

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 528 of 2008

BETWEEN: THE QUEEN

AND: (1) MARTIN BRIDGER
(2) RICHARD COY
(3) ACTING COMMISSIONER OF THE ROYAL
CAYMAN ISLANDS POLICE SERVICE

Respondents

Ex parte The Hon. Justice Alexander Henderson
Applicant

AND:

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 464 of 2008

BETWEEN: THE QUEEN

AND: CARSON K. EBANKS, MBE J.P.

Respondent

Ex parte The Hon. Justice Alexander Henderson
Applicant

AND: THE ACTING COMMISSIONER OF THE ROYAL CAYMAN
ISLANDS POLICE SERVICE

Additional Party

JUDGMENT delivered by The Honourable Sir Peter Cresswell, on
the 23rd day of December 2008.

APPEARANCES:

Mr. R. Alberga, QC

for the Applicant

Mr. S. McCann

Ms. K. Houghton

Ms. C. Richards, SG

for the Respondents

Mr. D. Schofield, ASG

REPORTED BY: Carol A. Rouse,
Court Reporter.

JUDGMENT

The Honourable Justice Sir Peter Cresswell

I have been appointed by the Governor to be a judge of the Grand Court of the Cayman Islands for a period of three months to the end of February 2009 for completion of the consolidated Causes 464 and 528 of 2008.

Introduction

This judgment follows my judgment of the 29th of October in Cause 464, to which I refer. Cause 528 of 2008 is the second set of proceedings for judicial review brought by the Applicant.

In Cause 528 the Applicant seeks declarations that the decision to arrest him and his arrest were unlawful.

The Applicant is a justice of the Grand Court and has held that office since 2003. On the 24th of September 2008, at about 7:06 a.m., the Applicant was arrested by Mr. Richard Coy, the Second Respondent, in the car park outside his home. It was alleged that

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8:45 a.m. that morning. Ms. Houghton, on behalf of the Applicant, told Mr. Worthington that the Applicant objected to the search and asked that his objection be recorded. Thereafter, the constables searched the office and the Applicant's robing room and seized items including the Applicant's judicial computer. The Chief Justice was present when the warrant was presented and following the search. He objected to the removal of the Applicant's judicial computer from the custody of the court.

The bail form in respect of the Applicant records, among other matters, that the conditions to be complied with after release on bail included not to contact direct/indirectly/interfere with certain persons, including the Chief Justice. That form is dated the 24th of September.

Press Statements

A statement by the Governor, dated the 24th of September, read:
"As you are aware, the Cayman

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there were reasonable grounds to suspect that he had committed the offence of misconduct in public office, contrary to Common Law. The Applicant refused to consent to a search of his home.

The Applicant was then taken to the police station in George Town. At about 9:03 a.m., Mr. Stephen Worthington and Mr. Timothy Thorne, special constables of the RCIPS, attended the Applicant's home with a search warrant which had been issued by the Respondent to Cause 464 at about 8:45 that morning. Mr. McCann, on behalf of the Applicant, repeated the Applicant's instructions that he did not consent to the search, but the constables, and others who arrived later, entered the premises and searched them, seizing certain items.

At about 3:02 p.m., Mr. Worthington and Mr. Thorne, accompanied by three other men, all of whom were said to be special constables of the RCIPS, attended the Applicant's personal offices at fourth floor Kirk House, George Town, with a search warrant relating to the Applicant's offices which had been issued by the Respondent to Cause 464, again at about

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Islands have been undergoing an unprecedented investigation involving some members of the Royal Cayman Islands Police Service. It saddens me to add that this investigation has now led to the arrest today of Justice Alexander Henderson.

"I wish to assure you first of all that this matter has nothing to do with any judgments delivered by Justice Henderson in court. As this follows short on the heels of the action against Justice Priya Levers, I want to assure the community that the courts will continue to function. These actions will not impede court operations and the community will continue to have access to justice....

"... this latest action is again a demonstration that the

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1 investigation is entirely
 2 independent of both the
 3 Government and my office. It
 4 will continue unimpeded to its
 5 full conclusion.
 6
 7 "I am regularly briefed by
 8 Mr. Bridger [the First
 9 Respondent to Cause 528] as
 10 matters develop, and I have
 11 confidence in his team....
 12
 13 "This is a difficult time for
 14 everyone - particularly those
 15 under investigation. Government
 16 continues to support the
 17 investigating team so they can
 18 move forward.
 19
 20 "That said, it is important to
 21 know that investigations of this
 22 nature inevitably take time and
 23 money. I do believe it is of
 24 national importance to pursue
 25 this specific investigation to

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1 its full conclusion, and I again
 2 ask for your support. I know
 3 there is speculation about the
 4 cost of this investigation;
 5 however, the price of doing
 6 nothing is far greater in
 7 regards to the long term
 8 credibility and reputation of
 9 the Cayman Islands as a safe and
 10 economically viable
 11 jurisdiction.
 12
 13 "Also, in fairness to the
 14 community and everyone involved,
 15 it is necessary to legitimately
 16 prove [sic] or disprove any
 17 allegations against anyone
 18 involved before putting the
 19 issue to rest. I ask again that
 20 people refrain from prejudging
 21 the outcome of the
 22 investigation.
 23
 24 "Ensuring good governance is a
 25 collective responsibility and

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1 requires clear and sustained
 2 leadership. It is only by
 3 working together that we will
 4 achieve the positive change this
 5 country deserves."
 6
 7 As part of the same press statement there
 8 was a statement by Senior Investigating Officer
 9 Martin Bridger which read:
 10 "First, let me say that I am
 11 grateful for the continued
 12 support from HE the Governor,
 13 the Cayman Islands Government
 14 and the wider community.
 15
 16 "As you have just heard from HE
 17 the Governor, Justice Alexander
 18 Henderson was arrested this
 19 morning in connection with the
 20 independent police
 21 investigation.
 22
 23 "I do not underestimate the
 24 impact of this action on the
 25 individual concerned, and the

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1 local and international
 2 communities. I assure you that
 3 in respect of Justice Henderson,
 4 I only took the action today
 5 after careful consideration of
 6 the evidence available at this
 7 time and the benefit of
 8 independent legal advice.
 9
 10 "I want to make it clear that
 11 this is part of the original
 12 investigation which commenced
 13 with the allegations made
 14 against Deputy Commissioner
 15 Anthony Ennis and Cayman Net
 16 News Editor in Chief Desmond
 17 Seales....
 18
 19 "I acknowledge that these are
 20 difficult times and the latest
 21 development will generate much
 22 public debate. That said, I ask
 23 the community and the media in
 24 particular not to prejudge the
 25 guilt or innocence of any

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1 individual involved in this
 2 investigation....
 3
 4 "As I have said on many
 5 occasions before, it is about
 6 the search for the truth. And I
 7 conclude by stating again: My
 8 team is committed and will
 9 meticulously follow the facts -
 10 and only the facts."

11
 12 The arrest of the Applicant led to
 13 publicity in many countries throughout the
 14 world.

15 On about 9 October Mr. Bridger issued a
 16 further press statement entitled "Update on
 17 Independent Investigation". It read:

18 "In my recent statement of 24
 19 September, 2008 I acknowledged
 20 that these were difficult times,
 21 and that the latest development
 22 concerning the independent
 23 investigation would generate
 24 much public debate. I also
 25 asked the community and the

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1 will treat everyone involved in
 2 an equal manner, following the
 3 same process.

4
 5 "As to the challenge to the
 6 legality of the search warrants,
 7 I am entirely satisfied that
 8 these were properly obtained.

9
 10 "An application for a search
 11 warrant is an application to the
 12 court, or a justice of the
 13 peace, to seek the use of an
 14 investigative power. The
 15 purpose of that power is to
 16 search for evidence. By its
 17 very nature, such an application
 18 is made without the need for the
 19 totality of the case being put
 20 before that court or Justice of
 21 the Peace.

22
 23 "Indeed, in most cases, as here,
 24 a great deal more investigation
 25 and evidence gathering is to be

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1 media in particular, not to
 2 prejudice the guilt or innocence
 3 of any individual involved in
 4 this investigation, nor to
 5 speculate, or indulge in
 6 rumour....

7
 8 **Justice Alexander Henderson:**

9
 10 "... the decision to arrest
 11 Justice Alexander Henderson was
 12 not based on his refusal to give
 13 me a statement. Moreover, it
 14 was not made lightly. I took
 15 that decision only after careful
 16 consideration of the available
 17 evidence and information in
 18 consultation with independent
 19 legal counsel and Assistant
 20 Commissioner John Yates of the
 21 Metropolitan Police Service.
 22 Whilst I recognize the effects
 23 of his arrest on Justice
 24 Henderson and more broadly on
 25 the jurisdiction, I must and

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1 carried out after any search
 2 warrants have been obtained. A
 3 search is just one part of an
 4 investigation.

5
 6 "It follows, then, that no court
 7 can hope to make a **meaningful**
 8 evaluation of guilt, or
 9 innocence or, the strength, or
 10 otherwise, of a case at the time
 11 of such an application. In
 12 fact, it would be entirely
 13 inappropriate and fruitless to
 14 attempt such an exercise.

15
 16 "As an investigator I do not
 17 pre-judge. I am sure that
 18 everyone concerned in the
 19 criminal justice process is
 20 similarly anxious to avoid
 21 arriving at premature
 22 conclusions. It should be borne
 23 in mind that the threshold for
 24 granting a search warrant is
 25 reasonable suspicion, not a

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1 prima facie case, or a realistic
 2 prospect of conviction.
 3
 4 "Let me repeat that a decision
 5 of whether [sic] a criminal
 6 offence has been committed
 7 cannot reasonably be based on
 8 the information supplied for the
 9 application of a search
 10 warrant....
 11
 12 **Chief Justice Ruling in Public**
 13 **Domain:**
 14
 15 "I am extremely concerned that a
 16 ruling made in a private hearing
 17 in chambers, following an ex
 18 parte application, appears to
 19 have found its way into the
 20 public domain on the 3rd of
 21 October. Just as transparency
 22 is a pre-requisite in any well
 23 governed society, so
 24 confidentiality has an equally
 25 valuable place in very limited,

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1 but well-defined circumstances.
 2 Such circumstances exist in
 3 relation to this aspect of the
 4 on-going investigation....
 5
 6 "I have now been informed that
 7 the judgements concerning
 8 Mr. Kernohan and Mr. Jones were
 9 released the day after the
 10 arrest of Justice Henderson on
 11 the 24th September i.e.
 12 released on the authority of the
 13 Chief Justice on the 25th
 14 September 2008. [I interpose
 15 that any implied criticism of
 16 the Chief Justice was, in my
 17 opinion, wholly unfounded].
 18
 19 **Keeping the Community Informed:**
 20
 21 "Beginning today, unless events
 22 require a more immediate report,
 23 a media update will be issued
 24 every two weeks. Media
 25 questions presented in writing

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1 will be answered as fully as I
 2 can.
 3
 4 "The community will be updated
 5 in a series of local district
 6 meetings to be scheduled over
 7 the coming weeks and months ... I
 8 want to meet with you and
 9 encourage you to invite me to
 10 attend your community,
 11 association, or congregational
 12 event so that you can learn the
 13 facts directly from the
 14 investigative team.
 15
 16 "The independence of my team is
 17 critical to establishing the
 18 facts. My team is committed to
 19 following the facts, but in so
 20 doing we will carefully consider
 21 issues of fairness and
 22 proportionality of our actions.
 23 Furthermore, any action taken is
 24 in accordance with the **Laws** of
 25 the Cayman Islands and I can

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1 expect thorough scrutiny....
 2
 3 "Assistant Commissioner John
 4 Yates of the Metropolitan Police
 5 Service to whom I am accountable
 6 continues to oversee the
 7 investigation and provide
 8 guidance. Additionally the
 9 investigation team has an
 10 experienced independent legal
 11 counsel, an established and very
 12 experienced legal practitioner
 13 in addressing issues of
 14 misconduct in public office.
 15
 16 "In addition, I have the support
 17 of a small group of local
 18 persons to provide me with
 19 advice on the local context and
 20 assist me with administrative
 21 matters...."
 22
 23 As will be seen below, Mr. Bridger's
 24 actions were not in accordance with the laws of
 25 the Cayman Islands.

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1
2 **The Letter of 13th October and Subsequent**
3 **Correspondence**
4
5 On 13th October, Campbells, solicitors
6 for the Applicant, wrote to the solicitors
7 acting for the Acting Commissioner of the RCIPS
8 asserting that the arrest of the Applicant was
9 unlawful because misconduct in public office is
10 not an arrestable offence in the Cayman
11 Islands. The letter stated:
12 "We understand that you are
13 instructed by the Acting
14 Commissioner of Police Service
15 in relation to Cause 464 of
16 2008, and we will correspond
17 with you concerning that matter
18 separately.
19
20 "However, we feel that we should
21 raise with you at this early
22 stage that it seems likely that
23 your client's arrest, by his
24 special constable Mr. Stephen
25 Coy, on 24th September 2008,

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1 Schedule, and accordingly, the
2 Offence is not an arrestable
3 one, since the Schedule provides
4 that, in the case of a
5 non-scheduled offence, it is
6 only arrestable if the maximum
7 penalty imposed by law is 6
8 years or more.
9
10 "In the circumstances, it
11 appears to us that the Judge's
12 arrest without warrant was
13 unlawful, and your client and
14 his officers acted *ultra vires*.
15
16 "Furthermore, the Judge was
17 interviewed unlawfully and
18 without his consent, and his
19 bail and the conditions thereof,
20 are also unlawful and of no
21 effect".
22
23 On 22nd October, Mr. Richard Oliver,
24 Investigating Officer, Operation Tempura, wrote
25 to Campbells on behalf of the Applicant:

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1 was unlawful....
2
3 "Powers of arrest without
4 warrant are defined by the terms
5 of the Police Law (2006
6 Revision), sections 24(4) and
7 36(a), and both powers are
8 defined by reference to
9 'arrestable' offences, as
10 defined by the First Schedule of
11 the Criminal Procedure Code
12 (2006 Revision) ("the Schedule")
13 (per s.2 of the Police Law).
14
15 "The Offence is not defined in
16 the Penal Code (2007 Revision),
17 but is, in effect, preserved by
18 it (s.2(a)). No penalty is
19 defined by the Penal Code for
20 the Offence, and accordingly,
21 the provisions of s.38(1) of the
22 Penal Code apply, imposing a
23 penalty of a maximum of 4 years'
24 imprisonment and a fine. The
25 Offence is not listed in the

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1 "Due to the protracted nature of
2 the investigation and the
3 necessity for undertaking
4 numerous further enquiries, it
5 will not be possible to complete
6 our preparation for [6 November
7 2008].
8
9 "It will therefore be necessary
10 to request a further extension
11 of bail on 6th November 2008."
12
13 On 27th October, Campbells wrote to
14 Nelson & Co., the solicitors acting for the
15 Acting Commissioner of the RCIPS:
16 "We refer to our
17 13th October 2008 [letter]
18 concerning the judge's arrest
19 (copy attached)....
20
21 "Our client remains concerned
22 that his arrest (and
23 consequently his bail) is
24 unlawful. However, without
25 prejudice to that contention,

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1 and without waiving any rights
 2 he may have to challenge his
 3 arrest and bail, he would be
 4 willing to be bound by
 5 undertakings to the Court in
 6 place of his 'bail'.
 7
 8 "The current terms of his 'bail'
 9 are onerous and unnecessary.
 10
 11 "Our client's passport has been
 12 seized by the custody sergeant.
 13 The passport was taken
 14 unlawfully during the search of
 15 our client's home (even if the
 16 search was lawful, which is
 17 obviously denied), and could not
 18 possibly have been of any
 19 evidential value. The bail
 20 sheet (copy attached) does not
 21 refer to any 'flight risk' and
 22 we request the return of the
 23 judge's passport. He is
 24 prepared to undertake that he
 25 will not leave the jurisdiction

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1 without the permission of the
 2 Court.
 3
 4 "The other conditions of our
 5 client's 'bail' refer to a
 6 suggestion that our client is
 7 likely to interfere with
 8 witnesses. There is no possible
 9 ground for this suggestion.
 10 However, our client is prepared
 11 to undertake, again without
 12 prejudice or waiver, that he
 13 will not make any attempt to
 14 contact etc with Evans, Ennis,
 15 Needham, Kernohan or Jones and
 16 that he will not contact etc.
 17 Richards, Smellie or Bulgin save
 18 in respect of his duties as a
 19 judge...."

On 27th October, Mr. Barrie, of Nelson &
 Co., sent on email to Ms. Houghton of Campbells
 as follows:

"Thanks for your letter in
 connection with Judge

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1 Henderson's bail conditions. We
 2 have passed a copy of your
 3 letter on to our clients for
 4 their consideration. We would
 5 however ask you to note that we
 6 act on behalf of the Acting
 7 Commissioner of Police in
 8 respect of the proceedings for
 9 Judicial Review only; we do not
 10 act generally for the
 11 investigation team in respect of
 12 the investigation itself. We
 13 are ... advised that Mr. Bridger
 14 will respond to you direct on
 15 these issues."

29 October 2008

On 29 October 2008 I gave judgment in
 Cause 464. It should be noted that as at the
 29th of October:

- (1) the legality of the arrest had been
 raised in Campbells' letter of the 13th of
 October;
 (2) the point was not considered in the

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1 first judicial review hearing;
 2 (3) the additional party to the first
 3 application for judicial review, the Acting
 4 Commissioner for the RCIPS, should, after 13
 5 October, have acknowledged that the arrest was
 6 unlawful;
 7 (4) Mr. Schofield, to whom I am indebted
 8 for his assistance, rightly conceded that the
 9 legality of the arrest was highly material to
 10 the first judicial review hearing. The RCIPS
 11 should have accepted in the course of the first
 12 judicial review hearing that the arrest was
 13 unlawful. In the event, the earliest
 14 indication that the RCIPS accepted that the
 15 arrest was unlawful was in the letter of the
 16 24th of November (see below).

**The Letters of 30th October 2008 and Subsequent
 Correspondence**

On 30 October, Campbells wrote to the
 Solicitor General -- and I acknowledge again my
 gratitude to the Solicitor General for her
 assistance in this matter -- in these terms:

"We understand the Hon.

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1 Attorney-General is currently
 2 out of the country and in the
 3 circumstances we enclose
 4 herewith our letter to him dated
 5 30 October 2008, with
 6 enclosures which we ask you to
 7 bring to his attention
 8 immediately upon his return."
 9
 10 Enclosed with that letter was a letter to
 11 the Acting Commissioner in these terms:
 12 "We act for the Hon. Mr. Justice
 13 Henderson and enclose copies of
 14 the following: ...
 15
 16 "We have been informed by Nelson
 17 & Co. that it does not act for
 18 you generally and that, in
 19 particular, it does not act for
 20 you in connection with the
 21 arrest of our client, or his
 22 bail.
 23
 24 "As you will see from the
 25 materials enclosed, the offence

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1 with thus far in order to avoid
 2 further controversy.
 3
 4 "We strongly urge you to obtain
 5 advice from competent Cayman
 6 Islands attorneys, and perhaps
 7 you should contact the Attorney
 8 General's Chambers."
 9
 10 On 31st October, David George, Acting
 11 Commissioner of Police, replied:
 12 "I acknowledge service of the
 13 documents in the
 14 above-referenced matter, the
 15 contents of which I have noted.
 16
 17 "I will seek legal advice and
 18 revert to you as soon as
 19 practicable."
 20
 21 On 3rd November, the Solicitor General
 22 wrote to Campbells:
 23 "On behalf of the Hon. Attorney
 24 General, we acknowledge receipt
 25 of your letter dated

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1 of Misconduct in Public Office
 2 contrary to common law is not an
 3 arrestable offence under the
 4 provisions of the Police Law.
 5 In the circumstances, our
 6 client's arrest was unlawful,
 7 and it follows that his
 8 detention, subsequent two day
 9 questioning and bail were and
 10 are also unlawful and a further
 11 grave abuse of process.
 12
 13 "The Judge wishes to return to
 14 his Court duties as soon as
 15 possible. We invite you to
 16 release him from his bail and
 17 its conditions immediately.
 18 Your special constables have
 19 shown no possible grounds for
 20 imposing bail or any conditions
 21 on it, and our client is
 22 effectively precluded from
 23 returning to his duties by the
 24 terms of his bail which, whilst
 25 unenforceable, he has complied

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1 30th October, 2008 with
 2 enclosures....
 3
 4 "Please be advised that we are
 5 presently reviewing the matter
 6 and will respond to you on or
 7 before Wednesday, 5th
 8 November 2008."
 9
 10 According to an internal email of
 11 Campbells, dated 5th November, on that date the
 12 Acting Commissioner telephoned the Campbells'
 13 switchboard and spoke to Mr. McCann.
 14 "He advised (1) that he had just
 15 finished meeting with the
 16 [Attorney General] re [the
 17 Applicant's] bail (2) due to
 18 lateness in day no letter today
 19 but will be forthcoming to
 20 confirm that (a) Judge Henderson
 21 does not need to attend at the
 22 CPS at 10 am on [6 November] (b)
 23 released from bail immediately
 24 (c) bail conditions no longer
 25 apply.

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1
 2 "I thanked him for telephoning
 3 me. I then informed him that I
 4 wished to raise a bigger picture
 5 issue namely that of the judge
 6 being unable to return to his
 7 duties as a judge whilst he
 8 appears to remain under
 9 investigation in Operation
 10 Tempura. I told him it remained
 11 a very live issue and that it
 12 needed to be sorted out. He
 13 replied that he was aware of the
 14 issue and told me that he would
 15 get me an answer on it sooner
 16 rather than later as a matter of
 17 practicability.
 18
 19 "I asked him to confirm that the
 20 judge therefore did not need to
 21 go to the police station
 22 tomorrow. He answered yes there
 23 was no need. I told him I
 24 looked forward to receiving his
 25 letter tomorrow"

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1
 2 On 6th November, Campbells wrote to
 3 Mr. David George, Acting Commissioner of the
 4 RCIPS:
 5 "Thank you for your courteous
 6 telephone call to the writer at
 7 4:55 p.m. Wednesday 5 November ...
 8 in which you confirmed as
 9 follows:
 10 1. Mr. Justice Henderson
 11 was no longer under arrest;
 12 2. There was no longer any
 13 necessity for him to be on
 14 bail;
 15 3. He was consequently
 16 released from his bail
 17 conditions; and
 18 4. He did not need to
 19 attend the Central Police
 20 Station ... Thursday
 21 6 November 2008....
 22
 23 "We understand from Lead
 24 Counsel, Mr. Ramon Alberga QC,
 25 that The Hon. Attorney General

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1 had spoken to him by telephone
 2 on Tuesday 4 November 2008 and
 3 promised to contact Mr. Alberga
 4 following a meeting with
 5 yourself in connection with our
 6 letter to you dated 30
 7 October 2008. The Solicitor
 8 General also confirmed to the
 9 writer by telephone on 5
 10 November 2008 that Mr. Alberga
 11 could expect at least a verbal
 12 response to our letter from the
 13 Attorney General following a
 14 meeting, which we understand he
 15 scheduled with you for 3:30 p.m.
 16 Wednesday 5 November 2008.
 17 Despite these indications, we
 18 were most disappointed to note
 19 that nothing whatsoever was
 20 heard from the Attorney General
 21 and that it was left to you to
 22 contact us. Had it not been for
 23 your call, the Judge and his
 24 legal advisors would have
 25 attended the Central Police

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1 Station at 10 a.m. this morning.
 2 We again repeat our gratitude
 3 for the courtesy of your
 4 telephone call.
 5
 6 "It is now clear from the
 7 content of your telephone call
 8 yesterday that you accept that
 9 Mr. Henderson's arrest was
 10 illegal; that the Special
 11 Constables who were tasked to do
 12 so by Mr. Bridger acted
 13 unlawfully; and that his two day
 14 interview following his arrest
 15 and his grant of bail and
 16 conditions attached thereto were
 17 also unlawful and of no effect.
 18
 19 "Are we now to assume that the
 20 investigation in relation to
 21 Justice Henderson is now at an
 22 end and that Mr. Bridger and
 23 other members of the Special
 24 Police Investigation Team ... will
 25 not be dreaming up any new

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1 offences to throw at Justice
 2 Henderson?
 3
 4 "We very much regret that you
 5 will be held vicariously
 6 responsible for the acts,
 7 failures, and misrepresentations
 8 of the SPIT members in the
 9 procuring and execution of the
 10 two search warrants and the
 11 unlawful arrest of the Judge on
 12 24 September 2008...."
 13
 14 On 11 November, Nelson & Co. wrote to
 15 Campbells to advise on behalf of the Acting
 16 Commissioner of Police that no appeal was to be
 17 "taken" in respect of the judgment of the
 18 29th of October.
 19 On 6th November, Mr. George wrote to
 20 Campbells:
 21 "This letter serves as written
 22 confirmation of our telephone
 23 conversation of yesterday
 24 evening, wherein I identified
 25 that ... Justice Henderson's

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1 the judge's bail status,
 2 particularly with the fear that
 3 any members of SPIT may take it
 4 upon themselves to arrest the
 5 Judge if they consider that he
 6 has, since and despite our
 7 telephone conversation
 8 yesterday, breached the original
 9 bail conditions. It is
 10 unacceptable that our client's
 11 position, a Judge of the Grand
 12 Court of the Cayman Islands, is
 13 left in limbo and your immediate
 14 response is required to this
 15 letter."
 16
 17 On the same day, Mr. George replied:
 18 "I have just received your
 19 letter of 6th November
 20 concerning our telephone
 21 conversation of 5th November.
 22 There is a need for me to
 23 clarify the points you make.
 24
 25 "I did identify that Justice

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1 attendance at George Town Police
 2 Station at 10 a.m. on today's
 3 date would not be required.
 4
 5 "During our conversation you
 6 mentioned the correspondence you
 7 had sent to me with regards to
 8 Justice Henderson's arrest; I
 9 believe that the Attorney
 10 General's office has indicated,
 11 on my behalf, that we should be
 12 in a position to respond today".
 13
 14 On 6th November, Campbells wrote to
 15 Mr. George:
 16 "We received your letter dated
 17 6 November 2008 at approximately
 18 12:30 p.m. today. It has
 19 crossed with our letter of the
 20 same date
 21
 22 "Given the limited content of
 23 your letter, it is imperative
 24 that we receive from you an
 25 immediate response concerning

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1 Henderson did not need to attend
 2 the Central Police Station at 10
 3 a.m. on Thursday 6th November
 4 2008.
 5
 6 "I did not say that Justice
 7 Henderson was no longer under
 8 arrest;
 9
 10 "I did not say that there was no
 11 longer any necessity for him to
 12 be on bail;
 13
 14 "I did not say he was released
 15 from his bail conditions;
 16
 17 "As I identified in my recent
 18 mail to you, I am currently
 19 awaiting advice from the
 20 Attorney General's Office and
 21 when I have that I will be able
 22 to consider all issues."

On 11th November, Nelson & Co. sent an
 email to Campbells:

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1 "We are no longer instructed in
2 this matter and I would suggest
3 that you direct all future
4 inquiries to the [Attorney
5 General]...."

6
7 **The Application for Leave to Apply for Judicial**
8 **Review**

9
10 On 12 November the application for leave
11 to apply for judicial review was issued in
12 Cause No. 528. It was supported by a Note on
13 behalf of the Applicant for leave to apply for
14 judicial review in respect of his arrest and
15 bail, to which I refer.

16 On 13 November Campbells wrote to the
17 Clerk of the Court:

18 "In accordance with the
19 obligation to make full and
20 frank disclosure, we enclose a
21 copy of a letter received today
22 at approximately 4:00 p.m. from
23 the Attorney-General, which
24 indicates that Justice Henderson
25 is no longer under arrest, is

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1 free from bail and bail
2 conditions and is no longer
3 under investigation."
4

5 **The Letter of 12 November**

6
7 The letter of 12 November from the
8 Attorney General to Campbells was in these
9 terms:

10 "We write on behalf of the
11 Acting Commissioner of Police
12 and with reference to your
13 letter of 6th November 2008 to
14 the Acting Commissioner of
15 Police and to advise you that
16 upon comprehensive review of the
17 matter, the police investigation
18 into the allegation of criminal
19 misconduct in public office
20 against Hon. Justice Henderson
21 has been discontinued with
22 immediate effect and is
23 therefore at an end.

24 "It follows therefore that his
25

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1 arrest and all related bail
2 conditions as well as all other
3 conditions have now completely
4 fallen away.

5
6 "We further advise and confirm
7 that Mr. Justice Henderson is no
8 longer the subject of the
9 aforementioned or any
10 investigation.

11
12 "The entire episode has clearly
13 caused inconvenience and
14 discomfort to your client which
15 is regretted."

16
17 It is to be noted that this letter did not
18 acknowledge that the arrest was unlawful.

19
20 **Press Release 14 November**

21
22 A press release headed "Statement from the
23 Office of the Acting Commissioner of Police",
24 dated 14 November, read:
25

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1 "As a result of the judicial
2 review action ... the search
3 warrants were subsequently set
4 aside ... it was decided not to
5 appeal the ... judgment.

6
7 "The Acting Commissioner of
8 Police, David George, upon
9 review of the judgment and other
10 relevant materials, as well as
11 after consultation with the
12 Chambers of the Attorney
13 General, and others, has taken
14 the decision that the
15 investigation into the
16 allegation of misconduct in
17 public office against Justice
18 Henderson be immediately
19 discontinued. Justice Henderson
20 is therefore no longer under
21 arrest or investigation and has
22 been released from his bail
23 conditions.

24 "The remainder of the
25

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1 investigation relative to the
2 alleged entry into the Offices
3 of the Cayman Net News on the
4 3rd September 2007 and other
5 matters continues...."

6
7 It is to be noted that this press
8 statement did not acknowledge that the arrest
9 was unlawful.

11 The Grant of Leave

12
13 On 20 November, the Hon. Justice Campbell
14 ordered that the Applicant have leave to apply
15 for judicial review in Cause No. 528 of 2008.
16 I refer to his ruling (DETERMINATION WITHOUT A
17 HEARING PURSUANT TO GCR O.53 r3(3)) for its
18 full terms and effect.

20 Service of the Notice of Motion in Cause 528

21
22 By letter, dated 21st November,
23 Campbells wrote to Mr. Bridger, enclosing by
24 way of service the Notice of Motion in Cause
25 528 and other relevant documents. Service in

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1 engaging in "*good faith*"
2 discussions to bring an early
3 close to this matter. In that
4 vein we look forward to
5 receiving your proposals in due
6 course.

7
8 "We are however concerned that
9 despite the discussions which we
10 have already had in this matter
11 we have been advised that the
12 Honourable Attorney General has
13 been served with what appears to
14 be an Order granting leave to
15 apply for judicial review as
16 well as a Notice of Originating
17 Motion in Cause 528 of 2008. We
18 would be grateful if you could
19 indicate your instructions in
20 respect to this matter as we
21 were left (following our meeting
22 of 19th November) with the
23 distinct impression that any
24 action would remain in abeyance
25 pending our discussions so as

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1 respect of the other Respondents took place at
2 about the same time.

4 The Letter of the 24th of November and 5 Subsequent Correspondence

6
7 On 24th November, the Deputy Solicitor
8 General, on behalf of the Attorney General,
9 wrote to Campbells:

10 "Further to the letter dated
11 12th November ... from the
12 Honourable Attorney General and
13 to the meeting of
14 19th November 2008 wherein we
15 agreed to confirm our
16 instructions in respect of the
17 matter at caption, we now write
18 on behalf of the Acting
19 Commissioner of Police to advise
20 you that we will not contest the
21 claim in the respect of the
22 unlawful arrest sought on behalf
23 of Justice Henderson.

24
25 "We are therefore amenable to

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1 not to unnecessarily aggravate
2 costs".

3
4 It should be noted that although the
5 letter said "on behalf of the Acting
6 Commissioner of Police ... we will not contest
7 the claim in respect of the unlawful arrest",
8 it did not in specific terms acknowledge that
9 misconduct in public office is not an
10 arrestable offence in the Cayman Islands.

11 Campbells wrote to the Deputy Solicitor
12 General on 25th November:

13 "We note that the Acting
14 Commissioner ... does not intend
15 to contest the unlawfulness of
16 the arrest Please will you
17 confirm that you are also
18 instructed on behalf of Special
19 Constables Bridger and Coy and
20 that they are also bound by the
21 Acting Commissioner's admission?

22
23 "Your final paragraph contains a
24 misunderstanding. We informed
25 you at our meeting on 19th

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1 November 2008 at the
 2 Attorney-General's Chambers that
 3 our client's application for
 4 leave to apply for judicial
 5 review had been filed, however
 6 we did not state that it would
 7 be postponed or withdrawn, or
 8 otherwise left in 'abeyance'.
 9 In fact, the application was
 10 submitted on [12th] November
 11 2008 and was dealt with on paper
 12 by Campbell J. in accordance
 13 with GCR Order 53 rule 3(3)."

Press Statement 4 December

16
 17 On 1st December, Campbells wrote to the
 18 Deputy Solicitor General enclosing a draft
 19 order for consideration.
 20 On 4 December, the Governor issued a press
 21 statement in the following terms:
 22 "Following the Judicial Review
 23 hearing ... it was important to
 24 consider carefully the way
 25 forward on the basis of

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1 authoritative legal advice.
 2 Given the Acting Police
 3 Commissioner's responsibilities
 4 for the investigative team we
 5 also had to give the new holder
 6 of that post, Mr. Smith, the
 7 chance to consider the
 8 matter....
 9
 10 "In the meantime we have already
 11 concluded that the first part of
 12 Operation Tempura [culminating]
 13 in the alleged unlawful entry
 14 into the Offices of Cayman Net
 15 News on the 3rd September 2007
 16 and other related matters ... must
 17 be concluded properly and with
 18 dispatch.
 19
 20 "We have to acknowledge that
 21 mistakes were made with respect
 22 to the Hon. Justice Henderson
 23 and, as already announced, the
 24 police decided not to appeal the
 25 judgment in the Judicial Review.

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1 However, I would like to remind
 2 everyone that [the] Judicial
 3 Review and subsequent ruling,
 4 setting aside search warrants,
 5 does not negate the fact that a
 6 considerable amount of exemplary
 7 investigative work has been
 8 carried [out] over the past year
 9 by the Investigative Team.
 10
 11 "Senior Investigating Officer
 12 Mr. Martin Bridger has assured
 13 me that during these
 14 investigations he has always
 15 endeavoured to act in good faith
 16 and I have always found him to
 17 have acted in a very
 18 professional manner. The
 19 actions that Mr. Bridger took in
 20 regard to the Hon. Mr. Justice
 21 Alexander Henderson were taken
 22 based partly on advice that he
 23 had received from independent
 24 legal counsel, which has now
 25 been questioned....

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1
 2 "I am committed to taking action
 3 where there is alleged
 4 corruption in the RCIPS. I wish
 5 to make it clear to those
 6 individuals who have
 7 demonstrated the courage in
 8 coming forward that the
 9 information they have provided
 10 will be dealt with in the
 11 strictest confidence.
 12
 13 "I have asked Mr. Smith to
 14 oversee the special
 15 investigation...."
 16
 17 It is to be noted that this press
 18 statement did not knowledge that the Applicant
 19 was arrested for an offence which was not an
 20 arrestable offence in the Cayman Islands.
 21 On 8th December, I sent a note to all
 22 parties in the two sets of proceedings for
 23 judicial review indicating in advance some of
 24 the matters I was likely to raise in the course
 25 of this hearing.

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1
2 **Unopposed Declarations and Consequential Orders**
3
4 What follows is taken from an Agreed Note
5 helpfully prepared for use by the Court. I
6 make it clear that the analysis referred to
7 below results from the Agreed Note and not any
8 examination of the issues by the Court.
9 The Agreed Note is in the following terms,
10 so far as material:
11 "16. The Respondents in Cause
12 528 of 2008 accept that the
13 decision to arrest the Applicant
14 made by Mr. Bridger on
15 22nd September 2008 ("the
16 Decision"), the actual arrest of
17 the Applicant by Mr. Coy on 24th
18 September 2008 ("the Arrest"),
19 and all actions consequent on
20 the Decision and the Arrest were
21 unlawful, for the following,
22 different, reasons:
23
24 (a) The search warrants in
25 Cause No. 464 of 2008 dated

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1 offence is defined in the
2 Police Law as "an offence
3 prescribed as such in the
4 First Schedule to the
5 Criminal Procedure Code
6 (2006 Revision)".
7
8 (c) A person may only be
9 arrested without a warrant
10 if the offence he is
11 suspected of is an
12 "arrestable" offence.
13
14 (d) The Applicant was
15 arrested on suspicion of
16 having committed the
17 offence of Misconduct in
18 Public Office. This
19 offence is a common law
20 offence. It appears
21 nowhere in the Cayman
22 Islands Penal Code (2006
23 Revision) and nowhere in
24 the First Schedule to the
25 Criminal Procedure Code.

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1 24th September 2008 were
2 quashed by orders of
3 *certiorari* made by Hon.
4 Cresswell J. (acting) on
5 29th October 2008, and he
6 also declared that the
7 entry of police officers
8 into the applicant's home
9 and office and robing room
10 on the same date and the
11 searches conducted at his
12 home, office and robing
13 room were unlawful.
14
15 (b) Statutory powers of
16 arrest without a warrant
17 are defined in subsections
18 24(4) and 36(a) of the
19 Police Law (2006 Revision)
20 and subsection 14(7) of the
21 Criminal Procedure Code
22 (2006 Revision). Each of
23 these provisions is
24 concerned with "arrestable"
25 offences. An arrestable

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1
2 (e) Subsection 2(a) of the
3 Penal Code provides
4 "Nothing in this Law shall
5 affect the liability, trial
6 or punishment of a person
7 for an offence against the
8 common law or any other law
9 in force in the Islands".
10 Therefore, a person may be
11 tried, convicted and
12 sentenced in the Cayman
13 Islands for a common law
14 offence.
15 (f) The common law offence
16 of "Misconduct in Public
17 Office" was and is a
18 misdemeanour and, at common
19 law, no offence of less
20 gravity than a felony may
21 subject an offender to
22 arrest without a warrant,
23 even at the hands of a
24 constable. There is only
25 one exception to this rule:

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1 a constable may arrest an
 2 offender who commits a
 3 common law misdemeanour in
 4 his presence (that is,
 5 within his sight and
 6 hearing) a circumstance
 7 that manifestly does not
 8 apply in this case.

9
 10 (g) In conclusion, the
 11 offence of Misconduct in
 12 Public Office is not an
 13 arrestable offence in these
 14 Islands without a warrant,
 15 either by statute or by
 16 common law.

17
 18 "17. Therefore, the decision to
 19 arrest the Applicant, the actual
 20 arrest of the Applicant, and all
 21 actions consequent thereon,
 22 including the detention of the
 23 Applicant on the day of the
 24 arrest, and on the day following
 25 the arrest, the taking of

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1
 2 "20. Against this background,
 3 the Court is invited to make the
 4 declarations and grant the
 5 prerogative orders set out in
 6 the agreed draft order. The
 7 declarations are not by consent,
 8 but both the Applicant and the
 9 Respondents to Cause 528 to 2008
 10 accept that the arrest of the
 11 Applicant was unlawful and the
 12 Respondents do not oppose the
 13 making of the declarations."

14
 15 The declarations and orders referred to
 16 are in these terms:
 17 "It is declared that:
 18 (a) the decision to arrest
 19 the Applicant taken by
 20 *inter alia* the First
 21 Respondent on or about the
 22 22nd of September 2008 (the
 23 Decision)
 24 (b) The execution of the
 25 Decision on 24th

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1 "identifying material", and the
 2 restrictions imposed upon the
 3 Applicant terms of bail, were
 4 unlawful.

5
 6 "18. The Respondents therefore
 7 accept that in the circumstances
 8 section 25 of the Police Law was
 9 contravened, and that, as the
 10 Applicant's custody was
 11 unlawful, there was no legal
 12 basis for taking identifying
 13 material from him. They accept
 14 that it must be returned, and in
 15 fact, have delivered all
 16 identifying material to the
 17 Applicant's attorneys, as
 18 requested in the draft order.

19
 20 "19. All parties [to Cause 528]
 21 therefore agree that the
 22 Applicant's arrest on 24th
 23 September 2008 was unlawful."

I read paragraph 20 as amended:

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1 September 2008 by the
 2 Second Respondent (the
 3 Arrest) together with
 4 (c) all actions consequent
 5 on the Arrest (the
 6 Consequent Actions)
 7 including the Applicant's
 8 detention, bail and bail
 9 conditions, the seizure of
 10 his government-owned mobile
 11 telephone, and the taking
 12 of identifying photographs,
 13 fingerprints, and DNA
 14 samples (the Identifying
 15 Material) were unlawful.

16 And it is ordered that:
 17 (1) Orders of *certiorari* shall
 18 issue in respect of the
 19 Decision, the Arrest and the
 20 Consequent Actions.
 21 (2) The Decision, the Arrest
 22 and the Consequent Actions be
 23 set aside."

And by consent it is ordered that:

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1 (3) the Identifying Material and
 2 any copies thereof, together
 3 with any results, samples or
 4 reports made or obtained in
 5 connection with it shall be
 6 delivered up to the Applicant by
 7 delivery to Campbells
 8 Attorneys-at-Law, fourth floor,
 9 Scotia Centre, Albert Panton
 10 Street, George Town, Grand
 11 Cayman forthwith."

12
 13 The Court was also invited by paragraph 21
 14 of the Note to give the following directions:

15 (a) That there shall be an
 16 inquiry as to damages in Cause
 17 58 of 2008.

18 (b) The inquiries as to damages
 19 in Causes 464 and 528 should be
 20 consolidated, and the new
 21 headings for the action be as
 22 set out in Paragraph 5 of the
 23 agreed order."

24 I make the declarations, grant the orders
 25

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1 and give the directions set out above.

2 In addition, the Respondents have agreed
 3 to provide a full indemnity in respect of the
 4 Applicant's costs of these proceedings to date,
 5 i.e. up to and including this hearing and the
 6 costs associated with it, and to make a
 7 contribution to his legal costs in Canada.

8
 9 How did it come about that Mr. Bridger and Mr. Coy
 10 purported to arrest the Applicant when it is now
 11 accepted that misconduct in public office is not an
 12 arrestable offence in the Cayman Islands without a
 13 warrant?

14
 15 No written explanation of how it came
 16 about that the Applicant was arrested (when
 17 misconduct in public office is not an
 18 arrestable offence in the Cayman Islands
 19 without a warrant) was to be found in the
 20 papers before the Court yesterday. Given the
 21 extreme seriousness of the consequences of the
 22 arrest so far as the Applicant was concerned,
 23 and the numerous failures set out in the
 24 judgment of the 29th of October, it might
 25 have been thought that this fundamental

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1 question would have been addressed in the
 2 correspondence.

3 Mr. Schofield, on behalf of the
 4 Respondents to Cause 528, told the Court on
 5 instructions yesterday that at the time of the
 6 arrest Mr. Bridger believed, on the basis of
 7 written advice from Mr. Polaine (1) that on the
 8 facts there was a prima facie case of
 9 misconduct in public office, and (2) that this
 10 offence was an arrestable offence within this
 11 jurisdiction. It is now accepted that the
 12 advice in relation to (2) was wrong.

13 Yesterday I asked Mr. Schofield whether
 14 the Respondents to Cause 528 accepted two
 15 propositions as follows:

16 (a) It is elementary that a
 17 police officer before arresting
 18 any citizen should satisfy
 19 himself that the suspected
 20 offence is an arrestable
 21 offence; and

22 (b) A police officer unfamiliar
 23 with the law of the Cayman
 24 Islands should, before arresting
 25 any citizen of the Cayman

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1 Islands, take advice from a
 2 lawyer qualified in the law of
 3 the Cayman Islands as to whether
 4 the suspected offence is an
 5 arrestable offence under the law
 6 of the Cayman Islands.

7
 8 Mr. Schofield took instructions and said
 9 that he was subject to a conflict of interest
 10 and that the Respondents needed to receive
 11 "their own advice".

12 The Court today has been handed a document
 13 by Mr. Schofield setting out Mr. Bridger's
 14 response in the following terms:

15 **"Question**

16 "It is elementary that a police
 17 officer before arresting any
 18 citizen should satisfy himself
 19 that the suspected offence is an
 20 arrestable offence. A police
 21 officer unfamiliar with the law
 22 of the Cayman Islands should
 23 before arresting any citizen of
 24 the Cayman Islands take advice
 25

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1 from a lawyer qualified in the
2 law of the Cayman Islands as to
3 whether the suspected offence is
4 an arrestable offence under the
5 laws of the Cayman Islands."

6
7 **"Response**

8
9 "From the moment Mr. Bridger
10 arrived on Island and took over
11 the Inquiry, he has continually
12 deferred to the Attorney General
13 on the matter of obtaining
14 independent legal advice.

15
16 "In the first instance this was
17 provided by Andre Mon Desir, an
18 individual who is familiar with
19 local laws.

20
21 "Following Mr. Mon Desir's
22 departure, efforts were made to
23 resource further Independent
24 Counsel within the Cayman
25 Islands. In the event,

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1 Independent Counsel from the
2 Cayman Islands was not
3 forthcoming and the services of
4 Mr. Martin Polaine [were]
5 obtained in writing by the
6 Strategic Oversight Group and
7 Mr. Bridger. They submitted Mr.
8 Polaine's CV to the Attorney
9 General who indicated in writing
10 that he had no objection to this
11 course.

12
13 "At every stage legal
14 clarification was obtained by
15 Mr. Bridger before taking any
16 action.

17
18 "Mr. Bridger specifically sought
19 legal advice from Mr. Polaine
20 on:

21 Whether Misconduct in
22 Public Office was an
23 offence in the Cayman
24 Islands
25

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1 Whether it was right and
2 proper to pursue the
3 matter, and

4
5 Whether it was an
6 arrestable offence in the
7 Cayman Islands.

8
9 "This advice was shared with
10 Assistant Commissioner Yates and
11 with the Strategic Oversight
12 Group.

13
14 "The advice and request for
15 advice was not shared with the
16 Attorney General.

17
18 "Mr. Bridger always wanted a
19 local Counsel but one could not
20 be identified. The Strategic
21 Oversight Group indicated that a
22 local Counsel could not be
23 found.

24
25 "Mr. Bridger did not become

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1 aware that there was an
2 alternative view as to whether
3 the offence of Misconduct in a
4 Public Office was arrestable in
5 the Cayman Islands until the
6 Attorney Generals advice of 12th
7 November 2008. Therefore at the
8 time of the arrest through and
9 beyond the 1st judicial review
10 proceedings Mr. Bridger
11 genuinely believed on legal
12 advice the offence was
13 arrestable."

14
15 The final paragraph was subsequently
16 amended to read:

17 "Mr. Bridger did become aware
18 that there was an alternative
19 view as to whether the offence
20 of Misconduct in a Public Office
21 was arrestable in the Cayman
22 Islands, but this was not the
23 view of his legal advisers at
24 the time and he did not accept
25 this view until the Attorney

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1 General's advice of
2 12th November 2008. Therefore
3 at the time of the arrest
4 through and beyond the 1st
5 judicial review proceedings
6 Mr. Bridger genuinely believed
7 on legal advice the offence was
8 arrestable."

9
10 It would be inappropriate for me to
11 comment further at this stage on the matters
12 recorded above in view of the issues yet to be
13 resolved in relation to the inquiries as to
14 damages.

15 I was informed by the Note that the
16 parties have entered into serious without
17 prejudice discussions conducted by the Attorney
18 personally in order to attempt to settle the
19 financial aspects of this matter. Nothing in
20 this judgment is intended to discourage an
21 early settlement. On the contrary, it is most
22 regrettable that no settlement has yet been
23 achieved despite a statement in the note to the
24 effect "it is hoped that figures may be agreed,
25 at least in principle, before Christmas".

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1 The parties have placed before the Court
2 proposed directions leading to the inquiry as
3 to damages being listed on the first open date
4 on or after 20 April 2009 with an estimate of
5 three days. I am of the opinion that the
6 outstanding issues as to the quantum of damages
7 need to be resolved as soon as practicable for
8 the reasons set out below. I will at the end
9 of this judgment discuss with the parties a far
10 tighter timetable.

11 The extraordinary failures on the part of
12 Mr. Bridger and his advisers, reflected in the
13 judgment of the 29th of October and this
14 judgment, inevitably caused very serious damage
15 and distress to the Applicant and his family.
16 The Applicant has suffered from unlawful
17 conduct by the police in relation to both his
18 arrest and the applications for the search
19 warrants.

20 The chronology set out above shows most
21 regrettable delay on the part of the RCIPS in
22 admitting that the arrest was unlawful. As
23 damages remain to be assessed, it would be
24 inappropriate for me to comment further at this
25 stage as the Applicant's position -- save to

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1 point out that the Applicant is a serving judge
2 sitting in these courts and it is
3 unsatisfactory that at the same time there
4 should be unresolved litigation between the
5 Applicant and the Respondents.

6 In addition, the extraordinarily failures
7 referred to above will have had a wider impact.
8 A strong independent judiciary is central to
9 the future of the Cayman Islands. It is also
10 of importance that the police should act fairly
11 and competently in relation to all citizens.
12 An important step in repairing the damage to
13 the Applicant and his family and to the wider
14 interests of these Islands requires an early
15 determination of all outstanding issues in
16 these causes. If there is no settlement, to
17 leave the determination of the outstanding
18 issues to April or thereafter is in my opinion
19 unacceptable.

20 I add a footnote to my judgment of the
21 29th of October. At page 110 of that
22 judgment the following appears under the
23 heading "Admitted or partly admitted failures
24 to put material facts and matters before the
25 Respondent and/or admitted misrepresentations

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1 of material facts and matters and/or
2 admitted errors."

3 "2. Paragraph 3 of the
4 Information set out the material
5 circumstances of the
6 allegations. At sub-paragraph
7 (1) it was stated:

8 • HENDERSON informed EVANS
9 that the letters possibly
10 constitute a criminal
11 offence of contempt.
12 However, the letters have
13 been examined by
14 independent legal council
15 (sic) and "do not relate to
16 any 'live' proceedings" and
17 therefore, are not capable
18 of amounting to contempt no
19 matter how offensive they
20 may appear.

21 "The 'independent counsel' (I
22 was told) was Mr. Mon Desir.

23 "Mr. Purnell accepted that
24
25

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1 sub-paragraph (l) as a
 2 proposition of law was
 3 inaccurate "because of the
 4 questionable existence of the
 5 form of contempt known as
 6 scandalising the Court".
 7
 8 I add the following. If such
 9 advice as alleged was given it
 10 failed to have any regard to
 11 among other matters
 12 (a) section 27(1) of the
 13 Grand Court Law (2008
 14 Revision).
 15 (b) the decision of the
 16 Privy Council in Ahnee v.
 17 Director of Public
 18 Prosecutions [1999] 2 AC
 19 294 supra.
 20
 21 and
 22 (c) what is set out in
 23 Arlidge, Eady & Smith on
 24 Contempt 3rd Edition 2005
 25 paragraphs 5-204 to 5-274."

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1
 2 The transcript for the 17th of October
 3 records the following:
 4 "THE COURT: ... Who was the
 5 independent legal counsel
 6 referred to at page five of the
 7 information on oath?
 8 MR. BARRIE: My Lord, my
 9 understanding is it was a
 10 Mr. Andre Mon Desir.... my
 11 understanding is that he held
 12 that position from late 2007
 13 until about August 2008 when Mr.
 14 Polaine took over that role....
 15 my instructions are that in fact
 16 he was special counsel to the
 17 investigating team, but he may
 18 have had a dual role...."

20 On the 30th of October, Murray &
 21 Westerborg, Attorneys-at-Law, wrote to the
 22 editor of the Cayman Net News, with a copy to
 23 me which I did not receive, a copy to Mr. Ramon
 24 Alberga QC, a copy to Mr. Christopher Russell,
 25 and a copy to Mr. Nicholas Purnell QC, in these

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1 terms:
 2 "We are instructed by the above
 3 named Mr. Andre Mon Desir, Esq.
 4
 5 "In light of various reports
 6 which have appeared in your
 7 newspaper in which Mr. Mon Desir
 8 has been named, we have been
 9 instructed to issue the
 10 following for the purpose of
 11 clarification.
 12
 13 "Mr. Mon Desir acted as special
 14 independent counsel appointed to
 15 assist the investigating team in
 16 relation to Operation Tempura
 17 from November 27th [2007]
 18 until May 17th 2008 at which
 19 time his appointment formally
 20 came to an end. From that date,
 21 May 17th 2008, Mr. Mon Desir
 22 ceased to be involved with the
 23 team and its investigations.
 24 Mr. Mon Desir has not advised on
 25 nor been involved with the

Tuesday, December 23, 2008 (c.a.r.)

1 matters which formed the basis
 2 of the Grand Court matter Cause
 3 No. 464 of 2008."
 4

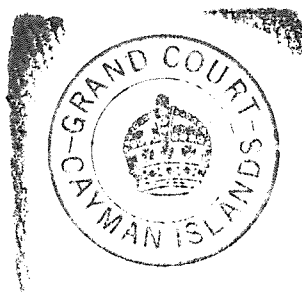
5 If what I was told in October was
 6 incorrect, I should have been so informed at
 7 the time, in the interests of fairness to Mr.
 8 Mon Desir, in the interests of accuracy and in
 9 the interests of ensuring that all material
 10 matters were placed before the Court.
 11 Yesterday Mr. Schofield told me that the
 12 independent counsel was not Mr. Mon Desir but
 13 Mr. Polaine.

14 The qualifications of the person alleged
 15 to have given the advice in question were
 16 highly material to the issues raised in the
 17 first judicial review hearing. Had the Court
 18 been informed that the relevant advice was from
 19 Mr. Polaine, the Applicant's submissions would
 20 have been to a different effect and the
 21 relevant part of the judgment would probably
 22 have been to a different effect. I express my
 23 **profound disquiet** that the Court was misled as
 24 to material information as above in relation to
 25 Cause 464.

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1 I direct that a copy of this judgment be
2 sent to Mr. Mon Desir so that he may understand
3 how it was that page 102 of my judgment
4 appeared as set out above.
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11 **The Honourable Sir Peter Cresswell**
12 **Acting Judge of the Grand Court**
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Tuesday, December 23, 2008 (c.a.r.)