

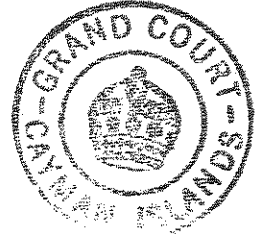
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL SIDE**

3 **INDICTMENT NO: 81/2011**

4  
5 **THE QUEEN**

6  
7 v.

8  
9 **FERNANDO MENDES**



10  
11  
12 **Appearances:**

**Ms. Toyin Salako, for the Crown**

13  
14 **Mr. Ben Tonner of Samson and McGrath**  
15 **for the Defendant**

16 **Before:**

**The Hon. Mr. Justice Charles Quin**

17 **Trial:**

**4<sup>th</sup> – 11<sup>th</sup> August 2014**

18 **Abuse of Process Submissions Heard:**

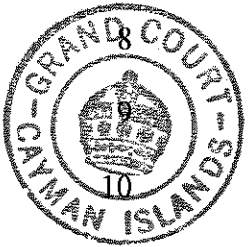
**7<sup>th</sup> – 11<sup>th</sup> August 2014**

19  
20 **RULING ON ABUSE OF PROCESS APPLICATION**  
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22 1. Defence made a submission that the Court should stop the prosecution of this case  
23 on the grounds that, to allow the trial to continue would be an Abuse of the Court's  
24 Process. Counsel on behalf of the Defendant submits that the application is founded  
25 on the Crown's failure to obtain and retain material evidence.

26 2. The Indictment, dated the 26<sup>th</sup> October 2011, originally contained five counts.  
27 However, by the date of this trial the prosecution maintains only count 2 against the  
28 defendant – that is, the charge of Theft contrary to s.235(1) of the Penal Code (2007  
29 Revision) – to which the Defendant pleaded Not Guilty on the 16<sup>th</sup> December 2011.  
30 The particulars of the offence are that the Defendant, between the 30<sup>th</sup> June 2009  
31 and the 11<sup>th</sup> January 2011, in the Cayman Islands, stole property in the sum of  
32 US\$132,807.43, belonging to FINAB Ltd.





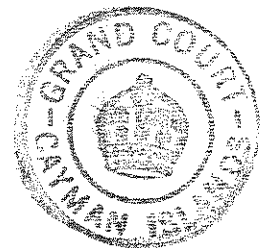
1       8.     On the 9<sup>th</sup> March 2011 the Defendant produced a statement to the FCU in  
2            which he alleged that AF and others were committing and encouraging  
3            clients to commit actions to evade US tax. In this letter the Defendant  
4            provided various email addresses of the Directors and other relevant  
5            personnel. The Defendant also stated that he was very concerned that staff  
6            had been instructed to destroy or hide evidence. The Defendant then  
7            confirmed that this evidence could prove his innocence of the charges laid  
            against him and the criminal activity of AF and others. In this statement the  
            Defendant affirmed that emails and other documents relating to these  
            activities are stored on servers in the computer room at FINAB's office.  
11           Hard copies of banking transactions are kept in a storage room in the office  
12           near to the emergency exit.

13       9.     On the 10<sup>th</sup> March 2011 the Defendant's attorneys wrote to the FCU in  
14            relation to a statement and the exhibits and stated that any delay could be  
15            prejudicial to the investigation.

16       10.    On the 11<sup>th</sup> March 2011 FINAB's and AF's Office Manager, Mr. Euclides  
17            Pitta (EP) gave a statement, alleging for the first time, that the Defendant  
18            had misappropriated funds from FINAB and provided cheques and  
19            spreadsheets along with the letter. Much of this material led to the execution  
20            of a Restraint Order on the 14<sup>th</sup> March 2011 against the Defendant. It is  
21            noted that no amendments have been made to these allegations since the 11<sup>th</sup>  
22            March 2011.

- 1           11.     On the 15<sup>th</sup> March 2011 the Defendant's attorneys wrote to the FCU stating  
2                     that "*Time is of the essence if information germane to our client's case is to*  
3                     *be preserved.*"
- 4           12.     On the 22<sup>nd</sup> March 2011 the Defendant's attorneys wrote again to the FCU –  
5                     enquiring after the status of the Defendant's SAR. In this letter counsel for the  
6                     Defendant stated that he was very concerned about how he (the Defendant) might  
7                     seek to protect any relevant information which remains in the possession of the  
8                     directors and others and which may assist his case.
- 9           13.     On the 29<sup>th</sup> March 2011 the FCU responded to this correspondence, saying, it  
10                    would not be prudent to comment on the case at this stage.
- 11          14.     On the 4<sup>th</sup> April 2011 the Defendant gave his second statement, which referred to  
12                    his first statement. The Defendant stated that he had discretionary authority to make  
13                    payments to third parties and to himself for salaries, vacations, paid trips and other  
14                    out of pocket expenses. The Defendant stated that payments of amounts due to  
15                    himself, could be made to third parties as authorised by the CEO, AF. The  
16                    Defendant stated that evidence of this could be found in the offices with accounting  
17                    records.
- 18          15.     On the 4<sup>th</sup> April 2011 the Defendant was arrested for money laundering and an  
19                    interview was conducted. Throughout this interview the Defendant gave largely "no  
20                    comment answers."

21



1 16. On the 7<sup>th</sup> June 2011 the Defendant provided a third statement – again confirming  
2 that payments had been made to him and other third parties over and above salaries  
3 and they were for vacations, paid out of pocket expenses as well as other benefits,  
4 and these were authorised by the Board of Directors. In addition, the Defendant said  
5 there was an agreement with Mr. Sergio Capela (SC) to lend him (the Defendant)  
6 funds for his personal business expenses. In this statement the Defendant reiterated  
7 his concern about the removal/destruction of evidence that could possibly support  
8 his statements.

9 17. From the time of his arrest until 5<sup>th</sup> June 2012 the Defendant’s attorneys warned the  
10 RCIPS about the importance of preserving FINAB documents.

11 18. On the 19<sup>th</sup> July 2011 the Defendant was charged with the theft of US\$132,807.43,  
12 the property of FINAB.

13 19. On the 19<sup>th</sup> October 2011 this case was transmitted from the Summary Court to the  
14 Grand Court.

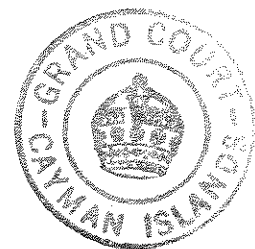
15 20. On the 28<sup>th</sup> October 2011 the trial was set for the 5<sup>th</sup> June 2012.

16 21. On the 16<sup>th</sup> December 2011 the Defendant pleaded Not Guilty to the theft of  
17 US\$132,807.43.

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1       22.     On some date after the 2<sup>nd</sup> March 2012 the Defence was served with a schedule of  
2                   unused material confirming that electronic documents had been seized from FINAB  
3                   during a search conducted in February 2011. This RCIPS schedule of non-sensitive,  
4                   unused material contained 35 different items. Defence counsel submits that the  
5                   boxes on the RCIPS schedule to the right of the items provide for the RCIPS/DPP  
6                   to determine whether the item is disclosable or not. These boxes remain blank and,  
7                   also, similarly the boxes for the reviewing signatures of Crown counsel, names and  
8                   dates remain blank. This leads to the inference that neither the RCIPS nor the DPP  
9                   addressed the vital questions of disclosure/discovery and inspection of this unused  
10                  material.

11       23.     On the 1<sup>st</sup> April 2013 the Defendant applied for inspection of all electronic  
12                  material received by the RCIPS.

13       24.     On the 13<sup>th</sup> September 2013 the Crown counsel, Mr. Snape, notified the Defence  
14                  that no emails since 2006 had been captured by the FCU. Crown counsel informed  
15                  the Defence that the police had “not captured” the emails from 2006. The FCU in-  
16                  house expert was of the view that the emails may have been in a cloud server or  
17                  similar to which the police did not have access. The FCU said these files are  
18                  technical and difficult to extract. Furthermore, Crown counsel informed Mr. Tonner  
19                  that the police have been unable to read the BANIF data file and, further, in relation  
20                  to the QuickBooks file 2010, the police have been unable to read the file.

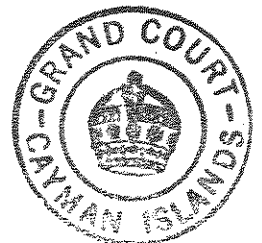
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1       25.    On the 15<sup>th</sup> September 2013 the Defendant's attorneys wrote to the Crown stating  
2            that since Mr. Mendes' arrest and removal from office in February 2011, he has not  
3            had any access to hard copy or electronic documents relevant to his employment.  
4            Defence has made the point that the Defendant has been entirely reliant upon the  
5            police to seize and retain potentially relevant evidence. The Defence put the Crown  
6            on notice that the Defence may be making an abuse of process application as it  
7            would be impossible for the Defendant to receive a fair trial since he has been  
8            deprived of the very material which can undermine the allegations of FINAB and  
9            positively advance his defence.

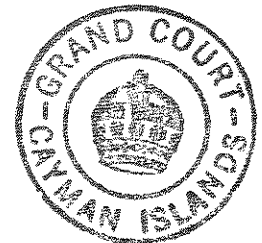
10       26.    On the 16<sup>th</sup> September 2013 the Defence asked for the Crown to provide, in  
11            accordance with s.55 of the Police Law, the Defence with electronic copies of all  
12            emails sent from and received by the Defendant's FINAB work computer and  
13            advised that this information would be crucial to Mr. Mendes being able to defend  
14            himself in the forthcoming trial.

15       27.    On the 27<sup>th</sup> September 2013 an IT expert was contracted to do a statement and he  
16            confirmed that he told the RCIPS how to gain access to the files on the server and  
17            that any files on the serve at the time of the Defendant's arrest should still be there  
18            as there has never been, to the best of his knowledge, any cause to delete them. The  
19            expert confirmed that the FINAB server had ample storage space and he further  
20            confirmed that that the FINAB staff had access to files stored on their server. He  
21            further confirmed that QuickBooks is still being used and should have all the data  
22            from the time when the Defendant was employed at FINAB.



- 1        28.    Between September 2013 and early 2014 efforts were made to locate emails post-  
2        dated 2006 and, most importantly, the time period of the Indictment, that is, from  
3        the 30<sup>th</sup> June 2009 to the 11<sup>th</sup> January 2011 and nothing was obtained.
- 4        29.    In early December Defence counsel asked if there is any additional material to the  
5        unused schedule. The DPP responded by saying that the police have stated that  
6        there are no additions to the material.
- 7        30.    On the 4<sup>th</sup> February 2014 Defence counsel wrote to the DPP confirming that he was  
8        still waiting for the FCU to state whether or not the email records of the Defendant  
9        still existed.
- 10       31.    On the 27<sup>th</sup> February 2014 AF stated that he did not know where the emails were  
11       stored and he himself does not have any emails. On the 28<sup>th</sup> February 2014 the MD  
12       of FINAB wrote to the FCU stating that FINAB does not have any emails. On the  
13       20<sup>th</sup> May 2014 DI Lavine again checked with AF, who again confirmed that he had  
14       no emails.
- 15       32.    On the 20<sup>th</sup> May 2014 Mr. Tonner was told that FINAB was going to enlist further  
16       help on recovering emails from the servers.
- 17       33.    On the 21<sup>st</sup> May 2014 – the day Mr. Tonner was due to make an Abuse of Process  
18       application – the Crown was informed by AF that he did in fact have possession of  
19       some email correspondence concerning the Defendant, which post-dates 2006.

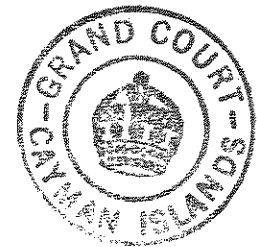
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1 34. On the 26<sup>th</sup> May 2014 AF provided the police with a statement. AF then confirmed  
2 that he believes he told the FCU that he did not have any FCU that he did not have  
3 any emails between himself and the Defendant during the period of June 2009 to  
4 early 2011. AF said that it was after telling the police that it occurred to him that he  
5 could also have made a search for “Fernando Mendes” in his general email files, as  
6 opposed to his specific folders. AF performed this search and the search yielded a  
7 lot of old emails between himself and the Defendant.

8 35. At around this time it was discovered that there are a number of emails relating to  
9 AF and the Defendant.

- 10 i. [Alfie333@ftnetwork.com](mailto:Alfie333@ftnetwork.com)
- 11 ii. [Alfie@alfie333.com](mailto:Alfie@alfie333.com)
- 12 iii. [Alfie-FINAB@yahoo.com](mailto:Alfie-FINAB@yahoo.com)
- 13 iv. [AGF@FINAB-ICMS.com](mailto:AGF@FINAB-ICMS.com)
- 14 v. [Alfie33@att.blackberry.net](mailto:Alfie33@att.blackberry.net)
- 15 vi. [Alfie@gmail.com](mailto:Alfie@gmail.com)
- 16 vii. [V.lopez@banif-ipb.com](mailto:V.lopez@banif-ipb.com)
- 17 viii. [fmendes@FINAB-ICNS.com](mailto:fmendes@FINAB-ICNS.com)



18  
19 36. On the 27<sup>th</sup> May 2014 Inspector Lavine prepared a statement in which he confirmed  
20 that on the 11<sup>th</sup> February 2011 he commenced FCU investigation as a result of a  
21 report made by AF and, as a result of AF's report the Defendant was arrested on  
22 suspicion of theft. DI Lavine confirmed that as a result of the investigation several  
23 enquiries were made into the whereabouts of emails between the Complainant and  
24 the suspect. Neither FINAB nor AF had provided any disclosure until late 2014 and  
25 only after considerable pressure from Crown counsel Toyin Salako.

1 **THE LAW**

2 37. It is accurate and fair to state that both Crown counsel and Defence counsel are  
3 agreed on the Law as it relates to an Abuse of Process Application.

4 38. The famous dicta of Lord Devlin in the House of Lords decision of *Connelly v*  
5 *DPP*<sup>1</sup> where he stated at page 1354:

6 *“The courts have ‘an inescapable duty to secure fair treatment of those who*  
7 *come or are brought before them’”.*

8  
9 39. In the English Court of Appeal decision of *R v. Beckford*<sup>2</sup>, President, Lord Justice  
10 Neil, stated:

11 *“The Court has power to stay proceedings in cases where it concluded that the*  
12 *Defendant could not receive a fair trial or where it would be unfair for the*  
13 *defendant to be tried.”*

14  
15 40. In *R v Telford Justices (ex parte Badhan)*<sup>3</sup> the English Court of Appeal in granting  
16 an application held:

17 *“That examining justices had an inherent jurisdiction to refuse to enquire into*  
18 *an offence on the ground that to do so would be an abuse of process; that it was*  
19 *an abuse of process for a prosecution to be brought so long after the*  
20 *commission of the alleged offence, that it was no longer possible for the*  
21 *accused to have a fair trial, irrespective of whether the prosecution was to*  
22 *blame for the lapse of time, and the onus was on the accused to show on the*  
23 *balance of probabilities that a fair trial was no longer possible.”*

24  
25 41. Lord Hope of Craighead in the House of Lords case of *Regina v Brown (Wilson)*<sup>4</sup>  
26 stated at letter G on page 374:

<sup>1</sup> [1964] AC 1254

<sup>2</sup> [1996] 1 Cr App R 94

<sup>3</sup> [1991] 2 WLR page 66

1                    “The rules of disclosure which have developed by the common law owe their  
2                    origin to the elementary right of every defendant to a fair trial. If the Defendant  
3                    is to have a fair trial he must have adequate notice of the case which is to be  
4                    made against him. Fairness also requires that the rules of natural justice must  
5                    be observed. In this context as Lord Taylor of Gosforth C. J. observed in **Reg.**  
6                    **v. Keane**<sup>5</sup>. The great principle is that of open justice. It would be contrary to  
7                    that principle to withhold from the Defendant material which might undermine  
8                    their case against him or which might assist his defence.”

9  
10            42.     The learned Chief Justice Anthony Smellie applied Lord Hope’s dicta in the case of  
11                    ***In Re Eurobank Corp***<sup>6</sup> where he set out the principles of pre-trial disclosure as they  
12                    apply to the Cayman Islands:

13                    “(i) The Crown has a duty to disclose to the defence all relevant unused  
14                    material, whether or not advantageous to the defence. (ii) Witness evidence of  
15                    documents satisfying the criteria for materiality would be those that were  
16                    relevant or possibly relevant to an issue in the case, those that raised or  
17                    possibly raise a new issue the existence of which was not apparent from the  
18                    prosecution’s evidence, and those that had a real prospect of providing a lead  
19                    on evidence pertinent to the above. (iii) Disclosure would be required not only  
20                    if the material were relevant to the offence charged, but also if it had some  
21                    bearing on the surrounding circumstances.”

22  
23            43.     Deborah Barker Roye in her Third Edition of Criminal Litigation in the Cayman  
24                    Islands provides a very helpful chapter on pre-trial disclosure. The learned author  
25                    cites the English Court of Appeal case of **R v. Ward**<sup>7</sup> which was applied by the  
26                    Chief Justice in ***In Re Eurobank Corp.***, and which is authority for the proposition  
27                    of material which might assist the defence is not limited to evidence which would  
28                    obviously advance the defence case. The Defendant is to be afforded the  
29                    opportunity of considering all the material evidence which the prosecution has  
30                    gathered.

<sup>4</sup> (H.L. (E)) [1998] AC 7

<sup>5</sup> [1994] 1 W.L.R. 746, 750 G

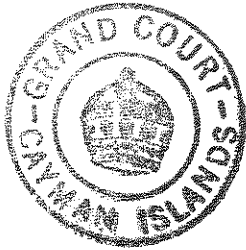
<sup>6</sup> [2002] CILR 15

<sup>7</sup> [1993] 1 WLR 619

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44. At paragraph 5.2.2, in relation to unused material, Mrs. Barker-Roye refers to the English Court of Appeal decision of *R v. Maguire & Ors*<sup>8</sup>:

*“The Crown is not to be excused from this duty on the basis that it was not made aware of material information.”*



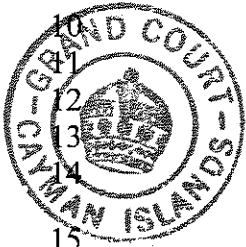
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<sup>8</sup> [1993] 94 Cr App R. 123

**JURISDICTION OF A COURT TO STAY  
CRIMINAL PROCEEDINGS FOR ABUSE OF PROCESS**

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45. The English Court of Appeal decision of *R v. (E R. (Ebrahim) v. Feltham Mags.' Ct.; Mouat v Director of Public Prosecutions*<sup>9</sup>, is arguably the leading authority where the court's discretion to stay proceedings in cases involving the destruction and or loss of evidence. The Court at paragraph 18 re-stated the principles governing the discretion to grant a stay:



*"The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this jurisdiction are: (i) cases where the court concludes that the Defendant cannot receive a fair trial; (ii) cases where it concludes that it would be unfair for the Defendant to be tried."*

15

46. In our own Court the learned Chief Justice Anthony Smellie held, in *R v. Stewart, Cunaj, Burgess and Donnagan*<sup>10</sup> stated:

*"Whether it has been bad faith or serious default, on the part of the Crown, to the extent that the Defendants would be prejudiced and would be unable to get a fair trial, then the Indictment or certain charges on the Indictment to which the material is relevant might be stayed."*

22

47. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances: *Attorney General's Reference (No 1 of 1990)*<sup>11</sup>; *Attorney General's Reference (No 2 of 2001)*<sup>12</sup>.

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<sup>9</sup> [2001] 1 W.L.R.1293

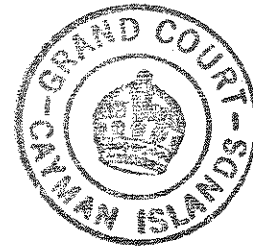
<sup>10</sup>

<sup>11</sup> [1992] Q.B. 630, CA

<sup>12</sup> [2004] 2 A.C. 72, HL.

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48. However, the courts have an overriding duty to uphold justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.



1 *ANALYSIS AND CONCLUSION*

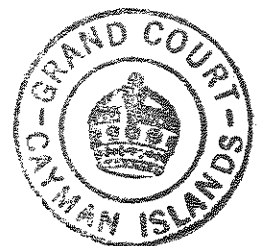
2 49. I remind myself that any application to stay proceedings as an abuse of the process  
3 of the Court is a matter for the Court's discretion. Furthermore, should the Court  
4 exercise its discretion in favour of such an application, discretion should be  
5 exercised carefully and sparingly and only for compelling reasons.

6 50. The Defendant was arrested without warning on the 11<sup>th</sup> February 2011 and  
7 removed from the offices. The Defendant's laptop and hard drive were confiscated.

8 51. From an early point in the investigations the Defendant and his attorneys alerted the  
9 FCU to the importance and relevance of material held in the offices of FINAB,  
10 including emails and other electronic data.

11 52. There is no evidence that in 2011 or 2012 or 2013 any further material was  
12 provided by FINAB to FCU and on to the DPP.

13 53. On the 13<sup>th</sup> September 2013 Crown counsel Mr. Snape reviewed the FINAB  
14 electronic data file of the FCU and told the Defence that there were no emails after  
15 2006 and that the police had not "captured" any emails for the relevant period. Mr.  
16 Snape informed the defence that the FCU IT expert thinks that the emails may have  
17 been in a cloud server or a similar area and therefore the police did not have access  
18 to these files. The IT expert also determined that such files would be technically  
19 difficult to extract from their location – should they be there. Mr. Snape seems to be  
20 first person to seriously investigate and inspect FINAB's disclosure.



1       54.     In addition Crown counsel Mr. Snape informed the Defence that the police had  
2             been unable to read the BANIF data file or the QuickBooks file in relation to 2010  
3             and therefore the period covering the Indictment.

4       55.     It is clear that when FINAB and AF made their complaints, they did not provide the  
5             police with full disclosure of all the FINAB documentation and data which would  
6             assist in their investigation. Efforts to locate emails post 2006, and particularly  
7             covering the Indictment on the 30<sup>th</sup> June 2009 to the 11<sup>th</sup> January 2012 came to  
8             nothing.

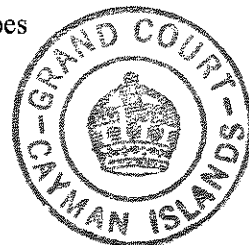
9       56.     On the 27<sup>th</sup> February 2014 the Complainant AF said he did not know where the  
10            emails were stored and he himself did not have any emails.

11      57.     On the 28<sup>th</sup> February 2014 the MD of FINAB advised, via email, that FINAB does  
12            not have any email communications.

13      58.     On the 20<sup>th</sup> May 2014 DI Lavine from the FCU spoke to AF who confirmed that he  
14            had no emails.

15      59.     On the 21<sup>st</sup> May 2014, DI Lavine had another conversation with AF and gave him  
16            an update regarding the case against the Defendant. He was advised by AF that he  
17            believes he has physical emails and he would check and provide whatever emails he  
18            had to his attorneys, Campbells.

19      60.     The Court is less than impressed by AF's delay in assisting the police and the  
20            contradicting statements that he has made regarding which emails he has or does  
21            not have in his possession.



1 61. AF is an experienced banker who has made the most serious allegations against the  
2 Defendant. Therefore AF had a duty to provide the RCIPS with full and frank  
3 disclosure of all relevant documents, in order to allow the FCU to have the  
4 opportunity to carry out a thorough and independent investigation. As Crown  
5 counsel, Ms. Salako, said on the 21<sup>st</sup> May 2014, “*The FCU has been trying to*  
6 *locate these emails for a considerable period of time and we have always been told*  
7 *by FINAB, the company and the Director, AF, that these emails don’t exist.*”

8 62. Ultimately disclosure of a large number of FINAB emails was provided in late July  
9 2014. These were seen by the Defence for the first time in either late July or early  
10 August 2014. As part of the case against the Defendant, FINAB had alleged that the  
11 Defendant stole US\$1,863.69 from FINAB.

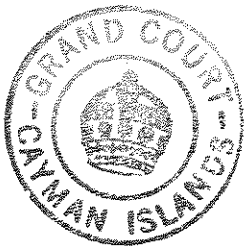
12 The following are examples of the evidence this late disclosure has revealed, which  
13 the court now highlights:

14 A. Cheque #1135 dated the 27<sup>th</sup> May 2010 for the sum of US\$1,863.69:

15 a) The disclosure of emails in late July 2014 demonstrate that by  
16 emails dated the 15<sup>th</sup> June 2010 and the 4<sup>th</sup> July 2010 AF had  
17 approved this sum for expenses for a STEP Conference.

18 B. Cheque #1373 dated the 23<sup>rd</sup> September 2010 for the sum of  
19 US\$4,506.86:

20 a) This amount is included in the overall sum of which the  
21 Defendant is accused by AF of misappropriating.

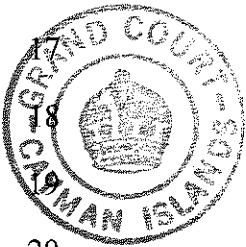


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b) The disclosure of FINAB's emails in late July 2014 demonstrate that these were monies for a dividend from a company called FINAB LP in which AF, Wilton McDonald and the defendant were shareholders. This sum was a dividend for Wilton McDonald and not monies misappropriated by the Defendant.

63. The foregoing examples cause the Court great concern and they lead to the inevitable question of what other documents that have not been disclosed by FINAB which can show that, not only is the Defendant not guilty of the charge against him but, that, in fact, he is innocent. Had the Defendant's trial gone ahead on the 5<sup>th</sup> June 2012 he might well have been found guilty of theft of US\$1,863.69 and US\$4,506.86. This would have led to a very serious miscarriage of justice for which FINAB and AF would have had to bear significant responsibility.

64. In addition, the defence has been able to illustrate that the late FINAB disclosure in July 2014 is seriously flawed. In the case against the Defendant the Crown was relying on cheques #1361 and #1362 – both dated the 20<sup>th</sup> September 2010 and related to \$5,000.00 and \$640.00. However, the Defendant has produced an email, dated the 20<sup>th</sup> September 2010, which was not disclosed by FINAB to the Crown. The email is from the Defendant to AF it shows that, as the Defendant could not authorise expenses above US\$5,000.00, he did that in two cheques - #1361 and #1362 – in the sums of \$5,000.00 and \$940.00 respectively. The email shows that these sums were approved by AF. Crown counsel very properly admits that, as she took some four days to review FINAB's late disclosure, she may have missed the email dated the 20<sup>th</sup> September 2010. The Court is grateful to Ms. Salako for her



1 candour but it still demonstrates to this Court that the disclosure from FINAB and  
2 AF is nowhere near complete.

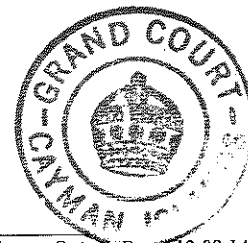
3 65. AF now says that he backed up his emails into Alfie333@yahoo.com, but,  
4 regrettably, there is no independent verification of this. The Court notes that AF had  
5 several email addresses as did the other directors. There has been limited disclosure  
6 of documentation from these other email addresses.

7 66. This Court is very disturbed by the extremely late and incomplete disclosure of  
8 electronic data from FINAB.

9 67. FINAB has given contradictory accounts regarding the existence or not of emails.  
10 Disclosure provided at the end of July 2014 is incomplete and, therefore, the entire  
11 disclosure exercise is inherently flawed.

12 68. In addition to my criticism of the conduct of FINAB and AF in not providing full  
13 disclosure to support their serious allegations against the Defendant, I am also  
14 concerned by the apparent lack of support that the RCIPS has given to the DPP in  
15 this case. This is a concern that I have expressed on previous occasions. It is  
16 imperative that Senior Investigating Officers liaise closely with crown counsel to  
17 ensure that discovery/disclosure is carefully examined and to ensure that it is as full  
18 and as complete as possible.

19 69. In this case it was the duty of the RCIPS to carry out an open minded and  
20 independent investigation to discover whether AF's allegations against the  
21 Defendant were true or untrue.



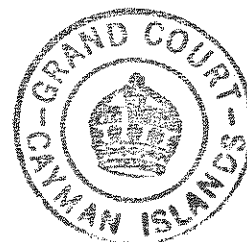
1 70. It is also the duty of the RCIPS to collect and preserve all the relevant and material  
2 evidence as soon as possible, which may include evidence that undermines the  
3 Crown's case and supports the case for the Defendant.

4 71. Although Mr. Mendes' laptop and hard drive were seized on the 11<sup>th</sup> February  
5 2011, it should have been clear that, at that time, or shortly thereafter, no emails  
6 post-2006 were recovered, no emails relating to the period on the Indictment – 30<sup>th</sup>  
7 June 2009 to the 11<sup>th</sup> January 2011 – were recovered, and that the RCIPS could not  
8 read the QuickBooks file 2010.

9 72. It should have been obvious to the FCU that this material was missing and was vital  
10 in order to properly investigate the allegations made against the Defendant. From  
11 February 2011 to September 2013 there is no evidence that anyone within the FCU  
12 focused their attention on this important lack of disclosure of the FINAB data and  
13 documentation. It seems that it was not until Crown counsel, Mr. Snape, reviewed  
14 the data in September 2013 that the Crown became aware of what material was  
15 missing.

16 73. It appears to the Court that Crown counsel Mr. Snape, and then Ms. Salako, were  
17 the first people to put pressure on FINAB and AF to provide additional disclosure.

18 74. As a result of this late disclosure, it is clear that some of the allegations of AF and  
19 FINAB against the Defendant are untrue. Furthermore, as a result of the late  
20 disclosure of emails it is apparent that the disclosure from FINAB is not complete.  
21 There may be other material which has not yet been disclosed may support the case  
22 for the Defence.



1 75. Just as there was a duty on FINAB and AF to provide full disclosure of electronic  
2 data from after 2006 and, particularly from the 30<sup>th</sup> June 2009 to the 11<sup>th</sup> January  
3 2011, there was also a duty on the RCIPS to collect and retain all the FINAB data  
4 and documentation in relation to the allegations made by FINAB and AF.

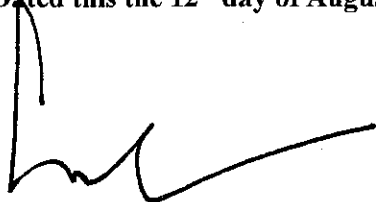
5 76. The RCIPS FCU failed to seize significant and relevant material at the time of the  
6 Defendant's arrest. I find that the FCU has failed to pursue all reasonable lines of  
7 enquiry and therefore has failed to obtain and retain material which may well serve  
8 to undermine the Crown's case and assist the defence.

9 77. This failure has led to a serious prejudice which, in my view, renders it impossible  
10 for the Defendant to have a fair trial, particularly some five years after the time the  
11 offences are alleged to have been committed, and, three and a half years after his  
12 arrest. Consequently there has been a serious fault so as to render it unfair to try the  
13 Defendant for the offence on this Indictment.

14 78. For all the above reasons I find that the Defendant cannot receive a fair trial and,  
15 further, it would be unfair for the Defendant to be tried in all the circumstances of  
16 this case.

17 79. Accordingly, I accede to the application by the Defence, I stay the prosecution of  
18 this case and the Defendant is discharged.

19 **Dated this the 12<sup>th</sup> day of August 2014**

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21 

22 **Honourable Mr. Justice Charles Quin Q.C.**  
23 **Judge of the Grand Court**

