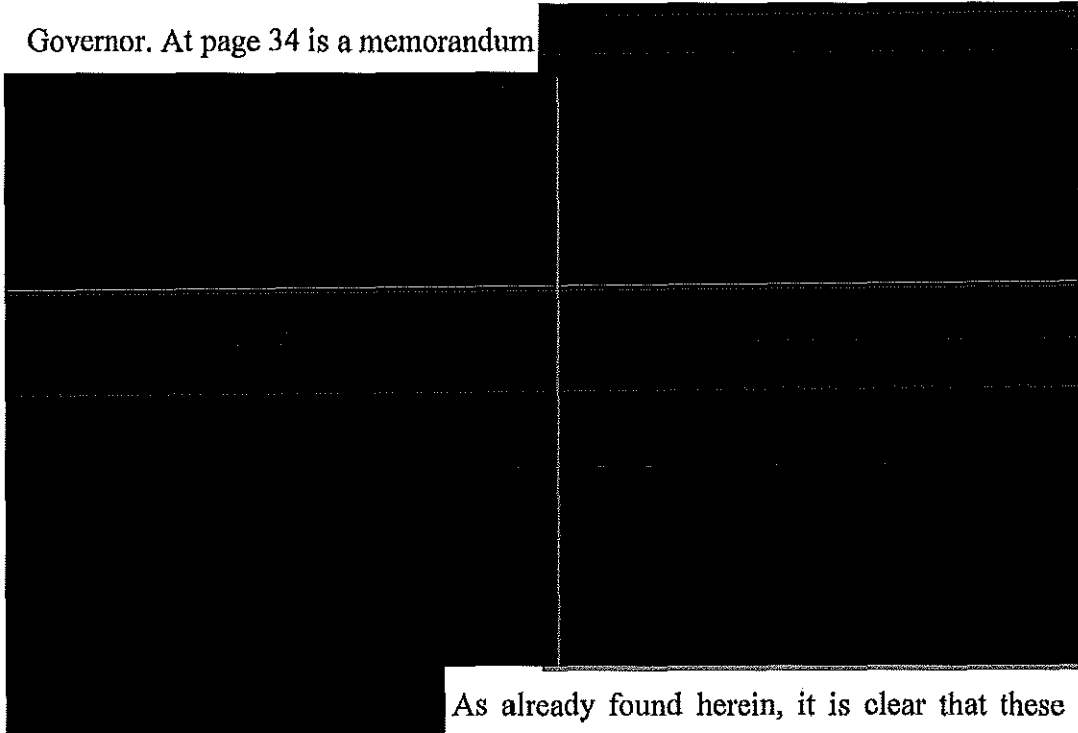
22 As already found herein, it is clear that this document is privileged, as it contains
23 legal advice.



1 126. The various letters and written records of telephone contact to be found between
2 pages 25 and 33 of Table 1 all contain privileged legal advice given between Mr.
3 Mon Desir and the Attorney General. There is no basis at all upon which Mr.
4 Bridger can claim a right to waive such privilege on this advice given to the
5 Governor and/or the Attorney General and he is not able to unilaterally disclose
6 these documents.

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8 127. The next group comprises communications between the Attorney General and the
9 Governor. At page 34 is a memorandum



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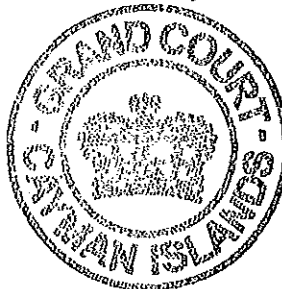
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As already found herein, it is clear that these communications are privileged as they contain legal advice. Again, there is no basis at all upon which Mr. Bridger can claim a right to waive such privilege on this advice given to the Governor and/or the Attorney General and he is not able to disclose these documents.



1 128. The next group of privileged communications comprises those between the
2 Attorney General and Operation Tempura. For example, at page 39 of Table 1 is a
3 request for legal advice concerning Operation Tempura made by Mr. Bridger.
4 This and the other requests for information were made in relation to the
5 investigation and not by Mr. Bridger in his personal capacity. As already
6 mentioned, a request for legal advice is privileged. Mr. Bridger, post retirement,
7 was no longer employed in any capacity in the investigation and, even if he were
8 able to successfully argue a right to waive whilst in post, he now cannot raise a
9 similar argument following his departure.

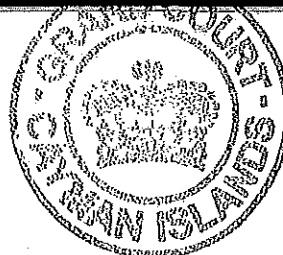
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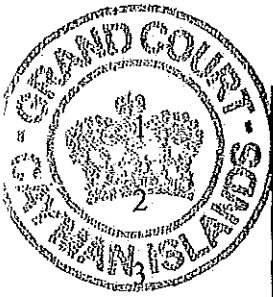
11 129. The next group of privileged documented communications are those between Mr.
12 Mon Desir and the Governor. The documents are analysed in the Schedule at page
13 8 to page 10 of Table 1. When considering the advice from Mr. Mon Desir in the
14 various documents, and who he perceived to be his client, I note that at page 1 of
15 the Chief Justice's Written Reasons for Decision dated April 4, 2008 concerning
16 the application for search warrants Mr. Mon Desir was described as being Special
17 Counsel to the Governor.

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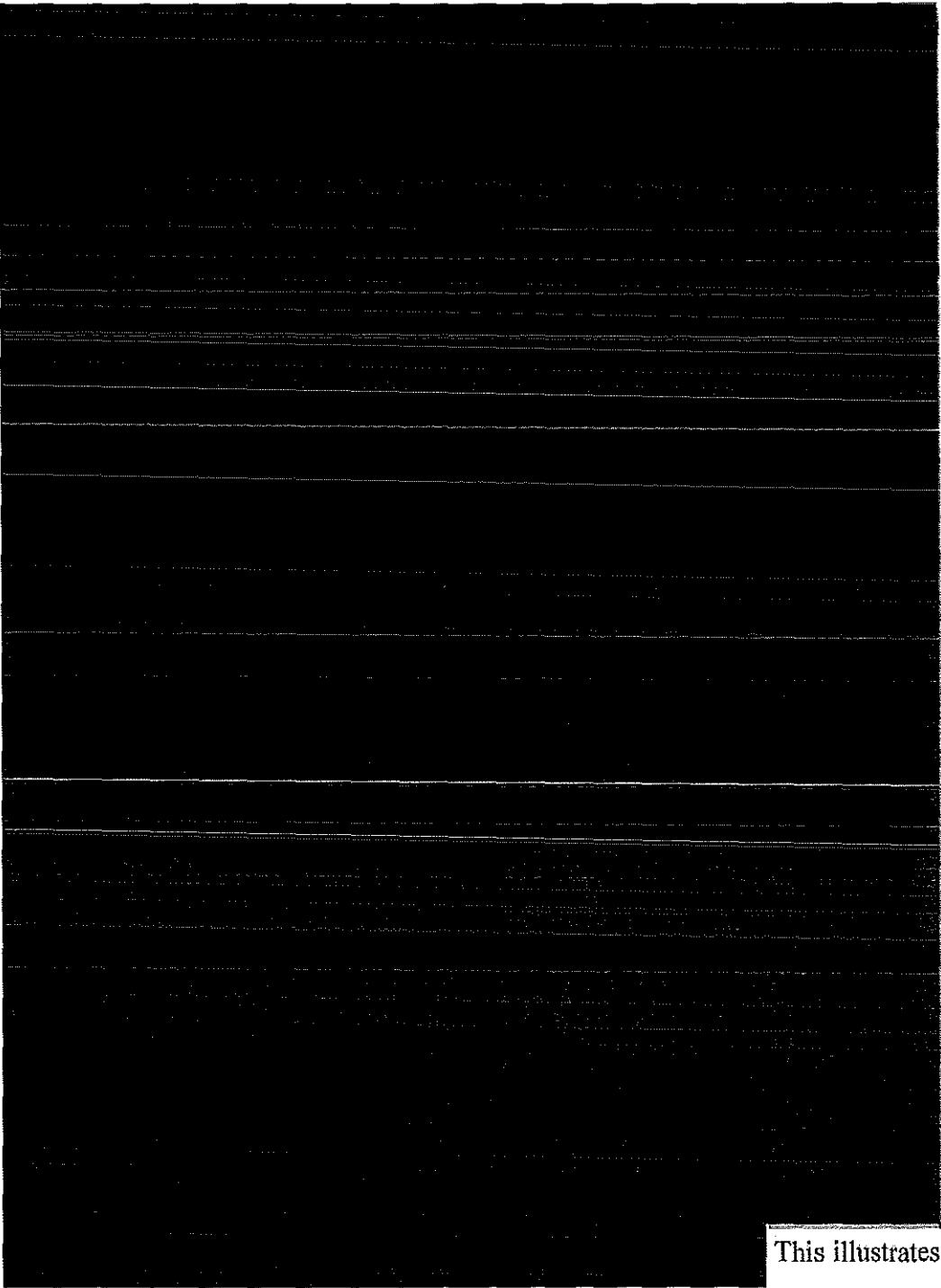
19 130. Mr. Mon Desir exhibited a clear and consistent approach when directing his
20 written advice. For example, between pages 170 and 180 in Table 1

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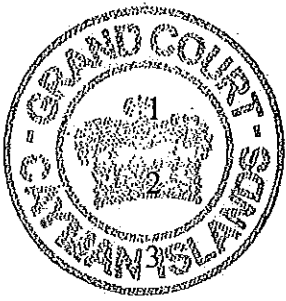
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This illustrates

that Mr. Bridger was clearly not the client and therefore is not entitled to waive any privilege.





[REDACTED]

The non-disclosure would not prevent the parties saying within the

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Kernohan proceedings that legal advice was taken.

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131. The same can be said for the letter at page 182 of Table 1, [REDACTED]

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It is further clarification of the intention and fact that the advice was privileged and that Mr. Bridger was not the client receiving the advice. Mr. Bridger does not address this document in his written summary.

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132. [REDACTED]

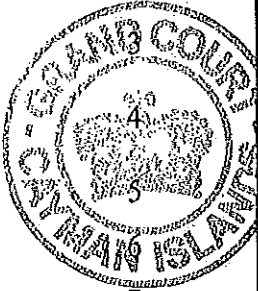
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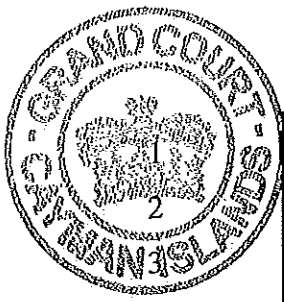
12 133. The section containing the Plaintiff's analysis of the documents concerning
 13 communications between Mr. Mon Desir to/from Operation Tempura and/or
 14 Strategic Oversight Group runs from page 2 to 7 in the Index to Table 1. Although
 15 not taken to every document by the parties during the hearing I have reviewed the
 16 same and I am satisfied that the description given by the Plaintiff in the index
 17 concerning the character and content of each document is accurate.

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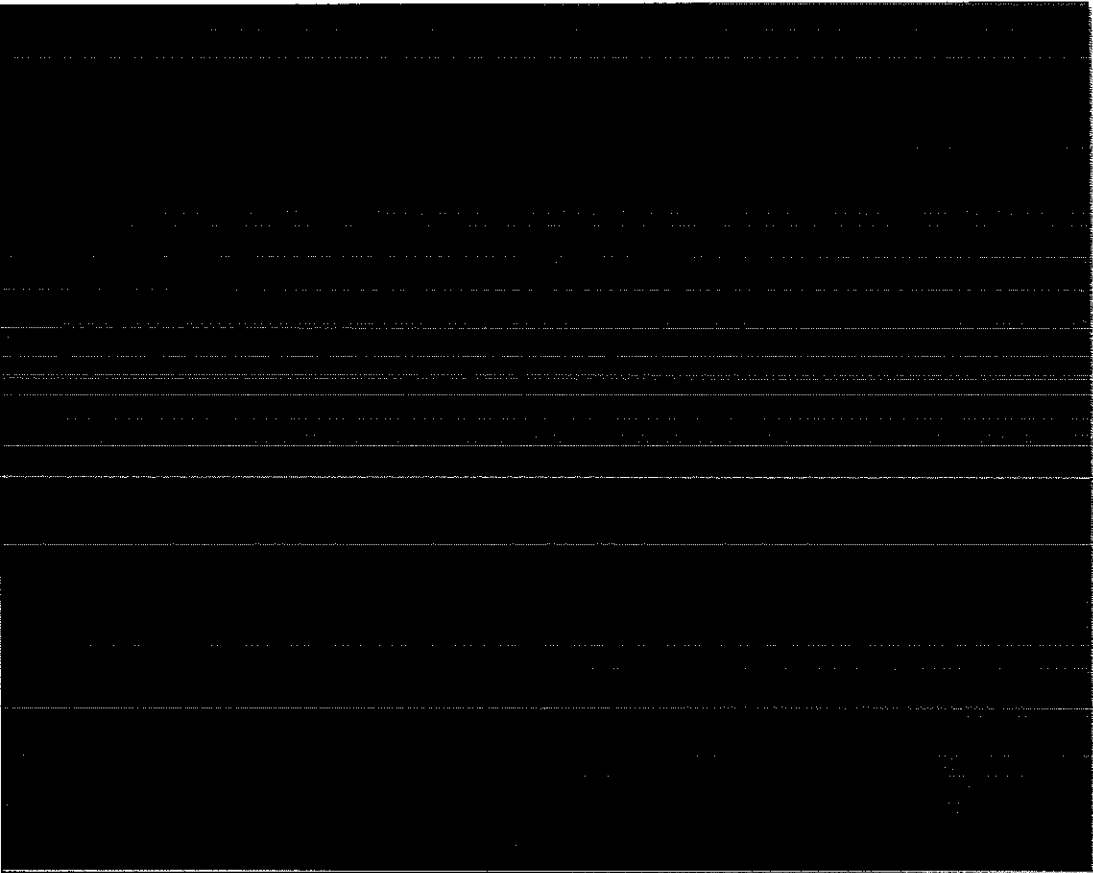
19 134. The following analysis of differing types of documents resulting from these
 20 communications helpfully establishes the identity of the client who may be in a
 21 position to waive any privilege.

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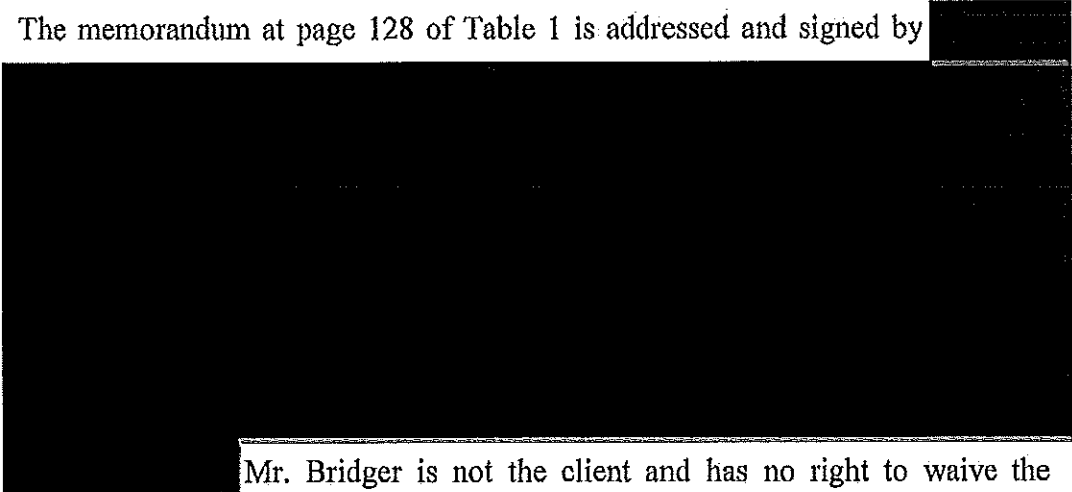


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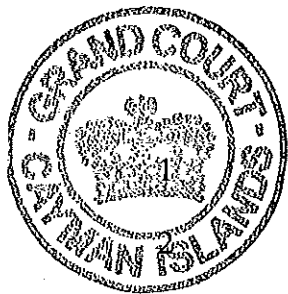


Mr. Bridger does not own that advice for he is a member of the SOG,
which is a Government body.

135. The memorandum at page 128 of Table 1 is addressed and signed by



Mr. Bridger is not the client and has no right to waive the



privilege that comes with this advice, the purpose of which is to assist Government.

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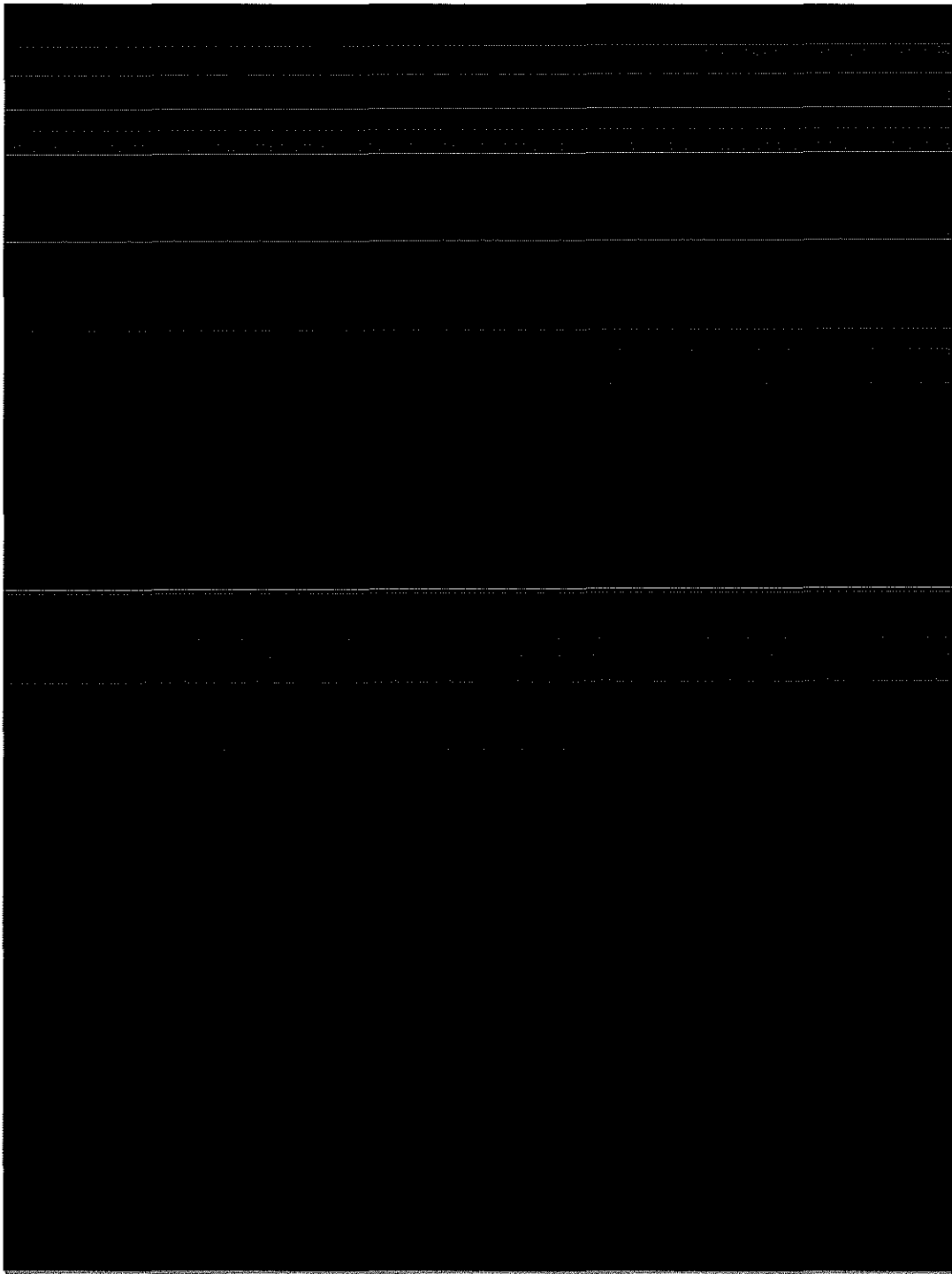
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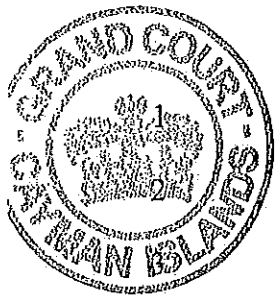
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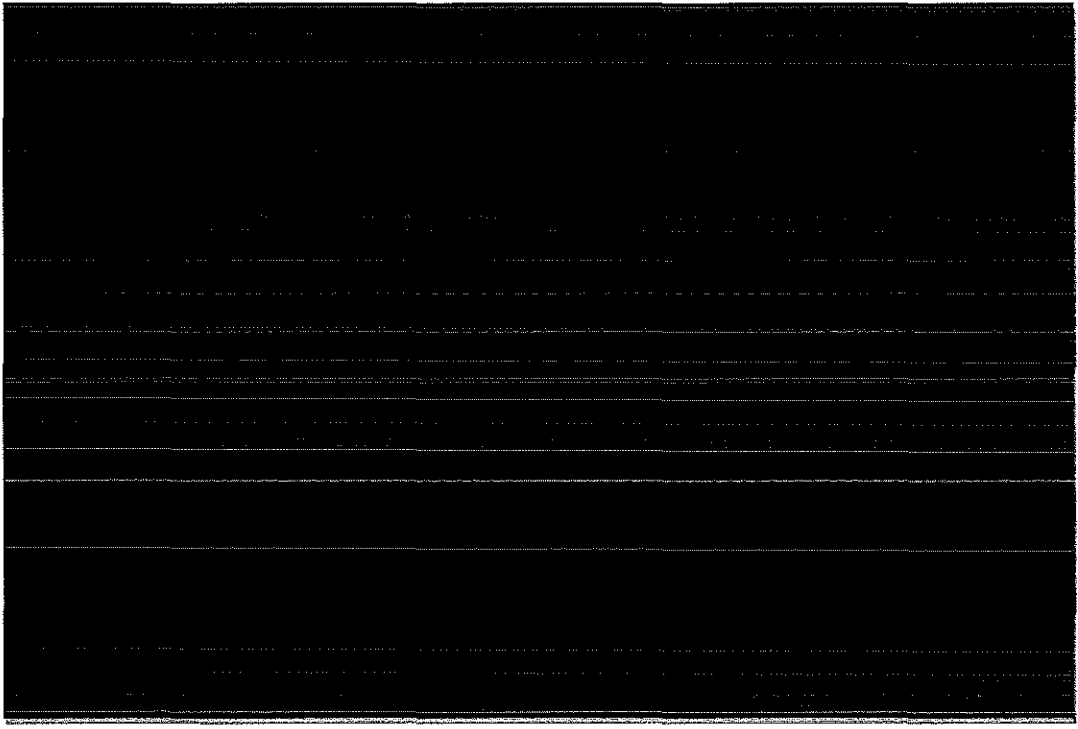
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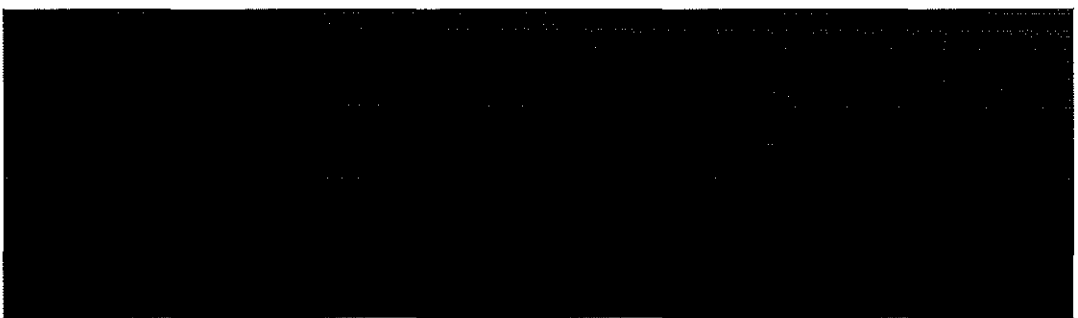


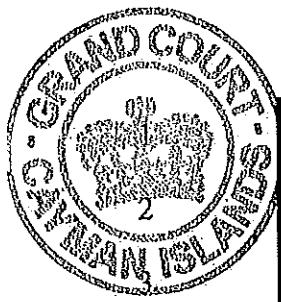
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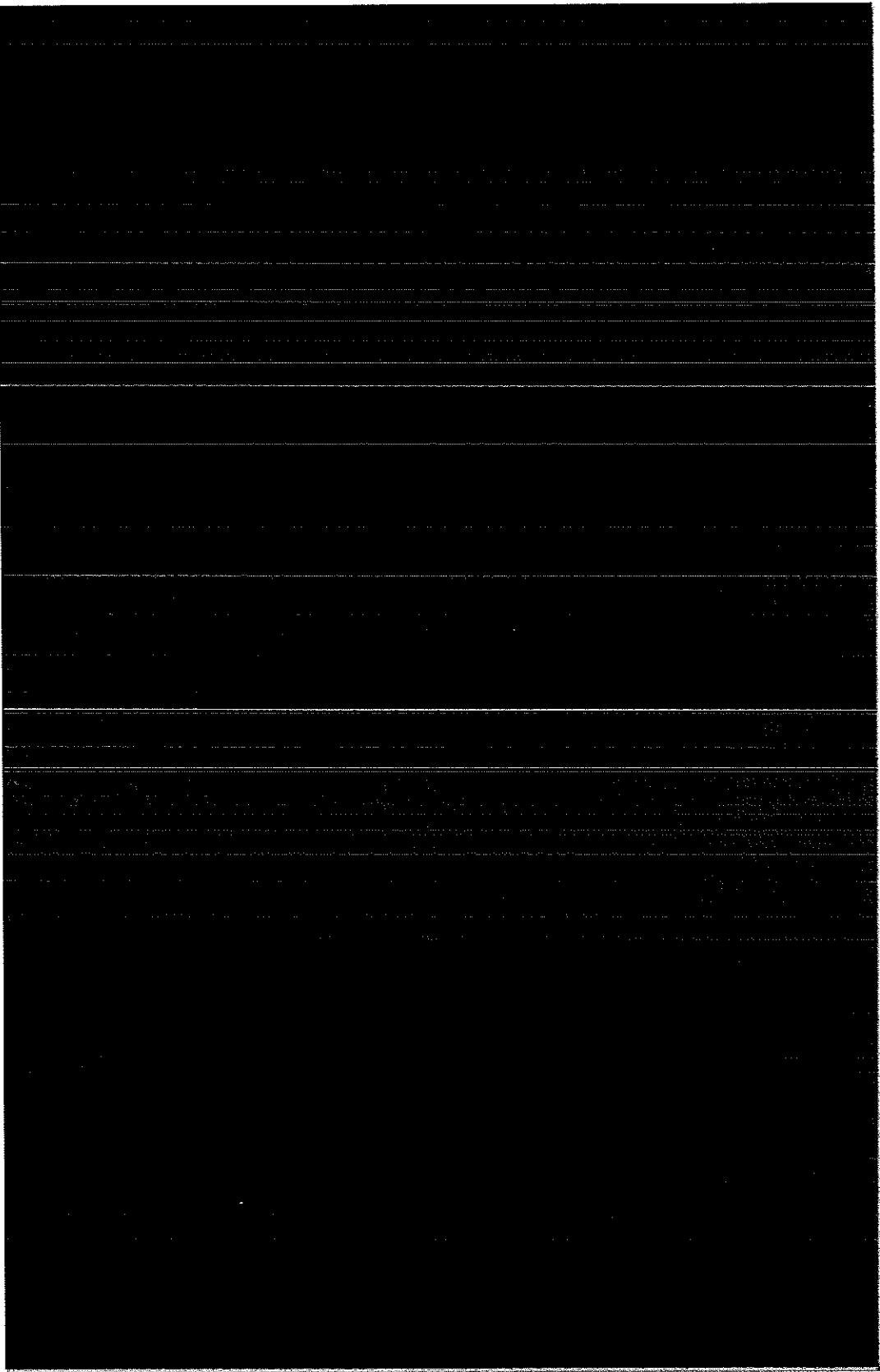
11 139. The next set of documents deal with communications between the Solicitor
12 General, and Operation Tempura and can be found between pages 203-317 of
13 Table 1. The Plaintiff summarises the documents between pages 10-16 of the
14 index to Table 1. Having reviewed the documents I am again satisfied that the
15 description and characterisation of the contents of the documents set out in the
16 index to Table 1 is accurate. However, I will again refer to different documents
17 which clarify whether or not Mr. Bridger is entitled to waive any privilege.

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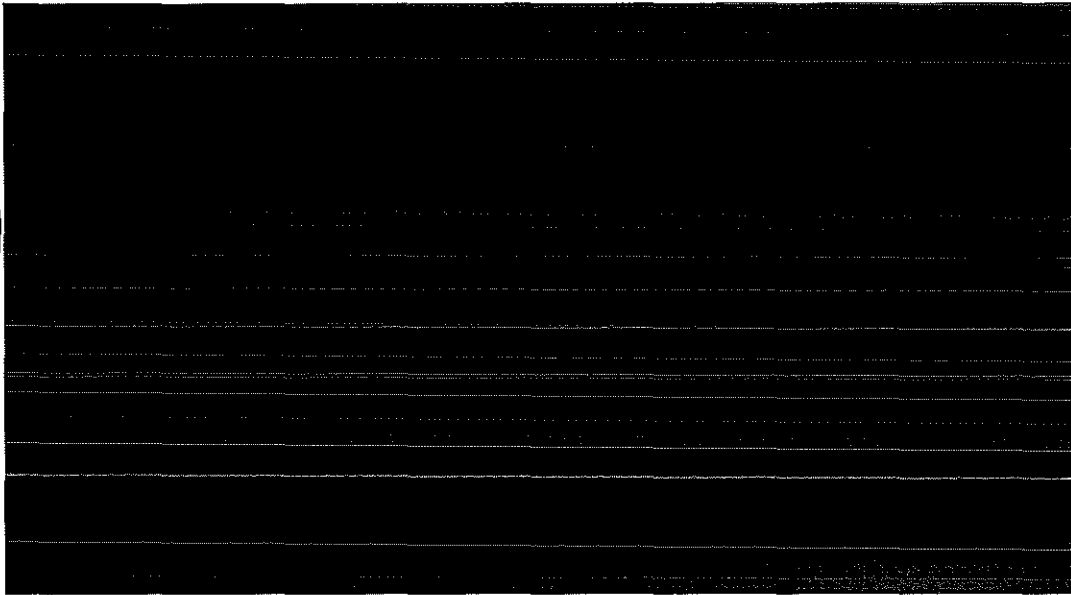


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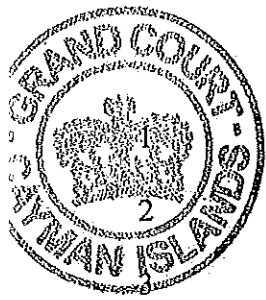


10 144. As already mentioned, Mr. Martin Polaine was appointed Special Counsel in
11 August 2008. At that stage the issue being concentrated on was Mr. Kernohan's
12 refusal to return to the Cayman Islands. The advice given by Mr. Polaine was also
13 paid for by the Government and the evidence submitted from the Metropolitan
14 Police Service before the Court sets out their clear view that it was advice to the
15 SOG. At page 322 in Table 1, is Mr. Polaine's written advice to Martin Bridger in
16 his capacity as SIO of Operation Tempura. Mr. Polaine signed the advice in his
17 capacity as:

18 *"Independent Legal Adviser to Operation Tempura."*

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20 It is rightly submitted by Mr. Griffiths Q.C., that Mr. Bridger receives such advice
21 not in his personal capacity, but on behalf of the Operation Tempura. It is also
22 rightly stated that the Operation Tempura has no legal personality and therefore



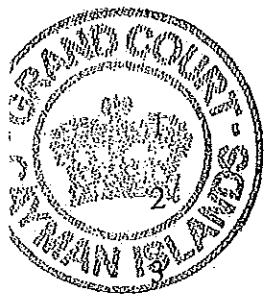
the advice belongs to the Government, and only the SOG and later the Commissioner of Police may arguably be able to waive any legal privilege attached to that advice. It is clear that prior to Mr. Bridger's retirement in April 2008, as well as during the time of Ms Lawrence, who filled his post, that no SIO sought to waive such privilege, even if it could be argued that Operation Tempura had personality and authority so to do. Therefore, I do not accept Mr. Bridger's submission set out at page 431 in Bundle D when he states:

"Martin Polaine's position is that he was the independent adviser to the independent investigation therefore all documents and advices produced by him are my privileged material to waive."

145. Document at page 334 in Table 1 is advice written by Mr. Polaine in August 2008, again signed in his capacity as:

"Independent Legal Adviser, Operation Tempura."

Paragraph 1 makes it clear that it is advice to Mr. Bridger in his capacity as SIO of Operation Tempura. The SIO was only but one of a number of members of Operation Tempura and of the SOG. Despite this, as already stated herein, even if it could be argued that a SIO could waive privilege, Mr. Bridger has long since retired and he cannot therefore now seek to exercise the powers of the SIO. I should add that the subject matter of the document, namely should the then Premier of the Cayman Islands be treated as a witness or suspect, has no relevance to the Kernohan proceedings. As with a number of the analysis entries



of the documents set out in his Schedule in Bundle D, Mr. Bridger simply states that it is his privilege to waive, without any helpful elaboration. Mr. Polaine's advice at page 337 and 348 of Table 1 are signed in the same manner and are for the Operation Tempura Investigative Team and the SIO of the Operation and not to Mr. Bridger in his personal capacity.

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146. The document at page 319 of Table 1 is a note of the meeting with the Solicitor General written by Mr. Polaine. It clearly contains legal advice, and, again, it is a meeting that Mr. Bridger was not involved in. The relevance to the Kernohan proceedings of the document is highly questionable, and Mr. Bridger has not sought to explain its relevance. In any event, the document is privileged and Mr. Bridger is not the client who may be entitled to waive that privilege.

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147. There are also documents contained within Table 1 which were not included in Mr. Bridger's original list of documents that prompted the filing of the Motion that is currently before me. The list that contains these documents was not mentioned until the witness statement of Mr. Bridger of 26th July 2012. At paragraph 6 of the affidavit Mr. Bridger refers back to the witness statement of Mr. Anthony Lewis dated 24th July 2012. Neither statement deals with the relevance and basis upon which Mr. Bridger seeks to introduce these additional documents. The list can be seen at page 262 of Bundle B. Two of these documents are legal advices prepared by Mr. Andrew Radcliffe Q.C. in April

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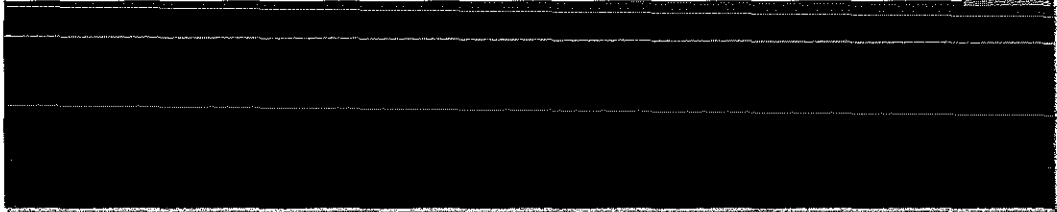
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2009. These can be found at pages 478 and 508 of Table 1. The first advice was undoubtedly prepared for the Attorney General, as it opens:

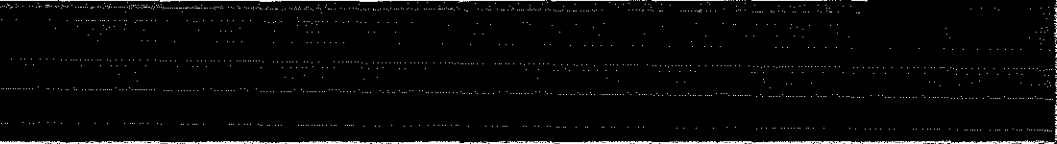
"I am asked to advise the Attorney General..."

5 This advice is clearly privileged, it is not directed at Mr. Bridger and there is no
6 justification for Mr. Bridger to claim entitlement to disclose the same. 

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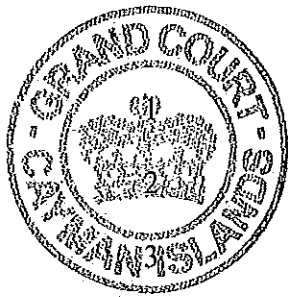
11 148. Paragraph 2 of the second written advice drafted by Andrew Radcliffe Q.C.
12 makes it clear that it was prepared for the Attorney General's benefit. Again, it is
13 privileged, and Mr. Bridger has no right to waive that privilege. 

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17 149. Despite the parties not talking me through all the documents in Table 1, I reiterate
18 that I have reviewed them all, I have used as examples a number of the various
19 types of documents herein to put into context Mr. Bridger's submissions
20 concerning whether the documents are privileged and his contention that any
21 authority to waive any privilege is vested in him. Mr. Bridger wrongly views



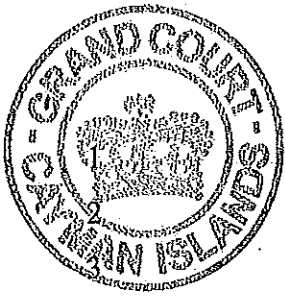


himself as a free agent, or as a department of the Metropolitan Police Service, rather than a part of the Cayman Islands Police Force, and contends that the privilege is therefore his to waive even after his retirement, as he is the client. As set out in paragraphs 69-71 above, Mr. Bridger was SIO of Operation Tempura, was one of the members of SOG which oversaw the Operation and which was the appropriate forum for the exchange of legal advice.

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150. However, if I am wrong about the above infrastructure and despite the fact that Mr. Bridger has long retired from the post of SIO, I go on to consider the effect of a possible joint retainer. It is clear that in such a situation the parties retain no confidence against one another and each can benefit from any privilege communication arising out of the retainer. Therefore against any third party each party can maintain a claim of privilege, and it only requires one party to so claim. As stated at section 6.02 in Thanki - The Law of Privilege 2nd Edition it does not matter whether the privileged communication is addressed by the attorney to one or both of them. Rix J. summarises the position in *The Sageera* at 165-6 as follows:

"As for the submission that there could be no privilege because of lack of confidentiality between the owners and their war risk underwriters, in my judgment that submission goes too wide. Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for



documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be weighed jointly, and not by one party alone."

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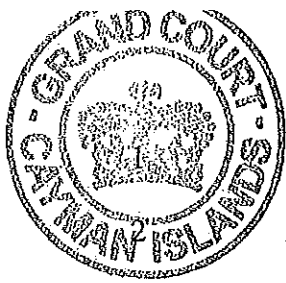
5 151. Accordingly, I find there is no waiver of the privilege by the client, who is
6 represented by the Attorney General. Mr. Bridger was not the client in whom the
7 privilege was vested, legal advice was supplied by and to the Government. The
8 SOG was, until the Commissioner of Police took over towards the end of 2008,
9 responsible to the Governor. In the present case there are no circumstances which
10 justify my going behind the claim of privilege. I conclude, therefore, that the
11 Plaintiff has established its claim to privilege and that the Defendant has failed in
12 his attempt to go behind the privilege.

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14 152. I must now turn to the documents set out and detailed in Table 3. There are a
15 significant number of documents running from page 804 to page 1302. The
16 Plaintiff refers to these as the "*Henderson documents*" because they relate to a
17 separate part of Operation Tempura, namely an investigation into an action taken
18 against Henderson J. Proceedings brought by Henderson J. in relation to his arrest
19 have concluded following a confidential settlement.

20

21 153. It is clear that some of these documents are privileged and are covered by
22 conclusions reached in relation to documents in Table 1 and Table 2. It is
23 contended by Mr. Griffiths Q.C., that they are also not disclosable because they



are irrelevant to the current proceedings. Mr. Griffiths Q.C. rightly submits that Mr. Bridger failed in his written arguments or in his evidence to address the issues raised by the documents in Table 3. Mr. Bridger did not seek to put forward any basis as to why they should be disclosable.

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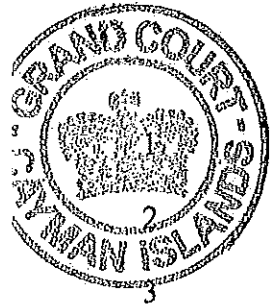
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154. Despite the lack of evidence from Mr. Bridger on point, Mr. Englehart Q.C. did make oral submissions, albeit extremely brief. He contended that the documents were relevant as they showed that legal advice was being taken at every step of Mr. Bridger's enquiry and that there was "*no targeting of malice*" against Mr. Kernohan. He recognised that the material was sensitive, but it should not be suppressed and suggested that a court could sit in camera for those parts of the hearing when the documents were raised. He suggested that the documents could be disclosed only to the attorneys involved with a prohibition preventing showing of the same to others. He submits that this would enable the trial judge to assess the case properly. One may ask why Mr. Bridger felt it appropriate or proper for him to retain documents that he readily accepts to be highly sensitive after he retired from his post.

155. Mr. Englehart Q.C. contends that the events set out in the documents in Table 3 feature "*significantly*" in the Statement of Claim in the Kernohan proceedings. However, the bulk of the references are about the judgment of Cresswell J. in those separate proceedings. I accept that the un-appealed judgment may be



relevant, although Mr. Bridger may wish to be cautious because of the Learned Judge's criticism of him, although I can see no relevance in the copious amounts of documents dealing with Henderson J.'s arrest and the events leading up to it.

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5 156. If the documents in Table 3 had importance and were felt to be relevant, one
6 might have expected them to have been commented upon in Mr. Bridger's
7 evidence as well as being contained in any written submissions. I am not assisted
8 by Mr. Bridger as to the relevance of the significant number of documents. It is
9 important to note that in relation to these documents a third party would be
10 seriously affected by the disclosure of documents which are irrelevant in the
11 current proceedings. I accept Mr. Griffiths Q.C.'s submission that there is a public
12 interest in not making improper disclosure of documents of this nature. I have
13 regard to the case of *National Westminster Bank plc v Rabobank Nederland*
14 [2006] EWHC 218 Comm. Mr. Englehart Q.C. did not seek to address this case in
15 his submissions. In the case Aiken J. expressed a view that, when there is no duty
16 to disclose a document, there is a duty not to disclose it when at paragraph 23 he
17 stated:

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"Accordingly, Rabobank are obliged not to disclose any document on which they do not rely, or which do not adversely fact their own case, or which do not adversely affect another party's case, or which do not support another party's case ."

1 157. I have a duty to case manage cases which is clearly spelt out in the Overriding
2 Objective. In the manner in which these sensitive documents in Table 3, which
3 relate to separate concluded proceedings, have been produced, the fact that a
4 number of them are privileged and that their relevance has not been established, I
5 am not satisfied that it would be appropriate for them to be disclosed by Mr.
6 Bridger in these proceedings.

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8 158. Accordingly, I make an order that the Defendant is not to permit any party,
9 including but not limited to the Plaintiff in Cause No. 255 of 2009 and his
10 attorneys, to inspect, or take copies of:-

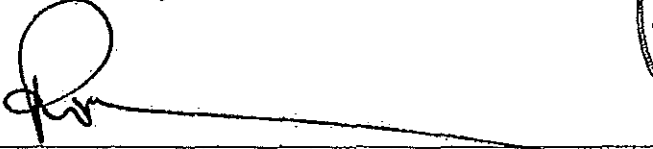
- 11 (1) any of the documents listed in Table 1.
- 12 (2) any of the documents listed in Table 2 except with the redactions set out in
13 Table 2.
- 14 (3) any of the documents listed in Table 3.

15 There will be a penal notice attached to this injunction.

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17 159. I will adjourn the issue as to costs. If the order for costs cannot be agreed, then
18 that application may be heard at a later date.

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20 Dated this 8th day of November 2013.

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26 **THE HON. MR. JUSTICE RICHARD WILLIAMS**
JUDGE OF THE GRAND COURT

