INQUIRY INTO THE RETIREMENT

OF THE FORMER COMMISSIONER OF POLICE

SUBMISSION ON BEHALF OF THE HASSANS WITNESSES FOR THE CHAIRMAN'S CONSIDERATION
21 June 2024

INTRODUCTION

THE HASSANS WITNESSES

[I] NO EVIDENCE

1. James Levy CBE KC, and Lewis Baglietto KC, who acted on his behalf at the time (the 'Hassans Witnesses') did not seek the termination of Ian McGrail's service, nor did they do anything to procure it. There is no evidence to support the assertion that they did. But parties to this Inquiry have at times used it as an opportunity to suggest otherwise. As a matter of basic fairness that requires an opportunity to reply and given how publicly the allegations have been made in the small confines of Gibraltarian society and propagated internationally it is best that be done transparently, which is the purpose of this document.

[II] NON-PARTIES

2. The Hassans Witnesses are just that. They are not parties to this Inquiry as Core Participants. They could have made an application to become so, to join in making opening statements before hearing evidence, in asking questions to put criticism to others, or in seeking to influence the direction of the Inquiry one way or another. None of that was their aim. Nor, frankly, was it their burden. Especially when the Chairman ruled the Inquiry was not a quasi-criminal trial of the Operation Delhi allegations. Instead, they have assisted this Inquiry in any way requested and answered any question asked of them during the hearings. Although the Inquiry has powers of compulsion it would have been inconceivable for the Hassans Witnesses to require their use. It foreshadows one of the key issues relating to the search warrant that the police officers applied for against James Levy[1] in May 2020 ('the warrant'). For a lawyer in any developed rule of law jurisdiction, not to comply with the lawful requirements of an official investigation is not a professional option. As a matter of principle,

[1] Once named, surnames are used thereafter in the text below for brevity.

they are officers of the courts. As a matter of reputation, they cannot afford, other than because of another compelling countervailing principle, to be judged to behave otherwise.

PROVISIONAL LIST OF ISSUES

3. One of the most established ways for a public inquiry to strike the balance between effective investigation and procedural fairness is to create a List of Issues that provide further details of the scope of its investigation. In its 'Provisional List of Issues' last updated on 29 November 2023, the Inquiry identified the "*issues which derive from allegations contained in the witness statements of the Statutory Participants and/or from documentary material which the Inquiry has examined*". Of those issues the relevant one for the Hassans Witnesses was Issue 5 which focused upon the criminal investigation "*of alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud, and the RGP's handling of the same*".

4. While the text of the issue was caveated with the words "*including but not limited to*", all its parts were focussed on the role of state actors, referring to the RGP's "*handling*" of the investigation, "*the RGP's stated intention to execute search warrants as part of that investigation on 12 May*" and: "*In particular* "*(5.1) Did Mr McGrail seek or receive advice from the…DPP or the AG regarding the Search Warrants, and did Mr McGrail accurately communicate any advice from the DPP or the AG on the Search Warrants (or lack thereof) to the CM and/or AG? (5.2) Was the RGP's intention to execute the search warrants on 12 May 2020 contrary to an agreement or understanding with the AG and/or the DPP? (5.3) Did the AG and/or CM place any or any inappropriate pressure on Mr McGrail regarding the investigation or otherwise interfere with the investigation, and in particular the RGP's intention to execute the Search Warrants?*".

5. List of Issues documents of this nature are not formal pleadings. Hence the words "*including and not limited to*" in the above. In identifying the issues, the Chairman indicated that he "*will only seek to ascertain [relevant facts] to the extent that he considers necessary and appropriate to address the matter under inquiry*." The wording therefore allowed for both a narrower reading of the issues and a potentially wider one. Given the implication of Levy at the time of the warrant, it was foreseeable that evidence referring to suspicion against him would arise. However, what was and remains significant to the Hassans Witnesses was that their own conduct was not made the subject of the Inquiry in this List, and no part of this document indicated that Levy would continue to be accused of involvement in the original

conspiracy or that he, or anyone else at Hassans, would be accused of any other wrongdoing as regards McGrail's resignation. However, there were points in opening submissions to the Inquiry and in the evidence of the witnesses where both things occurred, either expressly, or by necessary implication.

THE RIGHT TO REPLY

6. While the Chairman must consider how to deal with these submissions, natural justice should afford the Hassans Witnesses a right to reply in some fashion. They seek it because there are matters which the Core Participants will not deal with, or otherwise to date have shown themselves not predisposed to consider from their perspective. The observations below focus on the following:

   [PART I]: The risk of unfairness arising out a public inquiry that has necessarily considered the relationship between the application for the warrant and the resignation, but where allegations about criminality and misconduct have emerged without notice in the List of Issues and in circumstances where the ordinary safeguards of litigation do not apply.

   [PART II]: Subject to the challenges that the Inquiry faces in considering such matters fairly and sufficiently, the aspects of the criminal investigation as it affected the application for the warrant against Levy and those who sought to represent him in response to the warrant once it was served.

   [**PART III**]: The need for correction where the conduct of the Hassans Witnesses has been interpreted in error and where the appreciable customary relationships, events, and culture in Gibraltar have become at risk of being misunderstood.

   [**PART IV**]: The reality that the Hassans Witnesses had nothing to do directly with the ultimate issue in this Inquiry. But they have also been maligned and otherwise misconstrued during its course.

PART [I]: THE PUBLIC INQUIRY

LEGAL CONTEXT

[I] <u>NATURE</u>

7. Public Inquiries are well known to the common law world, but that does not prevent them from being misunderstood. They are not trials. They cannot rule on, and have no power to determine, a person's civil or criminal liability.[2] They do not have exacting procedural rules;

[2] Inquiries Act 2024, s. 4(1)

but inherently flexible ones, meaning that parties do not have to prove a case by way of pleadings, the laws of evidence do not apply, the list of issues are not set,[3] and there are no strict burdens and standards of proof.[4] The ordinary adverse implications for making unproven allegations are also not there, meaning there are no cost implications for ventilating mere suspicion or rumour without proof; and those who do so by way of their involvement in the inquiry are protected by immunity from suit.[5]

[II] PURPOSE

8. Subject to the duty of the chairman to act with fairness and with regard also to the need to avoid unnecessary expense,[6] the inquisitorial function of the Inquiry is to find facts where the available evidence allows. In that spirit it adopts a potentially wider focus at its outset, in the likelihood that its scope will narrow by its end.[7] That it does so in public is of great importance, more so than during trials, such that proceedings are normally televised, speeches and evidence are published, and testimony is transcribed. The transparency and flexibility of the process is a valuable means to achieve accountability and lay conspiracy theories to rest, but those same attributes render the various issues and lines of questioning iterative, the scope of the inquisition somewhat fluid; and it is in the nature of the endeavour that it is challenging to conduct a process that remains forensically disciplined and procedurally fair.

RISK OF UNFAIRNESS

9. Although this public inquiry is neither a criminal trial nor an employment tribunal, nevertheless the loss of confidence in a police commissioner in circumstances based in part on his perceived handling of the warrant aspect of a controversial criminal investigation has at times given the process the appearance of it being both, and in a fashion that risks unfairness to the Hassans Witnesses. McGrail entered this Inquiry blaming them, amongst others, for the loss of his job. His main statement and opening submission suggested a corrupt agenda on the part of Chief Minister ('CM'), the Attorney General ('AG') and other public officials to attack him to protect Levy, with the suggestion that they acted at Levy's and

[3] *R v South London Coroner ex p Thompson* (1982) 126 SJ 625
[4] *Keyu v Secretary of State for Defence* [2015] QB 57 §§110-112
[5] Inquiries Act 2024 s. 29(1)(c)
[6] Inquiries Act 2024 s. 17(3)
[7] *R (Lewis) HM Coroner for North Devon and Shropshire* [2010] 1 WLR 1836 §26

Hassans' behest. The effect of the blame was to treat an exonerated person as a suspect, and to impute improper motive to the response to the warrant.

10. The blaming narrative has not been subtle. Once this Inquiry opened with no notice in the Inquiry's List of Issues, and days before Levy was called to give evidence, McGrail and Paul Richardson sought without the safeguards or rigour of ordinary trial procedures, exposure to damages in libel, or personal litigation costs, to ventilate their belief in Levy's complicity in the underlying criminal offence,[8] his destruction of WhatsApp messages to both conceal his original alleged wrong-doing[9] and his impugned role in persuading politicians and law officers to act against McGrail;[10] packaged up in the trope descriptions of "*the most powerful lawyer in the most powerful law firm in a territory run by lawyers*"[11] and achieving the "*corrupt use of government power to insulate powerful figures in Gibraltar from a criminal investigation*".[12]

11. In doing so, again with no notice in the List of Issues and no inclusion in the witness list until the day after the oral hearings began, McGrail and Richardson made allegations against Lewis Baglietto KC of representing Levy at all due to "*conflict of interest*",[13] of joining him in "*plotting*" with the CM to remove McGrail from office,[14] of improperly approaching both the Law Officers and the CM, of cajoling and pressuring the police not to obtain the evidence they were after,[15] and of improperly concealing his involvement in all of the above.

THE LOGICAL FALLACY WITHOUT EVIDENCE

12. All these matters, now they have been aired, are strenuously denied. Given the relevance of the warrant in the causation of the CM's confrontation with McGrail, it was at the discretion of the Chairman within his broad terms of reference to allow these matters to be asked about during an unfolding inquisition, even if the List of Issues did not explicitly identify them. The result, at the very least, is that no one can say that anyone was protected from being asked to account for their actions. The Hassans Witnesses duly answered questions without objection. However, just because these matters were raised does not mean that they have not enabled the artificial entanglement of the blaming narrative into the scope of the Inquiry,

[8] Counsel for Richardson [T2/42/6-43/12]
[9] Counsel for Richardson [T2/51/23-52/13]
[10] McGrail (3) 04.10.22 §170R
[11] Counsel for Richardson [T2/42/4-6] Counsel for McGrail [T3/15/25-16/10]
[12] McGrail Opening Submission 21.03.24 updated 09.04.24 §27
[13] Richardson [T5/18/7-18]
[14] Counsel for McGrail [T3/93/20-94/20]
[15] Counsel for Richardson [T2/50/8-9]

which it is submitted they have. They have created the risk of a classic flawed syllogism, namely because: (i) Hassans were opposed to the warrant; and (ii) Levy was involved as an arm's length seed funder of others previously suspected of the underlying offences; therefore (iii) Levy was guilty of the offence, and that is why he opposed the warrant and why he procured McGrail's removal. The task of witnesses is to provide evidence; not comment. Given that these allegations constitute personal and professional attacks, and now that the hearings are over, the Hassans Witnesses respectfully ask the Inquiry to consider their submissions as to the extent to which the understanding of them and the facts has been erroneously misconstrued. They do so not to criticise others and in circumstances where they have no knowledge of what other parties will say about them in closing written and oral submissions.

PART [II]: THE INVESTIGATION

FUNDAMENTAL ESSENTIALS

13. As to the fallacy of the logic and the unfairness at stake, there are fundamental essentials that can risk getting lost.

14. First, on 28 October 2020 with no imputation of undue pressure from anyone and "*following extensive investigation*", the RGP wrote to Hassans to inform them that Levy was "*no longer considered a suspect in this matter*".[16] The main officers in Op. Delhi described how their own review of the evidence, including a voluntary statement provided by Levy, combined with advice from the DPP, caused them to conclude that there were no longer reasonable grounds to consider that Levy had committed an offence. Richardson agreed that neither the AG nor the CM "*played any role*" in *"obliging [the police] to come to that decision*" and whatever had happened to McGrail, it "*did not detract from the fact that the DPP had advised that there was insufficient evidence to proceed*."[17] Superintendent Wyan the principal Officer in the Case ('OIC') who authored the letter to Hassans in the above terms, said there was no "*influence*" placed on the police when the decision was made that reflected an "*accurate account of where we were*".[18] Police Sergeant Clarke confirmed that "*there was no interference with the investigation whatsoever"* and decisions were made "*without fear or favour"*.[19]

[16] HJML/3 [105]: Mark Wyan 28.10.20
[17] Richardson [T5/57/9-13] [T5/60/8-18]
[18] Wyan [T5/209/21-210/1]
[19] Clarke [T9/44/6] [T9/45/14-16]

15. Second, it was not until the conclusion of that "*extensive investigation*" that the RGP returned the devices seized from Levy. Why they chose not to examine those devices in the intervening six months is a matter for them, and not a question that the Inquiry has examined in any detail, but it is relevant that it remained open to the RGP in pursuit of their investigation to pursue an earlier plan to instruct independent counsel to review the devices for privileged material.[20] Enquiries of an undisclosed nature were made with US authorities by way of a Letter of Request ('LoR') that came back negative, such that as Richardson confirmed in evidence, there were no "*grounds to seek a further order to open the devices*";[21] and they were consequently returned.

16. Third, the alleged conspiracy has never been proved against anyone, because it was withdrawn before a pending submission of no case to answer. The Op. Delhi Defendants have referred the Inquiry to what they believe to be the relevance of their submissions to the criminal court and the prosecution reply, but those documents are not in the public domain, and for reasons within the Chairman's discretion he has not investigated them.[22]

17. Fourth, there is a legal dispute that the Legislature of Gibraltar has recognised in passing section 3 of the Crimes and Miscellaneous Provisions (Amendment) Act 2023 as regards whether the relevant offence existed under Gibraltar law at the time, which the Chairman has concluded is "*neither necessary or indeed possible*" to resolve in this Inquiry, although it remains relevant to the overall legality of the warrant,[23] and indeed (regardless of whether it was considered at the time) the legal foundation for the entire criminal allegation.[24]

18. Fifth, even if the offence did exist, the basic rudiments of the law of fraud and common law and ECHR requirements of legal certainty mandate anxious scrutiny not to allow a commercial dispute to be mischaracterised as a criminal conspiracy.[25] In this case that made it important to clearly establish ownership of the NCSIS platform and the nature of the contractual arrangements between the Government ('HMGoG') and Blands.[26] Both matters were relevant to any grounds to allege that the exercise of free market competition for maintenance services that were not the subject of a fixed contract and remained at the

[20] Clarke [T9/21-23/2-3]
[21] Richardson [T5/61/1-5]
[22] Perez 24.01.23 §57 – disclosed to Hassans by the Inquiry on 4 March 2023
[23] Chairman [T2/55/20-22] [T2/56/13-15] CTI Written Opening 02.04.24 (updated 07.04.24) §§84-88
[24] Levy 27.03.24 §6
[25] E.g. *R v SA* [2019] 4 WLR 142 §80 (an alleged unlawful threat was "*no more than a 'mere puff'*" in a commercial negotiation process)
[26] Counsel for Op. Delhi CPs [T2/102/4-105/20] [T2/112/19-115/6]

discretion of the buyer to award, amounted to a criminal conspiracy to "*dishonestly*" "*injure*" a "*proprietary right or interest*" of a victim.[27]

19. Sixth, the salient feature of the final police charges, relied on to prove both the conspiracy and the additional counts of computer misuse was a claim of hacking and sabotage that an expert opinion from Dr Paul Hunton procured in 2021, belatedly disclosed in the criminal proceedings but not in this Inquiry, identified no evidence that it occurred. Rather he was unable to distinguish between *"legitimate development activities or deliberate malicious system interference*" on the basis that "*Without rebuilding the application and database in full and running the code in a controlled test environment*" "*it was not possible to confirm at this time if the code in question was called and run by the NSCIS Platform.*"[28]

20. Seventh, for reasons addressed in the CTI's Opening Submissions, it is not the remit, or aim, of this Inquiry to establish whether the allegations of the police had actual merit.[29] That reflects the Chairman's preliminary rulings that these proceedings were "*not to be a forum to conduct a quasi-criminal trial*", adding that Issue 5 did "*not require…or indeed permit*" him to do that, and that there was no intention and probably no authority for him to act otherwise.[30] That afforded solace to the Hassans Witnesses that Levy was not to be called as a witness to provide an opportunity to revive the original suspicion against him and that there was to be due recognition of the presumption of innocence under the common law and Article 8(2) of the Constitution.

21. Eighth, even if it is not the purpose of this Inquiry to determine the criminal allegations, it is still important to comprehend any such arguable weaknesses in the police investigation that were relevant to: (i) the decision to apply for a warrant; (ii) the disclosure duties that arose in relation to the warrant application; (iii) the serious flaws in the warrant that rendered it legally indefensible; and (iv) the taking of no further action against Levy after October 2020, without any suggestion of undue influence to bring about that end. In the meantime, Levy had a right to mount a rigorous defence in response to the warrant. Basic understanding of that area of the law of police powers supports his objections. Evidence disclosed by this Inquiry undoubtedly proves him right.

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[27] *R v Evans* [2014] 1 WLR 2817 §§40, 169, 184, *R v Barton* [2021] QB 685, §§117-122
[28] Counsel for Op. Delhi CPs [T2/110/6-111/15] Perez Affidavit 24.01.23 §56: see also public access reporting, e.g. NSCIS report can't tell between 'legitimate activities or deliberate malicious system interference' | GBC - Gibraltar News - GBC TV and Radio Gibraltar
[29] CTI Written Opening 02.04.24 (updated 07.04.24) §§82-83.
[30] Chairman: Ruling on CP Status of Op Delhi Defendants 01.03.23 §§14, 17(a) and PH4 Ruling 26.07.23 §4

22. Ninth, in judging the police "*handling*" of their investigation as Issue (5) seeks to do there is a risk of asymmetrical unfairness, in that the police witnesses have been asked about why they regarded their investigatory decisions as correct, but alternative assessment based on equal access to the underlying police file,[31] including the unused material in the criminal proceedings, has not been possible.[32] Evidence has been given in private, apparently including attempts to justify the original suspicions against Levy, which has been received by the Inquiry without any possibility of hearing rebuttal.[33] The asymmetry requires caution about any invitation to go beyond the confines of Issue 5, and to restrict findings to those only necessary to answer the question of what relevance Issue 5 has to McGrail's resignation.

RELEVANT CONSIDERATIONS

23. With all the above caveats, there are relevant considerations that the Hassans Witnesses would wish the Inquiry to consider in respect of aspects of the police investigation insofar as they gave rise to an unlawful warrant with its associated consequences. These are: (A) Levy's formal designation as a suspect in spite of unresolved parts of the RGP case theory of the offence; (B) the seeking and the giving of legal advice that dealt equivocally with both (I) the designation of suspect status and (II) the application for the warrant; (C) the *fact* of the public law illegality of the warrant due to substantive and procedural errors; (D) the defence against the warrant by the Hassans Witnesses in accordance with the basic rights of any citizen; (E) the resolution of the dispute over the warrant in a manner chosen by the police and not dictated to them; (F) the consequences of the resolution from the perspective of the Hassans Witnesses that marked the end of the beginning of the need to exonerate Levy from the wrongful allegations he faced, rather than dedicating time and exposure by involvement in the resignation of McGrail. Each of these parts is taken in turn.

A. THE DESIGNATION

24. The legality of the formal designation of Levy as a 'suspect' is a matter that the Hassans Witnesses can never concede; and on all the available evidence there is no objective reason why they should.[34] At the same time the Inquiry had determined that it will not, and should not, determine that issue.[35] It must follow that Levy, the previous Op. Delhi Defendants nor conversely the police witnesses will be the subject of findings of whether the grounds for

[31] Counsel for Richardson [T2/40/11-22]
[32] Perez 24.01.23 §§50-71
[33] Wyan [T5/221/2-25] Richardson [T4/45/12-47/12] [T4/102/21-103/21] [T5/109/5-11]
[34] Levy 27.03.24 §§6-7 and the matters cited below
[35] Chairman: PH4 Ruling 26.07.23 §4

suspicion were correct. What the Inquiry can find is that at the point of seeking advice from the DPP on Levy's designation as a suspect on 8 April 2020 there were parts of the police case theory that required further investigation.

25. First, and chief amongst them, was that the RGP had not obtained an independent expert opinion on the gravamen of the entire allegation, the computer sabotage. That was despite being advised by the DPP on 17 January 2020 to get one, and in circumstances where the complainant's commissioned study from Price Waterhouse Cooper ('PWC') was regarded as inadmissible, and that NCA were not prepared to provide an expert report.[36] Nothing had changed by April 2020. The National Decision Model ('NDM') continued to rely on the PWC report.[37] Moreover nothing had changed in May 2020 when the Information in Support of the Search Warrants ('Information') relied on the same PWC report as the only cited source.[38] In the NDM the police asserted that the sabotage was done with Levy's knowledge to influence the Government to transfer the contract to 36 North.[39] In relation to the misuse of computer offences (alleged against the co-conspirators), the Information asserted that those acts were "*in furtherance of the agreement to obtain the NCSIS platform maintenance contract…to directly or indirectly disrupt the…platform, and thereby bring into question the ability of Bland (sic) to maintain the said platform*".[40] Other than being unable to prove sabotage of the system, the eventual Hunton Report would find the critical question of whether Tommy Cornelio had accessed the database after the 4 October 2018, when he was no longer employed by Blands, to be "*beyond the scope of the assessment*".[41]

26. Second, having arrested the Op Delhi Defendants in May 2019 as regards "*intellectual property rights in relation to the NSCIS platform*" the RGP was aware from 26 July 2019 that two of the subjects under investigation asserted that HMGoG owned the platform. On 23 March 2020 the then Counsel to John Perez and Cornelio had written to the AG providing details of HMGoG's ownership of the platform[42] and the issue had not been resolved by April 2020, when the DPP advised the RGP that the "*issue of ownership of the platform is integral to this case"* (formal ownership was asserted on behalf of HMGoG by the Chief Secretary on 4 May 2020).[43] This *"integral*" issue was also raised by the AG at the meeting

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[36] Rocca [T10/16/20-17/25] [T10/18/17-20/9] Richardson [T5/107/24-109/4]
[37] NDM 01.04.20 §7 p.1 – disclosed to Hassans in redacted form by way of an SAR during 2023
[38] Information 07.05.20 (dated 07.05.20) §§33, 102 – disclosed in unredacted form by the Inquiry on 04.03.24
[39] NDM 01.04.20 §10 p. 2
[40] Information 06.05.20 (dated 07.05.20) §§90, 102
[41] Paragraph 19 above
[42] Perez 24.01.23 §49 (3) pp 10-11
[43] Llamas (1) 24.06.22 §§34-35

on 7 April 2020 with McGrail and Richardson, in which, according to his evidence, he asked the question of ownership be clarified and the excessive charges rationalised, before McGrail met with the DPP and the AG again, and that meeting would precede any further action being taken.[44]

27. Third, the objective need for stocktaking was obvious, because the investigation was disproportionately dependent on Blands' account of the allegations. After the original complaint by the Chairman of Blands in Autumn 2018 and the arrests and searches in May 2019, his lawyers wrote letters before action in June 2019 and issued proceedings against Perez, Cornelio and 36 North in August 2019 (with the knowledge of the police[45]) under causes of action based on the same allegations as the criminal proceedings, which were brought to a conclusion by a notice of discontinuance in December 2019.[46] By April 2020, not only was the Blands claim to a proprietary interest in the platform now brought definitively into question by the intervention of the Law Officers; but if the complainant's account was disputed on that, then there needed to be some further investigation into the proprietary interest that it claimed to have in the contract for maintenance services. At the very least the NDM of 1 April 2020 stating that "*there may be a dispute over the intellectual property of the platform*" was now out of date.[47]

28. Fourth, in so far as the RGP had formulated an alternative case theory concerning injury to a proprietary right or interest in the maintenance contract that they described in the NDM as "*unsigned though implied*",[48] they had apparently done nothing by April 2020 to establish from HMGoG as the buyer of the services what the terms of the agreement were.[49] Nor does any consideration appear to have been given to the ultimate burden of proof upon them, and the competing positions of Blands owning the platform, and HMGoG owning the platform with an implied maintenance contract with Blands. Further, the fact that the complainant had discontinued civil proceedings based on the same alleged proprietary interests, but governed by the lower civil standard of proof, was a relevant consideration to a belief that an indictable offence had been committed. Instead, from the terms of the Information, it appears that the complainant was the only source for the description of the proprietary interests at stake.[50]

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[44] Llamas (1) 24.06.22 §§29-32 and Covert Taped Meeting 13.05.20 p. 2 disclosed by the Inquiry 04.03.20
[45] Richardson (2) 13.06.23 §18 (g) Richardson (3) 29.09.23 §§50-52 McGrail (1) 20.06.22 §§20 Covert Taped Interview 13.05.20 pp 14-15
[46] Perez 24.01.23 §48
[47] NDM 06.05.20 §23 p. 3
[48] NDM 01.04.20 §23 p. 3
[49] Wyan [T5/126/5-128/13]
[50] Information 06.05.20 (dated 07.05.20) §24

Hence, the common feature of all these investigatory lacunae is that they went to the heart of whether any criminal offence had been committed by anyone.

B. The Legal Advice

29. The above provides the context for the RGP meeting on 8 April 2020 to seek the DPP's advice on designating Levy as a suspect where the proposed warrant application was also discussed. For the DPP, Christian Rocca KC, the first to hold the post since its statutory creation in 2018, a brief to advise on suspect status was "*strange*" and unprecedented in his six years in office, but he treated it as a search for "*reassurance*" because of the profile of the subject.[51] Seeking independent legal advice at an early stage of proceedings from the dedicated Legal Officer, who under the AG was responsible for the evidential and public interest integrity of the criminal justice system, was not the problem. The major problem based on all the circumstances of this case was the commission and provision of the advice without the supply of a formal written opinion and without doing it in a structured manner. That it undoubtedly should have been done that way was compelled by multiple factors. They included the profiles of all the people involved and the sensitivity of the subject. Further the above lacunae in the case theory, especially given the DPP's own view that "*people could not be charged" "pending the outcome of the ownership"* issue,[52] manifestly called for proper stocktaking of the fundamental rudiments, rather than acting against a further suspect.

30. Rather than offering oral opinions in a 19-minute conference that cannot fully be recalled, and was only partially recorded, the Chairman might well have concluded that at this juncture a more careful written advice note was needed. However, as the subject of the police powers Levy is entitled to feel aggrieved. The result was that the advice provided dealt equivocally with *both* the issue of suspect status and the application for the warrant, and Levy would suffer damage in consequence.

[I] <u>Advice On Suspect Status</u>

31. On 3 March 2020, the DPP had advised without formally putting the matter into writing, or without any detailed note taken by the police, that there was insufficient evidence to suspect Levy of having committed the offence. The gist of his advice is recalled as being that at its highest what was at stake was "*sharp business practices*".[53] In oral evidence to the Inquiry

[51] Rocca [T10/59/20-60/22]
[52] Rocca [T10/47/24-48/6]
[53] Rocca [T10/8/15-9/11] Richardson (3) 29.09.23 §14 [T4/36/16-39/14]

Richardson said at the time the advice was given during a two-hour meeting, the DPP was "*of the very strong opinion… that the conduct had not stretched the boundaries into dishonesty and into criminal conduct*".[54] The DPP's evidence was that there was "*no evidence to suggest [Levy] had been involved or had knowledge of the computer hacking or any improper conduct that had been alleged by the police".* Rather it looked like *"people trying to take people's business, which happens all the time in the world of business*".[55]

32. It was of course open for the police to seek a further opinion from the DPP based on more detailed instructions, but from the perspective of safeguarding a suspect there are aspects of the second meeting that compounded the borderline nature of the case. Returning on 8 April 2020 to seek a reconsideration of the matter based on prior emailing of the NDM and a Police Charging Report (that the Hassans Witnesses have not seen), there is no record as to why the DPP's advice changed as result of the second meeting. There is only the barest of entries in the Day Book for that date of what occurred: "*re JL, reasonable grounds to question, would be a lingering doubt otherwise. Obligation to interview under caution*".[56]

33. Read on its own that is insufficient to ascertain what advice was attributable to the DPP and what was the decision of the police, and whether, if there were questions for Levy to answer, it was necessary for them to be asked under caution, and if so, upon what basis. When questioned on this in evidence, the DPP accepted his advice should have been recorded as a file note at his end.[57] His distillation of the advice in his evidence to the inquiry was as follows. He remained "*less*" "*comfortable*" about the case against Levy than other suspects, but there were "*lingering suspicions*".[58] Those he clarified were more to do with a "*lingering doubt*" on his part about Levy's "*involvement*", as they concerned messages between Cornelio and Levy (see below) "*which the police thought indicated some knowledge about the hacking and the conspiracy*", but the DPP and Junior Counsel "*weren't quite satisfied that was the case*", and so "*there needed to be an explanation for those messages*"[59] and "*a lingering doubt if we didn't question him".*[60]

34. The police had come for "*reassurance*" from the DPP to give them foundation for their next steps. According to Rocca, the product of this "*strange"* request to pass comment on the

[54] Richardson [T4/35/10-15]
[55] Rocca [T10/25/12-20]
[56] Richardson (3) 29.09.23 14 §14 Rocca [T10/57/6-11] Wyan (3) 04.08.23 §5
[57] Rocca [T10/49/17-50/8]
[58] Rocca [T10/52/16-53/6]
[59] Rocca [T10/58/11-23]
[60] Rocca [T10/57/6-61/14]

operational decision to interview someone, was comment to the effect of, "*I don't disagree with you*".[61]

35. The failure to record advice on the evidence in a disciplined fashion had direct consequence for the approach to the warrant; and it its eye-catching allegation that "*communications show [Levy] was aware of the Computer Misuse Offences committed by Cornelio*". The relevant parts of the Information stated that Levy was told by Cornelio in a text message on 18 October 2020 that "*Very confidentially*" he should note "*Gaggero has brought in a forensic team… to look at anything he or John [Perez] had done to tamper with the system etc*" and that "*Gaggero is going all out it seems*". On the same day Cornelio wrote to Perez that he had spoken to Levy "*confidentially*" and that he "*says not to worry*" but Cornelio expressed himself as "*very concerned that they will try to prove I have acted to sabotage the system in any way etc*".[62]

36. Of that evidence the NDM records the view that "*it is reasonable to suggest that [Cornelio] informed [Levy] that he had been sabotaging the system*" and Levy continued to support 36 North "*in obtaining the platform (sic) and did not dissociate himself from this conduct*".[63] The Magistrate would be informed as such. In fact, quite the opposite should be concluded from those passages, namely, a confidentially communicated fear of being wrongly accused as part of a commercial dispute. Wyan's expression of his "*thought process*" to the Inquiry that only a complete confession of wrongdoing could cause a person to say, "*don't worry*" is a non-sequitur.[64] Richardson's conclusion that an innocent lawyer would not tell a person who feared being investigated for a matter "*not to worry*", was equally jaundiced.[65]

37. There is no record of what the DPP said of these matters in conference, but in the evidence to the Inquiry this is a claim that he and junior counsel were "*less comfortable*" about as proving "*involvement*".[66] In the covertly recorded discussions on 15 May 2020 the DPP said it did not accord with the police interpretation that Levy knew that Cornelio "*has planted the bombs*". McGrail agreed that it read like Cornelio had expressed a fear of being "*suspected*" and it was that which Levy was reported to have told him not to worry about.[67] Everyone agreed that Levy needed to be asked about the matter, but at various points the DPP

[61] Rocca [T10/59/20-61/14]
[62] Information 06.05.20 (dated 07.05.20) §§99-101
[63] NDM Assessment §23 p. 4
[64] Wyan [T5/154/21-155/15]
[65] Richardson [T5/203/21-205/17]
[66] Information 06.05.20 (dated 07.05.20) §319(e)
[67] Covert Tape 15.05.20 pp 19-20 – disclosed by the Inquiry to Hassans on [04.03.20]

emphasised his "*reservations …about whether we have enough…to cross the line*" and that "*we would not get a conviction anytime now on what we've got*".[68] Wyan confirmed that Levy was "*certainly*" in a different evidential category to others.[69] The question remained as to whether there were reasonable grounds to suspect him of involvement in the offence, or whether this objectively borderline case amounted to a misconstruction of competitive business opportunism. Considering the above, it is unsurprising that police independently concluded, without fear or favour, by October 2020 that there was no case against Levy. What is more surprising is that the Magistrate who heard the warrant application was told nothing of the potentially competing interpretation of the centre piece of the police case.

[II] ADVICE ON THE WARRANT

38. The consequence of the informality of the commission and provision of the legal advice as to suspect status flowed into the same informality with which the application for the warrant was discussed at the same time. The evidence indicates that while the warrant may not have been the subject of a formal legal **Advic**e by the DPP on 8 April, it was in fact **advised** against by him during that period as part of his involvement in the case.[70] In that distinction between formal and informal advice commissioned by the police and appreciated by the DPP to involve a search for "*cover*" over what was telegraphed to be a controversial next step of obtaining the warrant, this was wholly unsatisfactory.

39. First, and foremost, the police desire for reassurance on the grounds to suspect Levy of the commission of an offence was *inextricably* tied to their intention to apply for a search warrant. The very reason why the RGP sought preliminary advice about the case at this juncture at all is that on 1 March 2020 McGrail, having been informed of the plan to apply for a warrant, had supported that step in principle "*subject to consultation with the DPP*".[71] McGrail told the Inquiry that he wanted to ensure their intended activity was "*legally supported*", namely ensuring that they "*were on solid footing with regards to addressing Mr Levy*".[72] That was immediately followed by police seeking and receiving the negative advice about the underlying case from the DPP on 3 March. The NDM version of 1 April referred to the intention to seek the warrant and conduct the interview.[73] McGrail accepted that the

[68] Covert Tape 15.05.20 pp 19-20
[69] Covert Tape 15.05.20 pp 9-10
[70] Wyan (3) 04.08.23 §31 (recalling that DPP's expressed his position prior to the application being made)
[71] Wyan (3) 04.08.23 [§19] Richardson [T4/3116-33/7] [T4/33/21-34/7]
[72] McGrail [T6/166/6-15]
[73] NDM 01.4.20 §31 p 4

intended use of the warrant was "*evident from the NDM assessment"*; it was part of the "*package"* put before the DPP[74]. As it was clear to McGrail, it must have been clear to everyone else that any change of advice on suspect status on 8 April would likely lead to the warrant application.

40. Second, the witnesses who were present all agree that the warrant was discussed at some point, but there has been confusion, even on the DPP's account, as to whether the informality of the discussion amounted to 'legal advice'. On this the wood has been lost from the trees. At the most basic level these were communications between a lawyer and his client made in the course of giving legal advice, and in the absence of waiver, legal professional privilege would apply.[75] No one could seriously suggest otherwise, but if they did, then the RGP applicants for the warrant should have told the Magistrate that the DPP himself thought it was preferable to seek a production order (see SECTION C BELOW). Further, in expressing any opinion at either of those conferences, or in their margins, the DPP was being asked to provide views in his capacity as the head of criminal prosecutions in Gibraltar, who would bear responsibility under the AG for the evidential, public interest, and due process aspects of any proceedings initiated out of this investigation. The DPP may have wanted to respect operational discretion, but he equally knew he was being asked to provide legal cover in a sensitive case. He also knew that the RGP's dedicated lawyer would not have the specialist knowledge to deal with such issues.[76] Whatever he chose to say was in his capacity of holding those statutory and constitutional functions, of which a role of warning and devil's advocacy would be an essential function.

41. Third, during the course of seeking advice from the office holder of the DPP, the evidence of Rocca, Wyan and Richardson now recalls that a negative opinion was provided by the DPP as regards applying for a warrant instead of a production order, with the caveat that this was an operational matter for the police and he would support them if they elected to act otherwise.[77] As the DPP told the Inquiry, "*I definitely expressed the view that a production order would have been my preferred course of action*".[78] Whatever the caveats, in substance that amounts to the DPP advising (negatively) upon the merit of the action. It is no different in substance to how he advised (positively) on suspect status to the effect of "*I don't disagree*

[74] McGrail [T6/165/15-166/15]
[75] *R v Central Criminal Court Ex p Francis* [1989] AC 346, 392
[76] Rocca [T10/11/4-11] [T10/77/24-78/9]
[77] Wyan (3) 04.08.23 §31 Richardson (3) 29.09.23 §14
[78] Rocca [T10/71/8-12]

with you".[79] Given that McGrail wanted the DPP to be consulted on that proposal to seek a warrant, the negative aspect of the expressed view should have been considered more carefully. However, by neither the DPP, nor the police recording the fact of the DPP's opinion, or any reasons as to why he held it, or discussion of the competing arguments both ways, the caveats could reign supreme. Richardson's evidence is that there was a discussion which culminated in the DPP reflecting that "*he wasn't a police officer, and we weren't lawyers*". [80] McGrail's statement to the Inquiry maintains that he was told that the DPP "*would not advise on the teams intended course of action…but he would defend the actions if and when it was needed*".[81] In his evidence McGrail explained he had understood that the DPP had given "*the green light*", which he later caveated as being "*in the sense that he was content to defend it"* and that it was "*not a matter that he [was] going to get involved in"*.[82] From that situation the RGP proceeded with their next steps in Op. Delhi, of which the application for the warrant was to be the major centrepiece, with the incorrect assumption that the warrant application against their newly designated suspect would be legally defensible.

42. Fourth, although the DPP's reasons for preferring a production order over a warrant were never written down, near contemporaneous records and evidence before this Inquiry make clear what they were. In the covertly taped meeting on 13 May 2020, the DPP took issue with the police assumption that a senior lawyer would not comply with a production order.[83] Both the AG and the DPP queried the RGP's equivalence between a senior lawyer and the others, especially where his phone would contain large amounts of privileged and other sensitive data, mixed in with what was sought.[84] Despite maintaining he would defend a JR, during the meeting of 15 May the DPP distinguished between the RGP's cited example of a warrant issued against a lawyer who did not know of the police investigation, whereas Levy had been aware of it for more than a year, and reiterated more forcefully that akin to other very senior lawyers someone like Levy could not countenance non-cooperation with production orders.[85] The DPP equally did not find any merit in the police suggestion that because Caine Sanchez was suspected of destroying messages before he was arrested, a few

[79] Paragraph 34 above
[80] Richardson [T4/73/25-76/25]
[81] McGrail (1) 20.06.22 §23
[82] McGrail [T6/174/7-176/9]
[83] Covert Taped Meeting 13.05.20 p. 5
[84] Covert Taped Meeting 13.05.20 p. 6, 15
[85] Covert Taped Meeting 15.05.20 pp 13 and Rocca [T10/72/3-73/10]

days after the others in the previous year, that the suspicion of the same conduct could be transposed on to Levy.[86]

43. Fifth, when Baglietto spoke to the DPP on 27 May 2020 about Hassans' request for further disclosure of the grounds for the warrant, the former's note of the conversation is that the DPP told him that despite "*operational differences*" he thought the warrant was lawful, "*[b]ut agrees*" (in keeping with his comments at the taped meetings) there was "*no risk of destruction /concealment*".[87] If the note accurately reflects what was said, then it went directly to lawfulness, because no cogent argument had been cited to the DPP or thereafter to the Magistrate to establish that there was. Thus, the DPP who had advised in April in the abstract that he would defend the warrant in a JR, was now accepting that the statutory threshold to justify its legality were not made out once the application was made.[88] The upshot for this Inquiry is that the police sought cover for their operational targeting of a high-profile figure like Levy in a patchwork blanket of legal advice that dealt equivocally, and therefore inadequately, with both the issue of suspect status and the application for the warrant.

C. The Illegality Of The Warrant

[i] Suggested Approach

44. Based considerably on the equivocal nature of the advice, both the police application for the warrant and the Magistrates' order were not only deeply flawed in both substance and in form, but the overall outcome was unlawful. The Inquiry can and should make findings to that effect, especially as regards process, candour and the statutory conditions (as dealt with below). It should do so without apportioning individual blame, so as not to stray into a ruling on civil liability, but it should focus on the fundamental errors of public law, because the illegality of the warrant is an essential factual ingredient to evaluate the consequences that arose from its occurrence. As to the Inquiry's power to make a finding of public law illegality, it can do so in accordance with section 4(1) Inquiries Act 2024 because such a determination cannot amount to a ruling on civil liability. In this instance, it would be a critical factual finding. There are several precedents in inquiry and inquest law to that

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[86] Covert Taped Meeting 15.05.20 p. 12 Rocca [T10/168/14-169/4] *Cf.* Richardson [T4/210/10-212/14] [T5/82/3-9]
[87] Baglietto (2) 03.05.20 §§10-12 and Ex. LB/2
[88] Paragraph 12 & 14 of Schedule 1 to the Criminal Procedure and Evidence Act 2011.

effect.[89] As to relevance, the bona fide criticism of the warrant, including its legality, is intrinsic to all that followed, such that if the Chairman refrains from finding a fact that underscores the strong objective basis to make those criticisms, then it produces only a partial understanding of what happened next. In the alternative, if the Chairman is not prepared to make formal findings as to the legality of the warrant, he ought, at a minimum, to reach the conclusion that, as recognised in the CTI's Opening Submissions,[90] there are legitimate, serious and compelling arguments that the warrant was unlawful, and those proper arguments form the necessary context for the steps taken by Levy and those representing him on, and after, 12 May 2020.

[II] ILLEGALITY

45. The warrant was sought, and issued, under Schedule 1 of the Criminal Evidence and Procedure Act 2011 ('CEPA'), because the material sought was said to include Special Procedure Material. The consequence was that a production order was not an alternative to be considered and was disregarded as part of the operational decision; it was the default legal option as intended as such by the legislature,[91] which can only be departed from if specific and limited statutory criteria under paragraphs 12(a) and 14 are fulfilled. Those criteria include demonstrating why a production order would not suffice.

46. The failure of the police application to properly meet these conditions contained in Schedule 1 paragraphs 2, 12 and 14 cannot be defended on public law grounds. The police witnesses to this Inquiry have not seriously tried to suggest otherwise.[92] The Magistrate applied conditions B & D of paragraph 14 to Schedule 1 as providing the lawful basis to issue the warrant, as opposed to a production order. Condition B is that it was not practicable to communicate with any person entitled to grant access to the material. It evidently was. The RGP were able to communicate with Levy and he granted access to the material sought. That this was precisely what happened fundamentally undermines the RGP's apparent reliance on this condition before the Magistrate.[93] It also demonstrates a failure to understand the legal conditions, where the RGP were advancing one case before the Magistrate and adopting a

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[89] Undercover Policing Inquiry (legality of CHIS at common law) Grenfell Tower Fire Inquiry (compliance with the building regulations) *R (Pounder) v HMC for Durham and Darlington* [2009] 3 All ER 150 §73 (whether physical methods of discipline used on a child in care who killed himself in accordance with law)
[90] CTI [T1/188/5-191/16] and CTI Written Opening 07.02.24 §§81 and 88
[91] CEPA 2011 ss 12(1)(d) and 13(1)
[92] Counsel for Richardson [T2/44/24-47/4] and see below *Cf*. Counsel for RGP [T2/31/12-32/24] was not to claim legality but to maintain that the matter was "*entirely irrelevant*"
[93] The Information in support of the warrant is silent on this condition

wholly contrary approach in practice. As the DPP observed in evidence "*if you've got a warrant, you execute it. You then don't turn up and negotiate*".[94]

47. Condition D, the second inescapable problem for this application, was to declare that service of notice of an application for a production order may seriously prejudice the application because Levy was "*highly likely*" to destroy the evidence, without citing evidence or countervailing arguments, and without addressing that any action to destroy evidence would have been a contempt of court (paragraph 15 of Schedule 1). Clarke, as the applicant, accepted the pleadings at paragraphs 324 and 326 of the application did no more than copy the wording of the statute that the person who is the subject of a production order "*must not conceal, destroy, alter, or dispose of the material to which the application relates*", but did not deal with the individual circumstances of this particular case.[95] In his oral evidence, Clarke proffered various views that were not contained in the Information and were not put to the Magistrate, and which would be queried by the DPP in due course in the covert taped meetings.[96] But the actual pleading was classically circular; because Levy was a suspect, it was sufficient to conclude that given notice he would destroy the evidence that would confirm the police suspicion. Subsequent evidence given by the police witnesses to this Inquiry has not reached meaningfully beyond that assertion. [97]

48. CTI were right in opening to characterise the pleading as "*unsatisfactory and generic*" because "*the reason would apply to all suspects*" whereas "*the fact that the legislation does not limit the use of production orders to non-suspects implies that the legislation foresees scenarios where a suspect would be made the subject of a production order, and therefore anticipates additional justification being put forward for the more draconian executive action of a search warrant*". [98] A similar pleading relating to a lawyer in the *British Transport Police* case was criticised for failing to constitute a reason, and overlooking without more, that "*a practising solicitor against whom no allegation of dishonesty had previously been made and who would in the ordinary course of events be expected to comply with a request from the police to hand over a document or at least not to destroy material*". Hassans referred

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[94] Rocca [T10/190/5-11]
[95] Paragraph 11 of Schedule 1 of CEPA: see Clarke [T9/25/4-26/8] Richardson [T4/111/16-113/7]
[96] Clarke [T8/24/2-25/2] [T9/28/14-30/1] *Cf.* Paragraph 41 above
[97] Wyan (3) 04.08.23 [§23] Clarke [T9/26/24-27/11]: see also Richardson (2) 13.06.23 [§17] [T5/81/5-82/9]
[98] CTI Written Opening 07.02.24 §81(a)

the RGP to the case in their letter of 15 May 2020, at a time when they had not yet seen the Information despite requesting to see it.[99]

49. The other stand out deficiency in the RGP's application was the approach to legally privileged material, and any suggestion that risks relating to privileged and other sensitive material were properly dealt with by the Information would be wholly wrong. As regards the potential that the devices might contain data subject to legal professional privilege the Information at paragraph 322 acknowledged that they would, and therefore "*will be reviewed by an appointed independent legal representative prior to the OIC being given access to any material*". However, the width of the proposed order at paragraph 320 placed no limitation on its terms, thereby conflicting with ample authority that the four corners of the warrant identify what the limits of the order are, which cannot be implied, nor saved for the purposes of LPP by the engagement of independent counsel. Richardson never considered the issue.[100] Wyan accepted legal advice on the matter would "*certainly*" have been of benefit.[101]

50. Given the statutory prohibition on the seizure of legally privileged material, the absence of these safeguards fundamentally undermined the legality of the warrant on its face.[102] But on top of that, the RGP had no practical safeguarding policy or protocol to signal to the Magistrate or the suspect as to how an independent lawyer would be instructed locally who would not be conflicted, or internationally who could travel during Covid, and either way under what conditions they would work, and what key words would be used for sift and search purposes.[103] Finally, the averment in the Information that the devices would not contain excluded material was irrational to suggest in relation to a senior lawyer, prominent figure in the Jewish community, and Chairman of the Community Care Trust, who on that basis would likely have devices that would be full of such material.[104] The existence of excluded material required the RGP to meet separate access conditions under Schedule 1 CEPA. They were never considered.

[III] PROCESS

51. Combined with the flaws in the application as pleaded, were the deficiencies of the judicial process that adjudicated upon it. The common law authorities, some of which were cited by

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[99] *R (S) v CC of the BTS* [2014] 1 WLR 1647 §§62-63 and HJML/3 Baglietto 15.05.20 [37] at [45]
[100] *McGrath v CC of RUC* [2001] AC 731 §18, *R(A) v CCC* [2017] EWHC 70 (Admin) §§81. 83, and *Gittens v CCC* [2011] EWHC 131 (Admin) §§36-37
[101] Wyan [T5/187/1-10]: see also Clarke [T9/21/17-22/16]
[102] CEPA 2011s. 25(6)
[103] *Cf. R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102
[104] Levy HJML/1 09.06.20 §2

Dudley CJ in a recent case in Gibraltar, but all the key ones were set out in the Hassans letter to the AG dated 15 May 2020,[105] emphasise the "*high constitutional importance*" that the citizen is protected by independent judicial scrutiny from the excesses of allowing an officer of the Executive to decide for himself whether to enter property and search.[106] Without exhaustive citation, of pertinence to the process in this case is that: (1) the statutory provisions should be "*fully and fairly enforced*" and powers should only be used "*with great care and caution*";[107] (2) the judge personally must be satisfied that the access conditions are met, rather than asking himself whether the views of the constable are reasonable;[108] (3) while reasons are not strictly mandatory, the failure to provide them as a result of an *ex parte* application is no longer good practice, and ill-advised unless the detail of the application makes it manifestly clear what the judge's reasons were;[109] (4) "*scrupulous care*"[110] should be taken to include all relevant information in the application, or otherwise note any additional matters dealt with during the applications, such that there is a "*proper record of the full basis upon which the warrant [has] been granted*";[111] and (5) in the making of the application on the *ex parte* basis the applicant must comply with enhanced obligations of candour and cooperation, known as the duty of "*full and fank disclosure*" (see §55 below).

52. In the proceedings in chambers before the Stipendiary Magistrate on 6 May 2020, there was no recording or transcript of the hearing. The reasons given were spartan, which while not fatal, were highly problematic because of the way the police Information was drafted. The evidence of Clarke who made the application was that the 38-page (small font and single spaced) Information filled with technical language about the platform took near enough all the 2-hour hearing to read out in full.[112] While no specific questions were recorded in the officer's notebook where he would normally record them, he thought if there were any questions asked at all they concerned "*the evidence*" rather than the "*procedure [he] was proposing*" and it would have been "*literally a couple of points…to clarify the evidence*" which could have really taken seconds of the hearing time.[113]

[105] HMJL/3 Baglietto 15.05.20 [39-48]: see also *Verralls v COP* [20024/GSC/104] 19.04.24 §§21-24
[106] *A-G of Jamaica v Williams* [1998] AC 351 at 358
[107] *R v Crown Court at Lewes ex p Hill* [1991] 93 Cr App R 60, 66
[108] *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 677
[109] *R (S) v CC of the BTS* [2014] 1 WLR 1647 §47, *R (Burgin) v MPS* [2011] EWHC 1835 (Admin) §37
[110] *R (S) v CC of the BTS* §43
[111] *R (Redknapp) v Comr. of the City of London Police* [2009] 1 WLR. 2091 §13, *R (S) v CC of the BTS* §45(e)
[112] Clarke (1) 13.03.30 §§8, 10 [T9/31/12-21] [T9/32/3-11]
[113] Clarke [T9/33/19-35/17]

53. The officer was clear in his evidence that the judge asked no questions about the statutory access conditions,[114] but accepted what was said in the document that other methods of obtaining the material, such as the use of a production order, were "*bound to fail*"[115] and that the service of the notice of an application for a production order "*may seriously prejudice the investigation*".[116] On the former condition the Information stated only that "*it is feared if notice was given to the subject to provide this material*" he would "*destroy, alter, deface or conceal the material sought*".[117] On the latter condition the Information read, "*A key subject in this case is the person I would serve a Production Order for the material sought. In the circumstances it is highly likely that they would destroy, alter, deface or conceal the material sought because it is evidenced sought by the OIC which may prove their involvement in the offence*".[118]

54. It followed that no explanation or evidence to substantiate the generalised claims about destruction of evidence was available to determine the issue.[119] Given the absence of any reasoning in the body of the document, there is therefore no basis to conclude why the Judge had made the order. That conclusion is reinforced from the Magistrate's reasons, such as they are (cited in the Opening by CTI[120]), the operative part of which reads "*that the evidence pointed to the existence of a conspiracy involving Mr Levy as a participant. That being so, issuing of the warrants was justified in order to obtain and preserve [evidence] necessary for the police investigation*". In addition, the reasons diluted the protection of privileged material by focusing on the fact that the material of interest to the investigation was not privileged, then asking no further questions of Clarke and concluding "*Since that material sought is electronically digitally stored, I was further satisfied by the officers that means exist by which data is shifted (sic) so that only material relevant to the investigation is retrieved.*"[121] However, without words inserted to limit the expansive extent of the order itself, that would be insufficient, and without proposal for how the sifting would occur, save that some "*independent counsel*" would do it, there was no basis within the application to indicate at all to the judge how privileged material would be protected.

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[114] Clarke [T9/35/18-37/4]
[115] Paragraph 2(b)(ii) of Schedule 1 of CEPA
[116] Paragraph 14(d) of Schedule 1 of CEPA
[117] Information 06.05.20 (dated 07.05.20) §324
[118] Information 06.05.20 (dated 07.05.20) §326
[119] Clark [T9/37/20-38/5]
[120] CTI [T1/186/16-187/15]
[121] CTI [T1/187/11-15]

[IV] CANDOUR

55. While the principal process errors lay with the Magistrate, the deficiency of the outcome was contributed to by the RGP's breach of duty of candour to the court. Specifically in this context it is a duty of "*full and frank disclosure*", requiring that *"in effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with the relevant interest, he would be saying to the judge, and, having answered that question, that is precisely what he must tell"*.[122] This has been described as "*a heavy burden but a vital safeguard*" requiring that "*full details must be given*" and "*useful reminder to the person laying the Information to state expressly which information is given pursuant to the duty of full and frank disclosure*."[123]

56. Answers provided by Wyan in evidence to the Inquiry indicate that the way the RGP understood the law at the time may have meant that they did not regard it as necessary to consider counter-arguments in their approach to applications once they determined that the search warrant was the right way to proceed.[124] This had the knock-on effect of failing to draw the Magistrate's attention to what the reasonable counterarguments might be, and in so doing, failing to carry out full and frank disclosure. Richardson's answer about the failure to disclose the DPP's counter-preference to the Magistrate, although accepted by him to be relevant, confirmed that in the absence of legal advice he had no idea of a legal duty to do so.[125]

57. Of those counterarguments, the application did not reflect in any way the much-debated basis of the suspicion that the police held, even if just to distinguish Levy from the other suspects when it came to assisting the Magistrate to make a fair assessment of the police fear that he personally was "*highly likely*" to destroy evidence. On the allegation itself, it also did not disclose the extent to which its citation of Blands' position and PWC's assessments had formed the basis for Blands' civil proceedings, and therefore failed to put the Magistrate on notice to be alert of at least the possibility that the RGP was being used to promote the interest of one party in a civil dispute.[126] That the risk of such an allegation about the overlap between

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[122] *Re Stanford International Limited* [2010] 3 WLR 941 §191; *R(Rawlinson) v CCC* [2013] 1 WLR 1634, §81
[123] *R (S) v CC of the BTS* [2014] 1 WLR 1647 §44(d)
[124] Wyan [T5/177/19-178/4]
[125] Richardson [T4/113/14-25]
[126] *Cf. Rawlinson v CCC* §§94-96

the civil dispute and the criminal case being made was acknowledged by the RGP to the AG in the covert meeting on 13 May, underscores the point.[127]

58. As to the risk of destruction of evidence if notice was given, the application did not disclose the contrary arguments. That as a very senior lawyer, the commission (and consequence) of contempt of court and the legal, career and reputational risk of even being officially suspected of obstructing a police investigation were both risks of categorical importance to avoid. Hence (at least arguably) Levy's situation could not be sensibly compared to other suspects.[128] It also did not advance the substance of the DPP's views to the contrary position (or take the trouble to ask him to particularise them so that their substance could be communicated prior to making the application).[129] Clarke did not know about them.[130] Richardson was mistaken to surmise that the Magistrate might have been told even if he could not remember.[131]

59. Finally, the application did not tell the Magistrate the basic facts that ran contrary to the RGP's views about the risk of destruction of evidence, including: (a) as to Hassans and Levy having knowledge of the arrests; (b) as to their having previously provided materials to the investigation voluntarily in May 2019 with regard to their stake in 36 North;[132] (c) that the company was the subject of civil litigation between June and December 2019 brought by the complainant that traversed the subject matter of the criminal case; and so (d) it was highly likely that Levy had knowledge of the case, including that he would have reasonable grounds to challenge the motives of the complainant and his claim to proprietary rights in both the platform and the contract.

[V] <u>THE WARRANT WAS UNLAWFUL AND DEFICIENT</u>

60. The overall outcome was undoubtedly unlawful. Richardson, Wyan and Clarke conceded that the Information did not contain sufficient detail.[133] As there was no reference in the Information to any basis on which the assertion about the destruction was made, and no further questioning during the hearing about it, the Magistrate could not possibly have satisfied himself of the access condition requirements. Wyan's further acceptance that the

[127] Covert Taped Meeting 13.05.20 pp14-15
[128] *Cf.* Wyan (3) 04.08.23 §24
[129] *Cf.* Wyan [T5/188/9-15]
[130] Clarke [T9/17/20-25] [T9/18/9-18]
[131] Richardson [T4/114/22-115/14]
[132] Levy HJML/1 09.06.20 §31
[133] Richardson [T4/4/100/10-19] Wyan [T5/187/15-188/8] Clark [T9/26/6-7]

team did not consider countervailing arguments, and that they would not have considered it necessary to do so, of itself is an admission of public law error and a breach of the duty of full and frank disclosure. Richardson, Wyan and Clarke were unequivocal in hindsight that the drafter of the Information should have had the benefit of legal advice.[134]

61. The outcome, of undoubted significance to all that followed, is that the RGP made a legally illiterate and otherwise irrational application; and they did so in circumstances where their leadership had brought the DPP into the fold of Operation Delhi at this preliminary stage to provide them with sufficient legal cover. The fact that the DPP gave the advice in April 2020 as he did, should have caused the RGP to consider the matter carefully, but the illegality of the warrant and the consequences for what happened next shows that they did not consider things carefully at all.

D. The Entitlement to Defend

[i] The Inversion of Rights

62. In response to police action on 12 May 2020, there was an absolute entitlement for Levy and his legal representative to do what they did, which focussed not at all on McGrail's job but on the rigorous defence of the protection of a citizen, including by direct contact with the legal and political officers of state. In McGrail's expression of his own aggrievement, the constitutional issues concerning the warrant have been inverted. Looked at as a matter of constitutional rights; by obtaining and seeking to execute a warrant, the Executive was acting as an unlawful antagonist against Levy, and not the other way round. It is an essential right of any citizen to defend themselves against state action whether by direct resort to the court or by other means. It was open to Levy to complain to whom he liked about his treatment. To suggest that the only acceptable remedy for a violation of the right to privacy was through resort to judicial review, where proceedings would have been conducted in public, overlooks the dilemma between self-exposure through litigation and vindication of privacy rights.

[ii] The Right of Defence

63. Levy denied that he had any involvement in the alleged conspiracy on the day the warrant was served. In due course he provided a voluntary statement to the police explaining why. Alongside their continued investigation, it caused them to conclude that he was no longer a suspect and to return his devices without searching them. In reaching that outcome Levy

[134] Richardson [T4/108/3-6] Wyan [T5/187/11-14] Clarke [T9/12/1-11] [T9/26/9-23]

exercised basic rights that any citizen would want to protect. He instructed lawyers of his choosing who wrote on his behalf to the AG, the DPP, McGrail, Richardson and the Magistrates' Court. Conversations were also had with both the AG and the CM. For the Hassans Witnesses those representations were designed to challenge the warrant, including the non-disclosure of any underlying evidential basis to justify it, and to avoid the further ignominy and publicity of either having to litigate the matter and/or attend police interview under caution, where it remained Levy's right not to answer questions without the drawing of adverse inferences.

[III] THE JUSTIFIABLE COMPLAINT

64. The Hassans Witnesses did not know then all of what they know now, but the way they acted, even more so in hindsight, was entirely justifiable. On the night of 12 May, Baglietto emailed the AG asking him in his capacity as the guardian of the public interest to intervene. His reasons for complaining about "*an apparent abuse of police powers*" went to the heart of the weaknesses in the warrant application outlined above. He found it "*completely inexplicable how the police could have thought that any warrant was proper, let alone that any court could have considered that the statutory pre-conditions were met*". Especially given the direct imputation on Levy's character as a lawyer and a public figure "*he could not understand how it could have ever been properly suggested that entry to the premises would not be granted unless a warrant was produced, or that a search would be frustrated or seriously prejudiced*". As regards the Magistrates' proceedings, both these complaints were entirely apposite. The absence of a clear search and sift (blue bag) protocol underscored the fact that the constitutionality of police powers was certainly at stake.[135]

[IV] THE NON-DISCLOSURE

65. The AG passed the letter on to McGrail on that night with a suggestion they meet jointly with him. The following morning the AG indicated that McGrail was amenable to joining a meeting pending "*time for him and his team to consider your email*", which McGrail subsequently decided would be "*inappropriate given the circumstances we find ourselves in*".[136] That still left Levy subjected to a warrant that they regarded "*excessive, unjustified and unlawful*". On 13 May Baglietto wrote to Richardson to make that criticism, with the AG copied in, and asked for disclosure of the core underlying materials, including "*the*

[135] HJML/3 [9-10] Baglietto 12.05.20

[136] HJML/3 [14] Llamas 12.05.20 and [16] Llamas 13.05.20 [26] McGrail 14.05.20

application for the warrant", and "*the substance of the advice given to the RGP in relation to the merits of seeking the warrant*".[137] He also wrote to the Magistrates' Court, with Richardson copied in, asking for the same.[138] Everyone now knew that disclosure of the warrant's underlying basis, including the substance of any advice that underpinned it, had been put into issue. Moreover, Baglietto's letter to Richardson of 13 May had summarised Levy's surprise and objection that the police had seen fit to apply for a warrant in the belief that he would not comply, to which the officers replied, "*they had obtained advice at the highest level*", which Baglietto "*understood to be a reference to the DPP*".

66. Instead of meeting with Baglietto and the AG, on 14 May, McGrail, not Richardson, replied to this letter directly. In disputing the complaint of illegality, McGrail "*did not think it would serve to enter into any discussion on the use of Production Orders as opposed to a Search Warrant*", or to disclose any part of the application (i.e. including the mandatory sections dealing with that very issue), even though the only other reasons were contained in the order itself, which simply referred to the Paragraph 14 Conditions B and D being met. He added, "*Although the DPP had been consulted on various non-operational issues concerning this investigation including the status of various parties he has not provided advice on the application of a search warrant which remains an operational matter*".[139]

[V] <u>THE UNLAWFUL POSITION OF THE POLICE</u>

67. With neither disclosure, nor a meeting, on 15 May Baglietto wrote to the AG with McGrail copied in to set out in detail "*why there are very good grounds for believing that the warrants were improperly procured and wrongfully granted (in the course of an ex parte hearing) and why the RGP officers acted unlawfully*".[140] McGrail's case in this Inquiry has been to focus on what informal conversations Levy and Baglietto might have had with the AG and CM to advance their case, but here it was in a detailed legal letter.

68. Without repeating all the matters raised, the letter underscored the impermissibility of the non-disclosure of all parts of the application, in the absence of a properly formulated claim for information to be withheld on public interest grounds.[141] There is no evidence that this was done, and there was especially nothing in paragraphs 320 to 327 of the Information that a public interest claim could conceivably attach to. The letter then further addressed that

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[137] HJML/3 [20-22] Baglietto 13.05.20
[138] HJML/3 [23] Baglietto 13.05.20
[139] HJML/3 [25-26] McGrail 14.03.20
[140] HML/3 [39] Baglietto 15.05.20
[141] HJML/3 [41] citing *R(Haralambous) v CC at St Albans* [2018] UKSC 1

there was no information as to the basis of how the Paragraph 2(b) criteria were met, especially the conclusion that other methods were "*bound to fail*", and in doing so identified the precedent of the *British Transport Police* case that quashed a warrant to seize a laptop from a lawyer of good character, because of a very similar type of generic pleading the RGP had used in Levy's application. That authority also emphasised the heightened duty of candour concerning full and frank disclosure in this context, and queried the extent, if at all, that the issues had been engaged with, including with the DPP. A similar point was made about paragraphs 14(b) and (d), complaining of the lack of an explanation of how the criteria were met, but also the seriousness of making such an allegations against Levy without more to support them.[142] The width of the court order was then challenged with the citation of standard authority as to how it could not be narrowed by implying words, or otherwise saved to protect privilege, for example, because extraneous provision would be made to engage independent counsel.[143]

[VI] <u>THE DIRECT APPROACHES</u>

69. Only when looked at this way round does the direct contact that the Hassans Witnesses engaged in with the AG and CM enjoy proper contextualisation. Of the content of 15 May letter, McGrail has focused on how Levy's stated belief that "*the DPP had advised the CoP against the making of the applications*" must have come from one of them. Even if it did, and despite Levy's evidence that he was told by the RGP at his officers that they had taken advice "*from the highest level*",[144] the fixation on that point has diverted from the legal merit of the Hassans' correspondence and the extent to which the police were alerted to a genuine legally precarious position, especially if they sought to enforce the warrant. Looked at in that way and from the point of view of the right of defence, all of the above matters are relevant to the entitlement of the Hassans Witnesses to advance their complaints by way of direct contact with the AG and the CM. As theirs was a legitimate complaint against the warrant, and the Inquiry is asked to find that it was, there could be no embargo from complaining to either the Legal Officers or the elected Head of Government. That is a basic safeguard of freedom of speech and the protection of the individual against executive abuse. It is the reason why even where the Official Secrets Act applies, the common law recognises the right

[142] HJML/3 [45-46] citing *R (S) v CC of the BTS* [2014] 1 WLR 1647 §§62-63
[143] HJML/3 [46-47]
[144] Levy 27.03.25 [§9.4]

to complain to the Prime Minister, or the Leader of the Opposition,[145] or to (among others) the AG, the DPP or the CoP.[146]

70. While it was a matter for the AG and the CM whether they engaged in those complaints and how they handled them, no criticism can be made of the Hassans Witnesses in doing what they thought was necessary to defend against unconstitutional conduct by the police that produced a crisis of personal and professional magnitude given the imputation against Levy on the face of warrant.[147] Levy was not to personally see any part of the Information, until after it was resolved on 17 March that his interview under caution was to be postponed pending the provision of a voluntary statement and that the devices would be kept under seal in the meantime. After that it was initially disclosed to him on a redacted basis.[148] Until then it was only the police and the Law Officers who could judge the full merits of the complaint that was being made.

E. THE RESOLUTION

[I] <u>THE MUTUAL DILEMMA</u>

71. While the resolution of the dispute over the warrant and the interview has at its height been demonised as an act of improper procurement by Levy of favourable treatment, in reality it amounted to the resolution of a mutual dilemma. The Hassans Witnesses' complaint of illegality created that dilemma because the police, unaided by full legal advice, or in-depth rigorous analysis of their case on suspect status, exposed themselves to legal action which could further damage their entire investigation; but equally a high-profile firm like Hassans was placed in a reputational crisis, irrespective of innocence. The compromise reached released all sides from their respective predicaments. Rather than reflecting improper influence by Hassans, the covert taped meetings on 13, 15 and 20 May 2020 show the Law Officers and the police grappling with the challenges legitimately created by the Hassans Witnesses' complaint. Most notably the genuine caution of the DPP when he gave his advice of April 2020 began to show.[149] In particular, the extent of his previously expressed preference for a production order was ventilated in detail, in circumstances when McGrail

[145] *AG v Guardian Newspapers (No 2) (Spycatcher)* [1990] 1 AC 109, 187G
[146] *R v Shayler* [2003] 1 AC 247 §27(2)
[147] Levy 09.06.20 HJLM/1 §§2, 4, 10 and 76
[148] HJML/3 Rocca 01.06.20 [87-100] and Robertson 03.06.20 [102]
[149] Paragraphs 37, 41 and 42 above

had written to Hassans on 14 May to say that the DPP had "*not provided advice on the application of a search warrant which remains an operational matter*".[150]

[II] <u>THE CHOSEN SOLUTION</u>

72. The compromise emerged on the afternoon of 15 May where the covert taped meeting began with the AG assessing that matters were on a "*collision course*". The warrant was under attack from the detailed Baglietto letter sent that day. The likelihood that Levy would refuse to answer questions in interview if compelled to attend the following Monday caused the DPP to express the view that it could be fatal to the merits of the case against him.[151] On this he returned to the high point of the police case as regards the exchanges on 18 October between Cornelio and Levy that the DPP did not interpret in the way the police did.[152] As to whether the seized devices could then be interrogated, the DPP provided his most detailed explanation for his preference for a production order,[153] with concern that the approach to the warrant - that he would have done "*differentl*y" - could "*taint*" the entire case.[154] If Richardson expressed disagreement with these points, he must have realised that the investigation risked having access to neither Levy's account, nor the opportunity to search the devices. It was against that background that <u>Richardson</u> suggested the solution of a voluntary statement with the devices to be retained, with the option to postpone the interview and revive the search of the devices if the statement or other investigations justified doing so.[155]

73. That was the chosen solution by the police that the AG was authorised by McGrail to convey on the Friday evening to Baglietto,[156] although pending its agreement once the Sabbath ended, Richardson still sent material on the Saturday to Baglietto in preparation for the Monday interview.[157] In the event it was agreed on the Sunday.[158] Had the police via the AG not conceded the route of retaining but sealing the devices pending the service of a voluntary statement then litigation might have ensued. If it did it would have necessarily proceeded in accordance with the duties of candour and full and frank disclosure that had not hitherto been complied with in the *ex parte* hearing, including establishing what the substance of the DPP's

[150] HJML/3 [25-26] McGrail 14.03.20
[151] Covert Taped Meeting 15.05.20 pp 1-2, 4
[152] Covert Taped Meeting 15.05.20 pp 19-20
[153] Covert Taped Meeting 15.05.20 pp 11-13
[154] Covert Taped Meeting 15.05.20 p 14
[155] Covert Taped Meeting 15.05.20 pp 24 29-30
[156] Covert Taped Meeting 15.05.20 pp 29-31
[157] HJML/3 [49] Richardson 16.05.20
[158] HJML/3 [58] Baglietto 17.05.20

advice had been. Conversely, Levy had agreed to answer the questions that those who suspected him thought he needed to answer. At the meeting on 15 May Richardson extolled his "*honest*" view of the benefits of the compromise: "*if the shit starts flying around with this, and what we know here becomes public, the reputation of the police has nothing to worry about compared to the reputation of Hassans*".[159] As is apparent from the three transcripts of the meetings, this was not a situation where the police, given the flaws in the warrant process, had been improperly forced into their choice.

F. THE CONSEQUENCES

[I] THE UNINTENDED RESIGNATION

74. The consequences of what happened next were not good for McGrail in that the CM's judgement about the handling of the warrant process appears to have formed a substantial component of his loss of confidence in him. But those consequences were also not good for Levy. He had gained agreement to refute false but professionally and personally damaging allegations and avoid the potential publicity of an interview under caution, and all the gossip in Gibraltar that would generate. He had no interest to become embroiled in the publicity surrounding an alleged unfair dismissal, and especially that of the commissioner in charge of the force investigating him for a crime he did not commit that he still had to defend himself over. McGrail's position in May 2020 was neither Levy's concern, his fight, nor his preference.

[II] THE EQUIVOCATION OVER LEGAL ADVICE

75. The consequences for everyone arising over whether the DPP gave legal advice on the warrant, and if so what, are significant to this Inquiry. But in terms of the legality of the warrant and constitutional right of privacy under Gibraltarian law their foremost consequence was for Levy. His evidence is that Richardson told him on 12 May while executing the warrant that the police had taken advice from the "*highest level*", or words to that effect. Richardson accepted something like that was said (although he thought to the Managing Partner) without meaning to refer to the warrant itself.[160] The CM says that on that same day, McGrail told him that the DPP had given positive advice to apply for the warrant.[161] McGrail's witness statement account to this Inquiry is he said that the Magistrate

[159] Covert Taped Meeting 15.04.20 p 26
[160] Levy HJLM/1 09.06.04 [§4] Levy 27.03.25 [§9.4] Richardson [T4/131/22-134/11]
[161] Picardo [T16/209/13-212/13]

"*was satisfied with the information laid before him and that all of the grounds to deal with JL had been consulted with the DPP*".[162] A subsequent conversation between the AG and the DPP produced a near opposite understanding, with the AG in his text to the CM at 15:41 on 12 May stating that the DPP had told him that he "*strongly*" advised against applying for the warrant. However, the AG's evidence to this Inquiry confirmed that was the impression he may have got rather than being told as such.[163] In the letters of 13 May and 15 May Hassans sought to uncover what the "*highest level*" meant; and it is entirely possible that having been told something onerous like that Levy spoke directly with the CM about it, and was told what the CM understood to be the case, that the DPP had advised against the matter. When Levy spoke to the CM or complained to the AG on the single occasion about being "*hung out to dry*"; and when Baglietto registered the complaint with the AG and put the matter into writing,[164] the Hassans Witnesses did so to vindicate the right to privacy, assert legal professional privilege, to challenge what they perceived to be the overreach of executive power, and to prompt the protection of fundamental rights.

76. Having done so, the various limbs of the executive had no option but to resolve what part its Legal Officer had had in the resort to a constitutionally draconian search measure. At the covert taped meeting on 13 May 2020, the DPP said only that he had "*always made clear [to the officers] that I don't get involved in operational matters*" but added that "*My view was that the warrant should come, if at all, post interview*."[165] During the meeting on 15 May the DPP continued to express his reservations.[166] By the time of the meeting of 20 May, where discussion was had to seek clarity on the DPP's role in the warrant, McGrail and Richardson put it that <u>the police were not advised</u> by him on the warrant. The DPP responded only "*These are not matters for the DPP, these are matters for the RGP and their operational functions*".[167] Richardson's letter to Hassans on the following day stated more narrowly that the DPP's advice had not been "*sought*" on what were operational matters.[168] That is not the same thing. The DPP wrote to the Magistrates on 22 May to confirm "*for the avoidance of doubt*" that "*advice in relation to the merits of seeking the warrant*" did not and had not "*ever existed*". That is overly formalistic. However informally done, with whatever caveats

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[162] McGrail (1) 20.06.22 §33
[163] Llamas [T11/214/14-19] [T11/216/10-217/23]
[164] Levy [T8/166/18-167/7] [T8/172/19-173/8]
[165] Covert Taped Meeting 13.05.20 p. 5
[166] Paragraph 42 above
[167] Covert Taped Meeting 20.05.20 p. 4
[168] Richardson 21.05.20 HJML/3 [66]: see Rocca 21.06.22 §13 who uses the same formulation

attached, the DPP had ventured an opinion against the warrants and the letters of 21 and 22 May continued to equivocate on the matter.

PART [III]: THE ERRORS

77. With so much of McGrail's case about the circumstances of his resignation tied into the criminal investigation[169] there was always a risk that Levy, his representatives, and their close relationships with the CM might be blamed for more than they deserved and so it came to pass, especially in the Opening Submissions (see §§10 and 11 above). Without seeing the Closing Submissions, it cannot be known what allegations are maintained. But as a matter of fairness, there are key matters that require correction.

[I] NO CONFLICT OF INTEREST

78. The police belief about Levy in the criminal case, which was transposed on to him and the CM in this Inquiry, is that that there was a conflict of interest over 36 North because of the default stake of all the Hassans partners in the firm's investment, even if the stake was relatively little and speculative. To state the obvious, if a conflict arose or interests had to be registered that was a matter for the CM, not Levy. From Levy's perspective, the charge of capitalising upon a 'conflict' is the ultimate source of the erroneous suspicion. For he was told from the outset that there was no intellectual property in the platform and that the HMGoG was free to use whatever contractor it wished to maintain the service of the platform as there was no formal contract between HMGoG and Blands. Equally, it initially appeared that Blands would invest in 36 North, rather than challenging it. When matters turned contentious across the summer of 2018, Levy, as the arm's length seed funder, did not improperly press his case. On the contrary, he suggested that Perez and Cornelio should settle and that Astelon (the vehicle for the Hassans shareholding) would be amenable to withdrawing from the business.[170]

79. Messages now made available by the CM to the Inquiry show that Levy knew the proper boundaries with regards to 36 North and kept to the local customs of managing myriad proximate professional and personal ties (see §86). For instance, on 24 August 2018 he told the CM that Perez "*was willing to compromise in some way to resolve the issue*" depending on "*how much the other side want to quash him*" but Levy was keen to emphasise "*Whatever*

[169] McGrail [T7/37/8-38/5]
[170] Levy HJLM/3 09.06.20 §§34-36 and 61-66

happens you know I support whatever you do even if I disagree with it".[171] But the essential feature that needs correction for all of what was alleged in this Inquiry, is that the CM removed any conceivable basis for a conflict of interest by deciding the issue in favour of Blands on or about 4 October 2018.[172] Nothing Levy did thereafter sought to unduly influence the CM otherwise; and if he wrote on 29 November to indicate that "*they feel that you have decided that G is right without giving them an opportunity to present their case*" that was no more than fair comment and did no more than touch upon the continuing commercial dispute.

[II] NO DESTRUCTION OF EVIDENCE

80. The police justification for the warrant that Levy was predisposed to deliberately destroy evidence was again transposed to this Inquiry, especially when he was questioned about the WhatsApp messages on the replacement phone that contained the copy of the material from the device that was seized on 12 May 2020. A replacement phone that Levy used after that day collapsed in about March 2023 most likely caused by an automatic IOS update not completing with consequence for the corruption and instability of the device. The IT department in Hassans were able to retrieve only parts of the data, while other parts were lost, including chunks of old messages, which it is possible can occur in these circumstances. There was no policy or practice in place to load content from phone devices on to the firm's iCloud. By that time the device that the police seized in May 2020 and returned to Hassans on 6 November had long been wiped clean by the IT staff because the phone was no longer in use. While Levy explained this in layman's terms during his evidence, he indicated that his IT department could provide a technically informed response, and a statement was duly served in accordance with structured questions provided by the Inquiry.[173] The IT witness further confirmed that there had been several attempts to retrieve messages at Levy's behest, with particular focus on the Inquiry's Core Participants, all of which had failed.[174]

81. Under questioning by Richardson's counsel Levy was asked about phone messages after 12 May 2020 relating to the subject matter of this Inquiry, but also with regard to the period before that date and his contact with people like Cornelio and the CM.[175] Not only did that line of questioning stray beyond the scope of Issue 5, but they were asked without the

[171] Disclosed by on the Inquiry at Hassans request on 28.05.24
[172] Picardo [T16/101/5-103/9] Levy [T8/214/10-215/18]
[173] Levy [T8/116/5-117/20] [T8/203/2-16]
[174] Mills 03.05.24 §§3-11
[175] Levy [T8/200/9-202/17]

possibility for Levy to present a detailed case about his dealings with those people during the Operation Delhi period. From Levy's perspective, this unfairness was compounded by the late disclosure of WhatsApp messages from the CM that make it plain that Levy, in his words, "*knew his red lines*".[176]

[III] <u>NO BENEFIT</u>

82. Relatedly, parts of Richardson and Wyan's evidence sounded a note of "*What if*" as regards the expiry of the search warrant and the RGP's decisions not to seek the lawful interrogation of the devices that they retained possession of.[177] That hypothetical reasoning casts suspicion about Levy's 'success' in his challenge to the warrant, without acknowledging its objective legal weaknesses. However, whilst without having access to the full police file, which they did, and Hassans did not, there are grounds to suggest that the assertion that the devices were returned unexamined because of Hassans' legal threats is just not correct. Through a subject matter access request to the RGP in May 2023, Hassans were disclosed a redacted email with the subject "*Re: Levy Report*", which from Inquiry evidence must have been written in around October 2020 and refers to a period after the RGP had "*returned the search warrant (unexecuted) to the Magistrates' Court*". It then reads "*It was agreed at that stage that we would defer examining Mr Levy's devices until we have received a substantive response from the USA LoR (letter of request). Now that the LoR has been received and the contents examined I agree that <u>we can no longer assert</u> that we believe that Mr Levy's device contains material that indicates that he has committed the offence of conspiracy to defraud*".[178] The position was then reflected in the final version of Wyan's Levy Report.[179] As Richardson accepted in his evidence, had the information that had been sought from America indicated further involvement by Levy, that "*would have given [the RGP] grounds to go and see a further order to open the devices*".[180]

[IV] <u>NO FAVOURS</u>

83. Any police sense of grievance, or any notion that Levy got special favours, about the agreement over the voluntary statement in return for them to postpone the interview and retain the devices is a plain re-writing of history. It overlooks the Hassans critique of the warrant, their pressure on the police to disclose the application and its treatment of the

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[176] Levy [T8/129/10-14]
[177] Richardson [T5/62/5-66/24] [T5/96/12-22] Wyan [T5/209/21-211/11]
[178] Response to Hassans' SAR 05.05.23. *Cf.* Richardson [T5/60/8-61/5]
[179] Richardson [T5/65/6-13] [T5/97/1-25]

Schedule 1 conditions, and potential legal challenges. McGrail's opinion (articulated in his first statement) that the AG and DPP tried to improperly influence favourable treatment of Levy during the meetings on 13 and 15 May, is not borne out by the transcripts, and in conflict with the section of the recording played at the hearing that was not transcribed.[181] It also disregards the fact that during those meetings the RGP were receiving advice from the DPP that he had always and genuinely doubted the application for the warrant. Those reservations had not been properly considered, and the Hassans legal arguments and disclosure requests were mounting. For o*bjective* reasons a range of problems facing Op. Delhi were discussed in those meetings, all of which culminated in Richardson's realistic chosen solution. As McGrail accepted in his oral evidence to the Inquiry as regards legal challenges that Hassans were absolutely entitled to raise, the RGP's decision was made to "*try to get the best outcomes*".[182] Hassans received no favours.

[V] <u>NO MISCONDUCT</u>

84. Particularly because Levy was made the subject of an unlawful warrant, there can be no basis to criticise the way in which he was represented to draw attention to that illegality. To do so would constitute the inversion of rights. As to all matters that were raised with Baglietto during his evidence, when he answered whatever was put to him, the essential point is that he exercised the right of defence on behalf of his client. Further, no allegation was made against Baglietto during his questioning that he had unduly caused the outcome of Richardson's chosen solution. If the CM sent him a reference to disciplinary matters, that is not something that was ever relied upon in the various Hassans correspondence.[183] Insofar as reference was made to the HMIC report, the content was relevant to the retention of devices, which he could not recall looking at, but was a matter of genuine and objective concern given the defects of the warrant.[184]

[VI] <u>NO 'PLOTTING'</u>

85. No questioning occurred of Levy or Baglietto that they asked for the CoP to be sacked (as alleged in opening submissions by McGrail). Neither was the CM questioned on this point as to whether they did, nor challenged on his evidence that Levy would not have wanted that.[185] They were of course asked about their contact with the CM at the relevant time, and

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[181] McGrail (1) 20.06.22 §§59.3, 59.5, 60 *Cf.* Richardson [T5/39/12-40/23]
[182] McGrail [T7/20/6-19]
[183] Baglietto [T9/113-120/4]
[184] Baglietto [T9/145/13-148/21]
[185] Picardo [T16/277/11-20]

Moshe Levy was subsequently asked to provide a statement of what he could recollect. These were close relations, and there were also compassionate grounds to provide support to Levy who initially found his subjection to the warrant genuinely shocking and abhorrent, and others could see he was severely affected.[186] The CM was certainly angry about Levy's treatment. But he saw it to raise a point of principle that applied to all citizens.[187]

[VII] LOCAL CONTEXT

86. Finally, there were otherwise matters that arose in the hearings that require local awareness of culture and practice, which those who have made allegations may have lost sympathy to the point that there is a risk of misunderstanding and a failure of appreciation. Government in a small city state like Gibraltar offers the positive attributes of flexibility and face to face accountability with its citizens. However, the inescapable proximity, familiarity and transparency between the small pool of political, legal and business actors means that customary approaches to conflict-of-interest management are far more based on individual trust than would necessarily be expected in a larger state.

87. That does not mean that conflicts of interest and the rule of law are not respected. Gibraltar is a common law jurisdiction in the Mediterranean with civil servants, politicians and lawyers schooled in the Whitehall and Inns of Court traditions. The standards of public and private citizens that are being impeached in this Inquiry have been long in the making, and if they operate, as the Privy Council held in its review of the tribunal of inquiry into a previous Chief Justice, "*[i]n a jurisdiction as small as Gibraltar there is bound to be interrelation between those in the different arms of State and, indeed, in every aspect of life*",[188] that does not mean that people do not know their red lines. On the contrary they live by them every day in a way that people in larger jurisdictions would not be called upon to do.[189] Therefore, in the Inquiry's microscopic investigation of a single moment when a set of relationships degenerated into mistrust, there is a danger that the decency and the integrity of everyday life in Gibraltar can become terribly distorted. Some of Levy's experience and position in this drama cannot be understood otherwise. As a prominent person in public life, his professional and personal relationships were bound to overlap, and in circumstances where if he was treated unlawfully, there would bound to be reaction.

[186] Levy [T8/164/21-165/15] Levy HJLM/1 09.06.20 [§76] Picardo [T16/239/7-25] [T17/89/6-19]
[187] Picardo [T16/168/12-171/24] [T16/183/16-17] [T16/274/11-14]
[188] *Re CJ of Gibraltar Referral under s.4 of the Judicial Committee Act 1833* [2009] UKPC 43 §§25-26
[189] Picardo [T16/91/10-92/6] Levy HJLM/1 09.06.20 §73

PART [IV]: THE REALITY

88. The reality is that the Hassans Witnesses had nothing to do directly with the ultimate issue in this Inquiry. However, these witnesses have at times been used to the ends of various core participants -- to bolster McGrail's discontents, to claim degrees of quality and handling for Operation Delhi that it did not have, to at times condemn the relationships and practices of Gibraltar's city state as worthy of nothing. Despite the aim to portray the matter otherwise, it was not Levy's aim to get McGrail sacked. It was his aim to stand up for his rights. But because of his profile McGrail has been too ready to make assumptions about Levy's role in his demise; and even though allegations have never been directly made, there has been willingness to float suggestions of impropriety about Baglietto, and other members of Hassans as well. As regards the Hassans witnesses, all of that detracts from the reality of what has occurred here. This was about how Levy, the senior partner in a firm he had spent his lifetime building, and those who represented him, sought to legitimately respond to an unlawful warrant. In that crisis, Levy's issue was not McGrail, and his solution was not in McGrail's removal from office. The Inquiry should find as such.

DANNY FRIEDMAN KC

MATRIX CHAMBERS

LONDON, GRAY'S INN

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