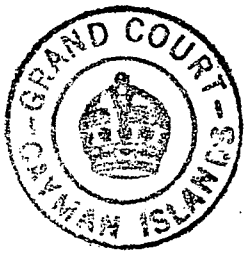

IN OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 464 OF 2008

BETWEEN: THE QUEEN

AND: CARSON K. EBANKS MBE JP RESPONDENT

EX PARTE THE HON. JUSTICE ALEXANDER HENDERSON

APPLICANT

ADDITIONAL PARTY:-

(1) THE ACTING COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE

SIR PETER CRESSWELL
(Acting Judge).

APPEARANCES:

Mr. Ramon Alberga QC instructed by Mr. Sean McCann and Ms. Kirsten Houghton Attorneys of Campbells for the applicant
Mr. Christopher Russell Attorney of Ogier for Mr. Carson K. Ebanks MBE, JP.
Mr. Nicholas Purnell QC instructed by Mr. Steven Barrie Attorney of Nelson & Co for the Royal Cayman Islands Police Service

JUDGMENT

On 16 October 2008 I was appointed by the Governor Stuart Jack CVO to be an Acting Judge of the Grand Court of the Cayman Islands with effect from 16 October 2008 until completion of this matter -Cause 464 of 2008.

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(1) THE APPLICATION

1. The applicant is a justice of the Grand Court, and has held that office since 2003.

On 24 September 2008, at about 7.06 am, the applicant was arrested in the car park outside his home ('the Home"). It was alleged that 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 the Home. The applicant was then taken to the Police Station in George Town.

At about 9:03am, Mr. Stephen Worthington and Mr. Timothy Thorne special constables of the RCIPS attended the Home with a search warrant which had been issued by the respondent at about 8:45am 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 pm Mr. Worthington and Mr. Thorne, accompanied by 3 other men all of whom were said to be special constables of the RCIPS attended the applicant's personal offices at 4th Floor, Kirk House, George Town with a search warrant relating to the applicant's offices, which had been issued by the respondent again at about 8:45am that morning.

Miss 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 applicant applies for the following orders and relief, namely:

1. Orders of certiorari in respect of two search warrants issued by the respondent at the request of Mr. Martin Bridger, special constable, Royal Cayman Islands Police Service, on 24 September 2008, ("the warrants").

2. Declarations that the entry of police officers, whether named in the warrants or otherwise, into the applicant's home ... ("the Home"), and the applicant's office and robing room .... ("Kirk House") and the searches conducted at the Home and Kirk House on 24 September 2008 were unlawful.

3. Delivery up of all items seized from the Home and Kirk House

4. Damages, including aggravated damages, for trespass to land and goods, and/or damages for unlawful interference with goods.

5. Further or other relief.

(2) THE GRANT OF LEAVE

On 7 October the Hon. Mr. Justice Campbell granted leave to apply for judicial review and directed that the applicant serve the Notice of Motion and accompanying documents on

(a) the Attorney General of the Cayman Islands and

(b) The Acting Commissioner of the Royal Cayman Islands Police Service ("the RCIPS") ("the additional parties").

(3) CASE MANAGEMENT, THE HEARING AND THE ISSUES

FRIDAY 17 OCTOBER

On 16 October I gave directions in advance of the hearing fixed for the following day.

At the hearing on 17 October the RCIPS handed over to the applicant's lawyers an unredacted version of the Information on Oath. All that the applicant had seen prior to the withdrawal of a claim to public interest immunity ("P11") on 17 October was the first page and part of the second page up until the word "propriety". Thus between 24 September and 17

October the applicant was denied sight of the key parts of the material relied upon in support of the applications for search warrants. This in my opinion was wrong.

At a hearing on 17 October the broad issues raised by the application for judicial review were set out in a document prepared by the applicant's legal advisers as follows:-

1) Do the evidence and argument placed before the respondent demonstrate on an objective assessment that in fact or according to reasonable suspicion the applicant has committed the common law offence of misconduct in public office as particularised in the Information on Oath?
2) Do the evidence and argument placed before the respondent demonstrate on an objective assessment that in fact or according to reasonable suspicion that recovery of the objects described in the search warrants was necessary to the conduct of the investigation then taking place?
3) In any event, should the search warrants be set aside because of a failure by the applicants for the two warrants to disclose all material facts on the ex parte application?
4) In any event, should the warrants be set aside because they do not comply with the Criminal Procedure Code and

purport to have been issued by the court rather than by the respondent.

I discussed the question of appropriate case management with the parties and with their agreement directed that Issue 3 should be heard as a preliminary issue.

MONDAY 20 OCTOBER

An application by RCIPS for permission to appeal was abandoned.

TUESDAY 21 OCTOBER AND WEDNESDAY 22 OCTOBER

Mr. Nicholas Purnell QC appeared for RCIPS for the first time on Tuesday 21 October. He submitted that (despite the fact that the parties had agreed that Issue 3 should be heard as a preliminary issue) it was more appropriate to hear all the issues at the same time. I accepted this submission and gave further directions to this end. In the light of the state of the case and the evidence it seemed to me that it was sensible to hear all issues together. The list of issues was revised in light of Mr. Purnell's submissions.

The RCIPS had served evidence in the afternoon of 20 October.

The court was provided with 2 versions of the first affidavit of Mr. Bridger one extending to 48 paragraphs plus exhibits, the other (in the form provided to the applicant) extending to 29 paragraphs and one

exhibit. A claim to public interest immunity was made in relation to paragraphs 30-48 of the first version and related exhibits.

On 21 October notice of an ex parte application to withhold material on the ground of PII was given in relation to paragraphs 30-48 and related exhibits.

A considerable amount of Court time was taken up on 21 and 22 October in relation to the claim to PII. In the event on 23 October the parties signed a Note of Agreement in the following terms.

"1. The applicant does not require the Court to consider the additional party's claim for PII in relation to the undisclosed portion of the additional material.

2. The penultimate sentence of paragraph 29 of [Mr. Bridger's first] affidavit will be deleted.

3. The affidavit [of 48 paragraphs with additional] exhibits will be removed from the judge's papers, sealed and kept in a confidential file in the Court Vault marked "not to be opened without [my] leave. In addition, the note handed in by Mr. Nicholas Purnell QC on 22 October 2008 is also to be placed in the same envelope.

4. Save for [an extract from paragraph 30], the Court shall not refer to or make any use of the additional material in reaching its decision concerning the applicant's application for judicial review, and shall

record that it has not done so in the ruling or judgment of the Court."

A recital to the Agreement recorded (correctly) that it had been arrived at between the parties and that it had not been approved or acceded to by the Court.

I record that in reaching my decision herein I have not referred to or made any use of the additional material now in the Vault.

THURSDAY 23 AND FRIDAY 24 OCTOBER 2008

The hearing of the application took place on Thursday 23 and Friday 24 October. The parties confirmed that the evidence was complete, that the issues were identified and that each side understood the other's case. I offered to receive any further written submissions that either side wished to put in the following Monday, but both sides said that they did not want to add to their oral submissions.

The issues in their final form were as follows:-

1) Was it Wednesbury unreasonable for the respondent on the evidence and argument placed before him to
   be satisfied that in fact or according to reasonable suspicion the applicant had committed the common law offence of misconduct in public office as particularised in the Information on oath?
2) Was it Wednesbury unreasonable for the respondent on the

evidence and argument placed before him to be satisfied that in fact or according to reasonable suspicion that recovery of the objects described in the search warrants was necessary to the conduct of the investigation then taking place?

3(a) Was there a failure on the part of the officers applying for the search warrants to put all requisite information, materials, submissions and guidance before the respondent and/or was there a misrepresentation of any material matters?

(b) If so, was that failure in bad faith, deliberate or inadvertent?

(c) In any event, should the search warrants be set aside?

4) In any event, should the Warrants be set aside because

(a) They are not in the form prescribed by section 28(1) of the Criminal Procedure Code and the second schedule thereto?

(b) They purport to have been issued by a court rather than by a justice of the peace?

(c) They do not bear the seal of the Court referred to?

By consent of all parties it was agreed that the Attorney General should cease to be an additional party. Mr. Russell for the respondent adopted a neutral position throughout.

(4) THE EVIDENCE BEFORE THE COURT

The evidence before the Court is listed in a document prepared by the parties to which I refer.

(5) CHRONOLOGY

The parties have helpfully provided the following chronology

22 September 2008

11.30 AM SIO Bridger informed the Governor of the proposed arrest of the applicant.

24 September 2008

7:06 AM The applicant was arrested in the car park outside his home by S.C. Coy. A charge of misconduct in public office contrary to common law was read out. The applicant refused to consent to a search of his home and office.

8:15-8:45 AM At the offices of Metropolitan Police, above Foster's Food Court, George Town.

The respondent met with SIO Martin Bridger, S.C. Stephen de Burgh-Thomas and a lawyer Mr. Martin Polaine, Special Adviser to the Metropolitan Police Inquiry Team), in the foyer/office.

SIO Bridger explained to the respondent the nature and purpose of the application.

Application was made to the respondent in a separate office for search warrants by S.C. Stephen de Burgh-Thomas in the presence of Mr. Polaine, but in the absence of SIO Bridger.

The information was sworn before the respondent by S.C. Stephen de Burgh-Thomas in the presence of Mr. Polaine.

Search warrants were signed by the respondent.

8:35 AM	The Chief Justice arrived at George Town Central Police Station.
8:43 AM	The Chief Justice departed from George Town Central Police Station.
9:03 AM	Investigators returned to the Home with a search warrant and commenced search. The officers conducting the search were S.C. Worthington, S.C. Thorne, S.C. Judge, S.C. Rosada, S.C. de Burgh-Thomas, S.C. Walkington, P.C. Gravitts.
9.05 AM	The Governor and SIO Bridger addressed the Chief Justice and court staff at the Court House on the applicant's arrest.
10 AM – Noon	The applicant was fingerprinted, photographed and a DNA sample was taken.

12:42 PM	Investigators began an interview with applicant.
2:25 PM	The search of the Home ended.
3:02 PM	A search of Kirk House began. The officers conducting the search were S.C. Worthington, S.C. Thorne, S.C. Kemp, S.C. Judge.
3:20 PM	Interview ended, to be continued on 25 September 2008.
4:10 PM	The search of office ended.
5:50 PM	The applicant released on police bail, to return on 25 September 2008.

25 September 2008

1:23 PM	Interview began.
4:29 PM	Interview ended.
5:20 PM	Applicant released on police bail.

(6) THE NOTE, SUPPLEMENTAL NOTE AND FURTHER SUPPLEMENTAL NOTES PROVIDED BY THE RESPONDENT

The respondent helpfully provided a Note setting out his recollection of

the application made to him on 24 September, a Supplemental Note and 2 Further Supplemental Notes.

The Note reads:-

1. This Note is made to provide the Court with my recollection of the application to me on 24th September 2008, for the issue of search warrants authorising the search of the office and personal premises of the Honourable Justice Alexander Henderson, and to take possession of certain specified articles…

2. The contents of this Note are based on the best of my recollection. I retained no documents that were put before me, nor did I retain copies.

3. On the morning of 24th September 2008, by arrangement, I attended the offices of the Metropolitan Police in George Town where I met a Special Constable (who introduced himself as Officer Stephen de Burgh-Thomas). He escorted me upstairs to an entrance/foyer area where I was met by Senior Investigating Officer Bridger, who I knew to be conducting investigations into matters concerning the Royal Cayman Islands Police, and another individual, introduced to me as a lawyer, whose name I do not recall.

4. Whilst in the foyer area I was told by SIO Bridger in the presence of Officer de Burgh-Thomas, and the lawyer, that Judge Henderson

had been arrested and warrants were required to search his home and office premises. He told me that the Judge had refused permission for such a search. I cannot now recall the precise words used by SIO Bridger, but to the best of my recollection, SIO Bridger told me that the search of Judge Henderson's premises was required as part of an ongoing investigation as they had reason to believe that Judge Henderson had information or evidence relevant to a charge of misconduct by him in public office. SIO Bridger told me that the Judge had requested John Evans, an employee of Cayman Net News ("CNN"), to find out who had been writing letters, published by the Cayman Net Newspaper, which had been critical of the judiciary. From what SIO Bridger told me I understood that Judge Henderson had interfered in the investigation by refusing the search and had used his position as a judge and his relationship with John Evans which had contributed to John Evans going into the CNN offices without authority, or words to that effect. During this conversation the only persons present were myself, SIO Bridger, the lawyer and Officer de Burgh-Thomas. Although I could see other personnel in other areas of the building, as far as I am aware, they did not overhear what SIO Bridger said to me. (emphasis added)

5. SIO Bridger then told me that Officer de Burgh-Thomas would take me into a separate room to swear the Information, on the basis of which the warrants were requested.

6. Officer de Burgh-Thomas, the lawyer and I went into an adjoining room. SIO Bridger did not accompany us into the adjoining room.

Officer de Burgh-Thomas invited me to sit down and informed me that he was going to swear the Information…
Officer de Burgh-Thomas took a Bible in his hand and swore an oath as to the accuracy of the Information. I was then asked to read through the Information, which I did, carefully.

7. I cannot now recall the detail of the contents of the Information. I do, however, recall it contained a reference to John Evans, and that Judge Henderson had been charged with misconduct in public office, and that it basically reflected what SIO Bridger had already told me.

8. I asked a few questions in relation to the Information which I cannot now recall, save that I do recall asking the reason for what appeared to be a duplication of a few words in the text. I was told this was an error and that it would be corrected. I now notice… that the first paragraph of the Information states that it is made on oath before me on 23rd September 2008. If this is a copy of what was shown to me on 24th September 2008 during the Application, I did not notice the incorrect date at the time.

9. I was then handed the search warrants to sign. I read them through and noticed that the search warrants referred to "the Court", rather than to me as a Justice of the Peace, and I enquired whether that should be struck out, and changed, but the lawyer I have referred to above, said that it could remain. I believe he told me I was an "agent" of the Court, or words to that effect.

10. I do not recall any information, explanation or material being put before me, or submissions being made to me, other than as I have set out above.

11. After reading the Information, and in reliance on that Information and what I was told by SIO Bridger and the lawyer as set out above, I was satisfied that there was a reasonable suspicion that Judge Henderson had committed the offence of misconduct in public office, and I was satisfied that the items listed in the search warrants appeared to be essential to the inquiry into that offence. On this basis, I was satisfied that it was appropriate for me to sign the search warrants in the form presented to me. I did not give any reasons for my decision that I was so satisfied. (emphasis added)

12. I cannot recall with certainty but I believe I signed three documents - the two warrants that were presented relating to Judge Henderson's home and offices, and the sworn Information.

13. The only note I made regarding the Application was an entry in my record book which I use to record any action I have taken as a Justice of the Peace. I made a record as follows "24/09/08 signed a search warrant for the offices of Justice Henderson and one for his home ..... At the request of the investigating officers of the metropolitan police force Sgt. Stephen de Burgh-Thomas, who swore a statement and Martin Bridger"...

14. I understand, from the papers served on me in these judicial review proceedings, that complaint is made on behalf of the Applicant that

I may not have been shown a previous judgment or decision by the Chief Justice refusing search warrants concerning Operation Tempura. I am quite certain that no mention was made to me of this judgment and decision during the Application to me on 24th September 2008; further, at that time I was not aware of any such judgment and decision.

15. The Application commenced at about 8:15am and ended at about 8:45am on 24th September 2008.

The Supplemental Note reads:-.

...I received a telephone call whilst still at my home, on the morning of 24th September 2008 at approximately 7:30am – 7:45am. In response to this telephone call I drove directly to the Metropolitan Police offices and arrived at about 8.15am. I was aware that I was to be asked to issue a search warrant, but I did not know for whose premises it would relate.

...I can only speak from my own experience; this is the first and only time I have been asked to attend the police offices for this purpose. Every other time I have heard an application for a search warrant it has been at my own office or at my home.

...I have now had an opportunity to re-read the Information in full, and to the best of my recollection, I was not shown any of these interviews and statements by the officers making the Application, nor was it recommended to me that I should. It may be that I was informed that I could read them if I so desired, but I cannot now recall whether I was so

informed. Had I been told or advised that I should read them I would have done so.

I have been a Justice of the Peace since 1998, and throughout that period I would estimate, without having checked my records, that I have issued, on average, about five search warrants a year. I have never sat in any Court in my capacity as a Justice of the Peace. I am not a qualified lawyer, and I am dependent on those applying to me for the issue of search warrants, to give me whatever information, explanation, guidance and material is appropriate to the application.

...there is no training manual for lay persons holding the office of Justice of the Peace. If such a manual or text exists, I have never been provided with a copy. I have received Guidance Notes issued to lay persons who hold the position of Justice of the Peace. None of the Guideline material I have been provided with contains guidance relevant to the issuing of search warrants.

I have also from time to time received invitations to attend "workshops" organised for Justices of the Peace, conducted by a Magistrate, which have included training and guidance on the signing of warrants. Due to my heavy commitments as a holder of a senior Government office, I have not been able to attend to date.

I would like to clarify that the area at the top of the stairs in the Metropolitan Police Offices where I had the conversation with SIO Bridger, in the presence of a lawyer and Officer de Burgh-Thomas ...was an open plan area, which I took to be a foyer, but it could equally well have been an open plan office.

The First Further Supplemental Note reads:-

... I have read the Affidavits served in these proceedings on behalf of the Acting Commissioner of Police. Insofar as these relate to me, and insofar as they add further detail to the events before me on 24 September 2008 when the application for search warrants were made, I do not specifically recollect these further details, but it may well be the case that they are correct. There is only one matter which I disagree: Mr. de Burgh Thomas says ... that I remarked that I signed a lot of warrants and could not remember them unless I made a note. I did not in fact say this; what I said was that I did a lot of JP work and that I noted this in my record book so as to be able to remember it. I do not think it would be right to say that I issue a lot of warrants; ...I have issued about 5 a year.

The Second Further Supplemental Note addresses particular parts of the affidavits of Mr. Donovan Ebanks, Mr. Bridger (first) and Mr. Stephen de Burgh-Thomas. I have taken full account of the contents of this further note.

(7) THE INFORMATION ON OATH

The information on oath was in the following terms:-

INFORMATION ON OATH

THE INFORMATION and complaint of Special Constable Stephen de Burgh-THOMAS [(Detective Constable Steven WORTHINGTON, Metropolitan Police Service, UK)] Special Constable, Royal Cayman Islands Police Force, in the Islands of Grand Cayman, Cayman Islands, made on oath before me, Carson EBANKS MBE, of the Cayman Islands and one of Her Majesty's Justices of the Peace in and for the said Cayman Islands, this 23rd day of September, in the year of our Lord Two Thousand and Eight who saith that:

1. I am [Detective Constable in Her Majesty's Metropolitan Police Service [(UK)] a Special Constable in the Royal Cayman Islands Police Force by virtue of my appointment as such on 26th day of March 2008 under 74 of the Police Law (2006 Revision) of the laws of the Cayman Islands and I am duly authorised pursuant to section 78(1) of the said law to swear this Information on Oath in these premises.
2. It is alleged that, contrary Common Law, Justice Alexander HENDERSON, between 30th June 2007 and 4th September 2007, being a holder of a public office, did wilfully, and without reasonable excuse or justification, misconduct himself, in that he did a series of acts and made a series of omissions calculated to injure the public interest, namely:

- informing John EVANS that he was considering whether letters published by Cayman Net News (CNN) amounted to contempt of court when he knew, or had reason to believe, that the content of such letters was not capable of so amounting and that, even if they did, the alleged contempt was not in the face of the court and would require investigation by the police at the request of the Attorney General;
- improperly using the influence of his position as a member of the judiciary;
- requesting the said John EVANS to ascertain information which he knew, or had reason to believe, would amount to a breach of trust and/or breach of contract by the said John EVANS as an employee of the said CNN;
- failing to have any/any proper regard to the risk of John EVANS being accused of a criminal offence (burglary);
- in so requesting the said John EVANS, having no, or insufficient, regard to the risk that 'journalistic material' might be obtained and that the right to a personal life by Desmond SEALES might be breached;
- failing to have any, or any proper, regard to the position, rights and interests of the said Desmond SEALES;
- risking the right of others (unknown to him) to a personal life;
- seeking to conduct an investigation, thereby exposing the judiciary of the Cayman Islands to the allegation of partiality and lack of propriety.

3. The material circumstances of the allegations are as follows:

a) On 5th June 2007 the first of a series of letters and articles appeared in Cayman Net News substantially criticising the judiciary. On 3rd July 2007 the Chief Justice received a memorandum from Justice HENDERSON drawing his attention to a letter published in Cayman Net News that day entitled 'There's room for legal aid abuse' which identifies allegations of legal aid abuse asking 'Where is the Chief Justice in all this?' It stated that the judiciary lacks leadership and administration.

b) On 11th August 2007 Mr. Lyndon MARTIN, an employee of Cayman Net News, a national newspaper, met with Deputy Commissioner Rudolph DIXON and made a number of very serious allegations against Deputy Commissioner Anthony ENNIS. [Statement Dixon & Interview Martin]

c) Mr. MARTIN alleged that Deputy Commissioner ENNIS, over a period of two years, had systematically leaked sensitive and confidential police information to the Editor in Chief of Cayman Net News, Mr. Desmond SEALES, potentially compromising ongoing police operations and thereby endangering officers' lives. [Statement Dixon & Interview Martin]

d) It is contended that in the days following 13th August 2007 Commissioner KERNOHAN takes both strategic and tactical control of the operation. He did refer the allegations for independent investigation on 28th August 2007. After this day he was involved in the chain of events which led to the

unlawful trespass on two occasions at the premises of CNN resulting in a charge of burglary in respect of MARTIN.

e) On 13th August Commissioner KERNOHAN directed Deputy Commissioner DIXON to establish from Mr. MARTIN whether he could provide any intelligence or supportive information or evidence of his allegation and whether he was prepared to come forward as a witness and provide evidence. [Statement Kernohan & Statement Dixon]

f) On 14th August 2007 Deputy Commissioner DIXON informed Commissioner KERNOHAN that Mr. MARTIN was prepared to provide documentary evidence of his allegations and also a statement but had stated that he would not provide open testimony and wished to remain anonymous. [Statement Dixon]

g) Subsequently on 23rd August 2007 Commissioner KERNOHAN personally met with Mr. John EVANS. EVANS is a journalist from Cayman Net News. Mr. Lyndon MARTIN suggested EVANS as a person able to corroborate his allegations. The meeting took place as a result of Mr. EVANS telephoning Commissioner KERNOHAN. [Statement Kernohan]

h) EVANS has since provided a series of witness statements in relation to his involvement and knowledge of events leading up to and including the unlawful entry to CNN. He confirms that Desmond SEALES is the 'publisher, editor in chief and

owner of the newspaper and that Lyndon MARTIN had joined the newspaper after his arrival. He mentions two separate 'requests' made to him to retrieve documents, one in relation to possible communication between the owner of CNN, Desmond SEALES, and Deputy Commissioner of Police ENNIS, the other a request made by Justice Alexander HENDERSON, who he states:

- Had asked me to look for some letters that had been published by Net News attacking the judiciary, specifically the Chief Justice. Judge Henderson had asked me to identify the source of the letters and their authenticity. Judge Henderson was not aware of the circumstance of me trying to obtain those letters. I am a good friend socially of Judge Alex Henderson, one of the Grand Court Judges. (Statement EVANS dated 8th October 2007)

- Judge Henderson asked me to talk to someone in the office, and ask if they could be a little more careful about the letters. More letters were published and Mr Henderson phoned me and asked if [I could speak] to someone to ask them to back off a bit. I decided that if I could find the box file in Desmond's office I may be able to establish where the letters had originated. (Statement EVANS dated 8th October 2007)

- Mr Henderson told me he was considering if the letters were contempt, and if there were sufficient

grounds to take legal action against the newspaper. (Statement EVANS dated 8th October 2007)

- Judge Henderson contacted me shortly afterwards and said you, meaning Cayman Net News, have to be careful because it is heading towards areas of contempt. Judge Henderson contacted me again by phone [in] the office around the 25th July 2007after two more letters appeared on the 20th July 2007 ...[produces letters as exhibit][1]. He just pointed out two more letters had been published and asked if we could be careful about the sources of the letters. He politely asked me to talk to the newspaper and also requested if I could find out where the letters had come from... (Statement EVANS dated 1st November 2007)

- ...sure at some stage Judge Henderson mentioned the Chief Justice was looking at whether the newspaper had exceeded 'fair comment' and was heading towards contempt. (Statement EVANS dated 1st November2007)

- If I had have identified the source by searching Mr. Seales office by finding the box file, this would not have been revealed to Judge Henderson or the Chief Justice. The documents as I have previously stated would have been handed to the police (Statement EVANS dated 1st November 2007)

- I have not seen Judge Alex Henderson for several weeks, and I am now aware that there is a separate police investigation. One of my roles now at Cayman Net News is to keep an eye out to see if any more letters materialise, although I think the judiciary may have already identified the source. I have a hunch that the letter writer has been identified. (Statement EVANS dated 1st November 2007)

- I did not have any concerns that I was asked to make enquiries on behalf of Judge Henderson unofficially.... (Statement EVANS dated 1st November 2007)

(i) Detective Chief Superintendent John JONES has also made a statement with regard to his knowledge of the events and his interaction with EVANS. He states that:

- He (EVANS) also advised me that he had been tasked to search for information relevant to the Chief Justice but was unwilling to provide me with details of the person who had tasked. I gained the impression that it had not been a police tasking. (Statement JONES dated 24th October 2007)

(j) Desmond SEALES has provided a statement dated 16 March 2008, confirming that he is the owner and Editor-in-Chief CNN. He confirms that nobody has permission to access his office or desk at any time to search for items.

(k) The offending letters that were published over a period of time by CNN fall broadly into two parts:

- The reporting of Privy Council judgements and their implications
- Letters criticising the judiciary on aspects of sentencing, transparency in appointments and administration

(l) HENDERSON informed EVANS that the letters possibly constitute a criminal offence of contempt. However, the letters have been examined by independent legal council (sic) and do not relate to any 'live' proceedings and therefore, are not capable of amounting to contempt, no matter how offensive they may appear.

(m) To amount to contempt under the Penal Code 2007, it must relate to on-going judicial proceedings, which would include under section 111(i) committing an act of 'intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,..' This is clearly not the case in respect of the letters criticising the judiciary or the Chief Justice. It is therefore hard to conclude that letters published in a national newspaper criticising the judiciary would in themselves amount to an offence of contempt.

(n) Justice HENDERSON remarks that the publication of the letters amounts to contempt. It is not clear on what basis he

asserts that publishing letters criticising the judiciary would amount to contempt. Such a comment by Justice HENDERSON could be construed as a 'threat' to secure the material/information he seeks particularly as he holds high office.

(o) On his own admission, Justice Henderson has asked Mr Evans to provide him with information as to the true identity of the letter writers. Given that Justice Henderson suspected that the letters were not written by the names that appeared in the Net News, he was not asking for details appearing in a public document, as he suggests, but rather for Mr Evans to provide him with other information which, if it existed, was not in the public domain, but was held by CNN. He was, in effect, inducing Mr Evans to breach his contract with his employer by providing information to a third party in circumstances in which such disclosure was not authorised by the employer.

(p) The 'unofficial' or informal request to EVANS to ascertain the identity of the authors and secure the letters is of particular concern. Such conduct would no doubt amount to a breach of contract by EVANS.

(q) In order to ascertain the involvement of Justice HENDERSON, and to obtain his account, he was invited to avail himself for a witness interview by the independent enquiry team on five occasions, but declined each time.

(r) The legitimacy of Justice HENDERSON's request can further

be gauged against the fact that he did not approach Desmond SEALES, the Editor in Chief of CNN, directly in order to secure the information sought. Had the request been an honest one, this would have been the most appropriate course of action.

(s) The evidence presently available, it is submitted, tends to show that Justice Henderson was in breach of his duties of impartiality, propriety, and integrity in the following ways:

- He requested John EVANS to ascertain information which he knew would amount to a breach of trust/breach of contract by John Evans as an employee of CNN;
- In so using John EVANS, he paid no/insufficient regard to the risk that 'journalistic material' might be obtained and that the right to a personal/private life by Desmond SEALES might be breached;
- He failed to have any/any proper regard to the position, rights and interests of Desmond SEALES;
- In so using John EVANS, he improperly used the influence of his position as a member of the judiciary;
- In so requesting, he knew/was wilfully blind to the fact that John EVANS was exposed to the risk of being accused of a criminal offence (burglary);
- He sought to conduct his own investigation, thereby acting with partiality and a lack of propriety;
- In so doing he risked the right of others (unknown to him) to a private/personal life.

(t) Taking into account Justice HENDERSON's position as a senior judge, his use of that position to seek information through John EVANS and the exposing of Mr EVANS to a risk of loss of employment, as well as civil or criminal proceedings, it is contended that the breach of duty is capable of amounting, as a matter of fact, to a breach of such seriousness as to warrant criminal sanction.

This information seeks to allow the police to enter and search the office and personal premises of Justice Alexander HENDERSON and if necessary any persons therein, situated at 7, Grand Palms, 25 Moxam Road, Grand Cayman and his personal office located within Grand Court, Hero's Square, Georgetown, Grand Cayman for the items and material stipulated above.

Signed: Stephen de Burgh-Thomas

This 24th day of September, 2008

Sworn to before me.

Carson EBANKS MBE JP

This 24th day of September, 2008

_____

Justice of the Peace

(8) THE SEARCH WARRANTS

The search warrants were in the following terms:

WHEREAS: The Court is satisfied by information on oath that there is reasonable suspicion of the commission of the offence of.

(a) *Misconduct in Public Office*, contrary to Common Law

AND: It has been made to appear to this Court that the production of the following articles is essential to the inquiry into the said offence:

(a) Government issued mobile phone(s)/blackberry devices;

(b) Personal mobile phone(s)/blackberry devices;

(c) Any diaries containing material that may be relevant to the aforementioned offences;

(d) Personal computer(s) and computers provided for or by his employment;

(e) Keys to facilitate the effective entry to premises detailed within this warrant or storage located within;

(f) Any other documentation, material or items that may be relevant to the commission of the aforementioned offence.

THIS IS TO AUTHORISE and require you to enter upon and search the office and personal premises of one Alexander HENDERSON and if necessary any persons therein, situated at [the Home/Kirk House] and if discovered to take possession of the said articles and produce the same forthwith before a Court; returning this warrant with an endorsement certifying the manner of its execution.

GIVEN UNDER my hand and the seal of the Court this 24th day of September 2008.

(9) OPERATION TEMPURA, APPLICATIONS FOR SEARCH WARRANTS BEFORE THE CHIEF JUSTICE AND THE CHIEF JUSTICE'S RULINGS

On 22 February 2008 an application was made to the Chief Justice who gave a Ruling refusing the issuance of search warrants against Mr.

Kernohan the Commissioner of Police, Deputy Commissioner Dixon and Chief Superintendent Jones.

In his ruling the Chief Justice said

1. The decision at which I have arrived I must give provisionally with the caveat that the Investigators, having heard it, may wish at my invitation to have the matter convened again before a different judge. I place this caveat on my decision because I have reflected further upon the involvement of Mr. John Evans in particular.
2. This is lest it be thought that my decision lacks objectivity because Evans states in his statement that "I also had another brief for being in the building. Judge Henderson had asked me to look for some letters that had been published by Net News attacking the judiciary specifically the Chief Justice. Judge Henderson had asked me to identify the source of the letters and their authenticity. Judge Henderson was not aware of the circumstance of me trying to obtain those letters. I am a good friend socially of Judge Alex Henderson one of the Grand Court judges".
3. I have raised this aspect of my concern with Judge Henderson. While it is certainly the case that he knew nothing of the circumstances under which Evans might have tried to obtain the referenced letters, he does recall having mentioned in confidence our collective concern as judges over the sort of letters being published in the Newspaper. And while he does not regard Evans as "a friend socially", Judge Henderson

did have various conversations with him in which he, Evans, proffered his views, based on his own insights as an employee of the Newspaper, as to the provenance of the letters. There was never however any "brief" given to Evans by Justice Henderson for recovering the letters".

4. Against that background, I do not think there is any real basis for perception of bias such as to require me to recuse myself. Otherwise, I would have. Nonetheless as indicated, I am prepared, if the Investigators wish, to appoint a judge to reconsider the matter as I think it is open for me to do because my decision is by no means a final decision as if by way of a trial of the matter".

The appearances on 22 February 2008 were

Mr. Mon Desir (with him Det. Sgt. Ali and Det. Gus Smith from the Metropolitan Police Service).

The Chief Justice was asked to re-consider his earlier ruling of 22 February 2008. Further hearings took place on 13 and 20 March. On 4 April the Chief Justice gave his Reasons (extending to 51 pages) for the refusal of search warrants against the Commissioner of Police and Chief Superintendent Jones and for issuance of a warrant against Deputy Commissioner Dixon.

The appearances recorded in the Reasons were "Mr. Andre' Mon Desir, Special Counsel to .... the Governor

(present with him Detective Superintendent Martin Bridger and Detective Inspector Simon Ashwin).

In his full, careful and detailed Reasons for Decision the Chief Justice dealt with (among other matters).

(1) The circumstances (paragraphs 13-62).
(2) The role of the judge to whom the application for a search warrant is made (paragraphs 63-68).
(3) Conditions precedent to the grant of a warrant (paragraph 69).
(4) Commission of an offence (paragraph 70-81).
(5) Police powers of entry, search and seizure (paragraphs 82-88).
(6) The trespassing constable and improperly obtained evidence (paragraphs 89-95).
(7) The alleged offences and the case law relied upon by the Investigators (paragraphs 96-120).
(8) Specific analysis of the allegations as applied to the circumstances of the case (paragraph 121).
(9) What offence? (paragraphs 122-128).
(10) Media houses (paragraphs 129-141).
(11) What evidence? (paragraphs 142-146).

It is necessary to quote the following extracts from the Reasons

THE ROLE OF THE JUDGE TO WHOM THE APPLICATION FOR A SEARCH WARRANT IS MADE

The judicial officer from whom a warrant is sought has a high duty imposed on him to protect individual citizens from arbitrary infringement

of their liberties, as well as a responsibility to facilitate the conviction of those guilty of serious offences in the interests of the society as a whole. The common law and the statutes both make this clear by insisting that reasonable cause must appear from the information presented to justify the issuance of the warrant.

The judicial officer must act judicially in arriving at his decision, which means that he must consider all aspects objectively; not subjectively either as a matter of his own subjective point of view or of that of the investigator bringing the allegations in support of the warrant.

The matters relied on to justify the grant of a warrant must be substantiated by information on oath – an aspect of the procedure upon which I have insisted throughout these proceedings. I have throughout felt obliged to give careful and detailed consideration to the material placed before me and to the statements on oath of the Investigators who appeared before me.

I must also note that I have felt particularly obliged, given the undeniable sensitivity of the matter, to satisfy myself that all the relevant principles are considered. This – without in any way detracting from the efforts of Mr. Mon Desir or those of the Investigators – is because experience has shown that these applications are notorious for bringing to light a less than complete consideration of the principles and relevant factors. This is perhaps archetypically shown by the case of Rea v Gibbs [1998] A.C.

786. I have therefore, from my own research, raised certain case authorities (which I brought to his attention) with Mr. Mon Desir (that is, M.M. v Netherlands and R v Wright) and still others which I will examine below. My duty is to base my decision on a proper construction of the law and to arrive at my decision as it is supportable on the evidence presented before me: IRC v Rossminster Ltd. (above)

I note, in conclusion of these introductory remarks, the reminder that the subjects here are no less entitled to the protections of the law, simply because they happen to be police officers themselves accused of having infringed another person's rights.

CONDITIONS PRECEDENT TO THE GRANT OF A WARRANT

By the information on oath, the applicant must establish (a) that in fact or according to reasonable suspicion, an offence has been committed and (b) that in fact or according to reasonable suspicion items or evidence for which the statute authorizes search are within the premises to be searched: here the homes and/or offices of the subjects. See Section 26 of the Criminal Procedure Code.

COMMISSION OF AN OFFENCE

The power to issue a search warrant is given in the public interest, and is only to be used where genuine public interest exists in the detection and prosecution of a criminal offence.

A warrant should not be granted where the case is not a proper one for criminal prosecution. In cases where warrants were granted to recover property (or in pursuit of an investigation) which should properly have been the subject only of civil litigation, the warrants have been held to be unlawful and outside the jurisdiction of the Court (see for instance: McDonald v Bulwer (1862) 13 ICLR (CP) 549 at 555-6; Lawrenson v Hill (1860) 10 ICLR 177 – both cited in David Feldman's seminal work: The Law Relating to Entry, Search and Seizure); Butterworths, London, 1986.

This aspect of the matter has been of particular concern to me as I have been at pains to discern where the conduct complained of here, crossed the deep divide between conduct which may be sanctionable as criminal (the conduct needed to be shown here) and conduct which at worse, may have given rise to civil liability for the attempted invasion of someone's (here Mr. Seale's) right to privacy.

The question is whether, from all the circumstances (as particularised in the information on oath) it is shown, albeit only prima facie, that events have occurred which cross that divide and which attract criminal liability.

This remains the aspect of greatest difficult with the application and the reason why, in the end, I remain convinced that I may not change my decision in respect of two of the subjects, the Com. Pol. and Ch. Supt. Jones.

To restate my fundamental concern: It is that the application – predicated as it is upon the basis that the entry into the office building of the Newspaper at night by employees with the intention to recover specified documents from the desk of the proprietor – must itself have been criminally unlawful because it occurred without a search warrant and without the proprietor's consent. And following from that, because the subjects are police officers who counselled and procured that entry, they must have acted in so doing, criminally unlawfully in abuse of their public offices; that is: under the specified sections of the Penal Code – sections 95 and 121.

This premise is, in my view, fundamentally flawed because it overlooks well established common law principles which represent the state of the law in the Cayman Islands.

The premise of the application also confuses that distinction already mentioned above, between civil liability in tort (for trespass) and criminal liability (for burglary or trespass). Only the latter criminal liability would predicate an offence under section 95 or 121 of the Penal Code in the alleged circumstances of this case.

The all-important distinction between the two – civil and criminal liability - is the element of the "guilty" or "unlawful" intent.

Neither the section 95 offence nor the section 121 offence is prescribed by the Penal Code as an offence of strict liability; that is: one which does not require the presence of at least a basic intent to commit it. It follows that the applicants for the warrants must point to reasonable basis for concluding that this unlawful intent existed in the minds of the subjects. (see Sweet v Parsley [1970] A.C. 132).

I will return to examine this issue below.

At this point I turn to consider the general state of the common law (which still applies in Cayman) in relation to the Police powers of entry, search and seizure.

POLICE POWERS OF ENTRY, SEARCH AND SEIZURE

An important starting point is the Privy Council case of Canadian Pacific Wine Company Ltd. V Tuley [1921] 2 A.C. 417 where it was decided that merely because an officer is trespassing when he finds evidence of a serious crime, it does not follow that seizure of the evidence will be unlawful. The tort of trespass to land must be separated from trespass to the goods. This judgment being a Privy Council judgment is of binding authority, on the issue which it decides, in the Cayman Islands.

In Ghani v Jones [1969] 3 All E.R. 1700, the English Court of Appeal reviewed the common law principles of entry, search and seizure (which remain applicable in the Cayman Islands perhaps more so than in the United Kingdom since the introduction of the P.A.C.E. Act there in 1984). Lord Denning stated the principles in the following definitive terms (at page 1704-5):

> "What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the Police and not hinder them in their efforts to track down criminals.
>
> Balancing these interests, I should have thought that, in order to justify the taking of an article where no one has (as yet) been arrested or charged, these requisites must be satisfied:
>
> First: the police must have reasonable grounds for believing that a serious offence has been committed -so serious that it is of the first importance that the offenders should be caught and brought to justice.
>
> Second: The police must have reasonable grounds for believing that the article in question is the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by the bank raider or the saucer used by the trainer robber - [(here an allusion to the saucer containing the fingerprints of one of the great train robbers recovered without warrant from the private property of a farmer in whose barn the robbers had been hiding)].

> Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal ([to give access]) must be quite unreasonable.
>
> Fourth: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.
>
> Fifthly: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.

Also at page 1703 Lord Denning stated:

> "The police have to get the consent of the householder to enter if they can: or, if not, do it by stealth or by force. Somehow they seem to manage. No decent person refuses them permission. If he does, he is probably implicated in some way or other. So the police risk an action for trespass. It is not much risk."

Here Lord Denning was not promising judicial protection to police officers against civil actions for trespass. In fact, nothing in Ghani v Jones allows the police to enter premises without a warrant, a specific statutory or common law power or the occupier's consent. And Ghani v Jones does not purport to change the rule in Davis v Lisle [1936] 2 K.B. 434 that there is no general common law powers to enter or remain on premises against the occupier's will to conduct an investigation. Rather, the idea being communicated is that the risk of paying large amounts of damages for trespass to someone who was believed to hold incriminating

evidence was not great because, unless some other harm was inflicted against him when the police invaded his privacy, his losses could only be nominal. Hence the risk of liability for trespass was "not much risk". The principles enumerated by Lord Denning from the earlier cases became established principle In England and Wales until they were refined there by the Police and Criminal Evidence Act in 1984. They, along with the dicta from several other cases of that era, still represent the law of the Cayman Islands and of much of the Commonwealth and, as Diplock LJ observed in the case of Chic Fashions (West Wales) Ltd. v Jones [1968] 2 QB 299 at 315, 318 in those earlier cases the common law Courts were seeking to bring the law of police powers into the twentieth century.

Neither the Canadian Pacific v Tuley case nor the Ghani v Jones case was referenced by Mr. Mon Desir. His arguments therefore overlooked the principles which they establish. As we have seen, one of them is this: Where the Police, acting with an earnest and genuine intention to interdict serious crime, commits a trespass to someone's private property or privacy; at common law the police do not commit a criminal offence. Rather, they are at risk of being civilly liable in tort for damages.

Nothing about section 95 or section 121 of the Penal Code can be taken as having abolished the common law in this regard, so as to make the police criminally liable in such circumstances, circumstances which I

emphasise show clearly in my view, that in this case the Com. Pol. and Ch. Supt. Jones acted under an earnest and reasonable belief that a serious crime had been committed and that the documents in question were as Lord Denning put it: "the fruits of the crime".

This is all in the context of Lord Denning having earlier in that judgment of the Court of Appeal recognised nonetheless that the police have no unfettered right to enter someone's private property without consent or without a warrant. The earnest and reasonable belief that proof of serious crime was recoverable therein, is what makes the difference. ...

SPECIFIC ANALYSIS OF THE ALLEGATIONS
AS APPLIED TO THE CIRCUMSTANCES OF THE CASE

Before I might issue a search warrant, I must remember that pursuant to section 26 of the Civil Procedure Code, I must be satisfied in fact or upon reasonable suspicion of two things:

(i) that an offence has been committed;

(ii) that anything upon, by or in respect of which that offence has been committed or anything necessary to the conduct of an investigation into that offence is in the place to be searched. ...

WHAT EVIDENCE?

Finally, I turn to the question of what evidence the Investigators, as the applicants before me; could have reasonably expected to find to bolster their case on the section 95 and 121 offences, by the warrants which they seek.

At the end of the day, Supt. Bridger's "quest for truth" in reality came down to this: The hope or expectation that within the items to be seized (that is: the day-books, cell phones and computers of the subjects) there might be found some inculpatory record of criminal intent to trespass – that crucial element which, on any objective analysis of the known circumstances, is clearly shown not to have existed in the minds of the Com. Pol. and Ch. Supt. Jones.

The issuance of a search warrant, simply in the hope of finding something self-incriminatory against a subject already regarded as having committed an offence, but without any objective basis for thinking that it could exist, would be precisely that sort of oppressive "fishing expedition" so firmly discountenanced by the case law.

In the end, I accepted, however marginally, that a different view could be taken of the involvement of DCP Dixon as the subject having the closest connection to Mr. Martin and who, from the statement of DCP Ennis in particular, may reasonably be suspected to have been privy to and perhaps was associated with, the motives behind Mr. Martin's

machinations. Of the three subjects, he is the only one whom, it could reasonably be suspected, might be aware of Mr. Martin's fabrications. And such a connection would make him a suspected accomplice to the blatant public mischief offences now alleged to have been perpetrated by the fabrications attributed to Mr. Martin.

On that basis, there is reasonable ground for suspicion that proof of that complicity could exist.

The foregoing are my reasons for the refusal of the warrants as against the Com. Pol. and Ch. Supt. Jones and for the issuance of the warrant against DCP Dixon.

I refer to the Reasons for their full terms and effect.

(10) THE APPROPRIATE ADDITIONAL PARTY

This application proceeded on the basis that the RCIPS was the appropriate additional party. In the event it is not necessary to examine questions as to who the Operation Tempura investigators report to, their standing and related matters. I express no opinion on such questions or matters.

(11) THE APPLICANT'S SUBMISSIONS

Mr. Alberga QC for the applicant submitted as follows.

Full and frank disclosure was not made to the respondent when the application for the search warrants was made to him, and consequently, the decision he made to grant the warrants was fatally flawed.

There were two broad categories of undisclosed material:

(a) legal principles and

(b) material facts and documents.

The following aspects of the law were not, but should have been, disclosed:

(a) the legal principles governing how the respondent should approach his task, namely:

(1) the role of the respondent to whom the application for a search warrant is made;

(2) the conditions precedent to the grant of a search warrant; and

(3) that the case must be a proper one for a criminal prosecution.

(b) the legal elements of misconduct in public office.

(c) the Rulings of the Chief Justice in *Re Ali & Smith (Operation Tempura)* (unreported) February 22/08 and in *Re Operation Tempura* (unreported) March 20/08.

(d) the correct legal definition of the form of contempt known as scandalising the court.

(e) the offence of burglary requires proof of an intent to steal.

(f) the inapplicability of s. 8(1) of the *European Convention on Human Rights* in the Cayman Islands;

(g) the lack of legislation on "journalistic material" in the Cayman Islands;

The investigators' "independent legal Counsel" was not qualified or entitled to make submissions on Cayman Islands law or to guide the respondent on what the law was. Those applying for the warrants elected to so in person and without asking for any legal assistance from the Attorney General's office; See *Rea v. Gibbs* 1994-95 CILR 553, at 610-11 per Collett, JA.

The following material facts were not, but should have been, disclosed:

(a) the overall context in which the applicant made his request of Evans, including the nature of the letters to the Editor of the Cayman Net News.

(b) the statement given by the applicant to the investigators;

(c) the correspondence between the applicant and the investigators, including his repeated offers to answer questions in writing;

(d) the entirety of the two statements by Mr. Evans recounting his involvement with the applicant.

On any ex parte application the applicant must proceed with the highest good faith. The fact that the court or decision maker is asked to grant relief or make a decision without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant make full and frank disclosure of all that is material to the application. If this is not done, the order may be set aside without regard to the merits.

The material to be disclosed is everything which might influence the decision maker to exercise his discretion or which would be likely to affect him in arriving at his decision one way or the other. The question of materiality is to be decided by the court or decision maker and not by the assessment of the applicants or their advisers. Material facts include not only facts known to the applicants but also any additional facts that should be known if proper inquiries were made.

The nature of the disclosure made by the applicant must be judged at the time of the ex parte application and not by what happens afterwards – see *Ghani v Jones* per Lord Denning at page 200.

The following cases support the principles set out above relating to the absolute necessity for full and frank disclosure at ex parte applications:

Schmitten v Faulks (1893) W.N. 64, per Chitty J.
R v Kensington Income Tax Commissioners ex-parte de Blegnac [1917] KB 486.
Brinks MAT Ltd v Elcombe [1988] 1 WLR 1350, at page 1356 F to 1365 G per Ralph Gibson LJ

C Corporation v. P [1994-95] CILR 189 per Smellie J. at 195 line 19 to 196 line 25.

The observations of the Privy Council in the *AG of Jamaica v Williams* 1997 AC 351 and in *Redknapp v Comm. of City of London Police et al* [2008] EWHC 1177 emphasising that protection against lawful search is a fundamental human right at common law underlines how necessary it is for there to be full and frank disclosure at ex parte applications for the grant of search warrants and that the greatest candour should be observed by the applicant for a search warrant. The observations of Lord Hoffman on the duties of a justice who is asked to issue a search warrant (at page 358-360) are of particular importance and significance.The Information alleged the offence of misconduct in public office, contrary to common law. Such offences are preserved in effect by s. 2(a) of the *Penal Code (2007 Revision)*. The elements of the offence are set out authoritatively in *Attorney General's Reference (No. 3 of 2003)* [2005] Q.B. 73 (CA) and the respondent should have been referred to them. They are:

(1) A public officer acting as such
(2) wilfully neglects to perform his duty and/or wilfully misconducts himself
(3) to such a degree as to amount to an abuse of the public's trust in the office holder
(4) without reasonable excuse or justification.

In his judgment, Pill LJ elaborated upon these elements. There must be a breach of duty, which may be an act of commission or omission. There must be a "serious departure from proper standards". "A mistake, even a serious one, will not suffice". Motive is relevant to the decision whether the public's trust is abused. The threshold is high. The misconduct must be "calculated to injure the public interest so as to call for condemnation and punishment." "It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence."

It is most unlikely that the respondent had any prior experience of the offence of misconduct in public office. The respondent has no legal training.

The proper discharge of the respondent's duty required him to consider whether the evidence was capable of giving rise to a reasonable suspicion that the applicant had committed the offence. That required him to consider each constituent element of the offence separately and to assess the evidence relevant to that element. At a minimum, the respondent should have been handed a Note setting out the legal elements identified by the Court of Appeal in *Attorney General's Reference, supra.* There is no indication the respondent was told anything, in writing or orally, on this fundamental subject. Lacking such information, the respondent had

no proper framework within which to approach his assessment of the evidence.

The failure to disclose the two prior Rulings by the Chief Justice cannot have been accidental. The Rulings address in depth and in a considered way the elements of two offences closely related to misconduct in public office and defined in ss. 95 and 121 of the *Penal Code*. They are concerned with the very same event - the unauthorized entry of September 3 2007 - with respect to which the respondent was asked for the warrants. The respondent was entitled to know that the Chief Justice had considered that event in depth and reached some considered conclusions. The Rulings should have been given to the respondent so that he could decide for himself on their materiality. On any view, they were arguably material. Disclosure of these Rulings might well have caused the respondent to adjourn until he had heard argument on behalf of the Attorney General or from a prosecutor with a right of audience and entitled to practice in the Cayman Islands.

The applicant relies, by way of example, on the following passages in the Rulings, which are relevant and material and should have been drawn to the attention of the respondent:

(a) there is no "clear basis upon which it can reasonably be said,

even at this prima facie stage, that any offence has been committed" (underlining added): Ruling of February 22 2008 at p. 5; and see Ruling of 4 April 2008 at p. 42;

(b) "... it is not clear to me why the subjects are said to have acted in contravention of the law by enlisting persons who could obtain access otherwise than by a search warrant obtained by the RCIPS itself, to recover sensitive documents reported to have been disclosed for a dishonest purpose and where the enlisted persons themselves are not clearly shown to have committed any offence in so doing.": Ruling of February 22 2008 at p. 6;

(c) "Nothing less therefore, than a full and objective examination of all the known circumstances will suffice for arriving at the appropriate decision in this matter.": Ruling of 4 April, 2008, p. 3;

(d) The actual witness statements, not merely extracts, were put before the Chief Justice: p. 3. The respondent was not afforded such material;

(e) The remarks of the Chief Justice on the duty of a judicial officer hearing a search warrant application and the conditions precedent to the grant of a search warrant : p. 24 et seq.

(f) His comment about a "fishing expedition" and the "team's quest for the 'truth': p. 35.

The failure to disclose these two Rulings should be considered in light of the decision by the investigators to apply to the respondent who had no

legal training, rather than return to the Chief Justice (or a judge assigned by the Chief Justice) to ask for the warrants. If they had taken the latter appropriate course, they would not have enjoyed the tactical advantage of concealing the earlier Rulings.

As to contempt of court Mr. Evans says that the applicant "told me he was considering if the letters were contempt." The first particular in the Information alleges that

(a) the applicant knew or had reason to believe that the letters were not capable of amounting to contempt; and
(b) if they did, the contempt was not in the face of the court "and would require investigation by the police at the request of the" Attorney General.

Neither proposition is correct; their effect is to unfairly paint the applicant as dishonest.

In fact, the letters amounted to the form of contempt known as scandalising the court. Anything done or published which is calculated to bring a court or a judge into contempt, or to lower its or his authority, is a contempt of court: *R. v. Gray* [1900] 2 QB 36, 40; *Badry v. DPP* [1983] 2 AC 297 (PC); *Ahnee et al. v. DPP* [1999] 2 AC 294 (PC). In *Ahnee*, the Privy Council observed that the need for the offence of scandalising the court is greater in a small island country (see p.306 A). The investigators

were guilty of misleading disclosure. At para. 3(l) of the Information the respondent was advised by the deponent of the opinion of "independent legal council" (sic) to the effect that the letters could not possibly amount to a contempt because they did not refer to "live proceedings." The separate type of contempt known as scandalising the court is part of the common law and is preserved in effect by s. 111(3) of the *Penal Code*. Further see the reference to scandalising in Section 27 of the Grand Court Law (2008 Revision).

The letters make sweeping assertions of impropriety on the part of the judiciary but, for the most part, fail to offer specifics. The following themes in the letters are representative:

DATE	"AUTHOR"	ASSERTION
July 3/07	Thelma Turpin	Visiting judges are selected out of favouritism and behave in an "injudicious manner"
		Favouritism and breach of law in hiring of Legal Analyst
		Judiciary lacks leadership and administration
July 12/07	Hoyt T.C. Williams	Behaviour of visiting judges is questionable
July 22/07	W. Scott Jeffers	People in judicial system should be investigated for misconduct or asked to step down
July 23/07	H. Irvin Jackson	Suspicious circumstances in hiring

DATE	"AUTHOR"	ASSERTION
		CJ committed abuse of power & breach of natural justice, causing loss of confidence in justice system; "people" may have to be removed from office
July 29/07	Leticia Barton	Judiciary is now a laughingstock; public has lost confidence
		Injudicious behaviour of visiting judges; inquiry needed into abuse of power & CJ using courts as his "private domain", etc.
Aug. 13/07	Helena Leslie	CJ a "mediocrity"; investigation into justice system needed

The letters were represented to the public as genuine expressions of opinion by those whose names were attached. The applicant did not believe that to be so and suspected that the letters were written by a third party as part of a concerted campaign to undermine the reputation of the judiciary by deceitful means, which amounts to contempt by scandalising the court. Contrary to the allegation in the Charge, the applicant had more than ample reason to believe the letters constituted a contempt. If these facts had been disclosed to the respondent, he may well have agreed.

As to burglary the investigators told the respondent (implicitly, at least) that Evans had committed burglary. There is no indication they gave him appropriate guidance on the legal elements of that offence. In any event, they failed to disclose what Mr. Evans (their only witness on the subject) said about it.

Section 243 of the Penal Code (2007 Revision) defines burglary in terms identical to the definition in s. 9 of the Theft Act 1968.

The definition of theft in s. 235(1) of the Penal Code is identical to that found in the UK Theft Act 1968 s. 1(1). Five elements must be proved:

Mr. Evans says he was searching for two things: (1) the Gold Command Minutes, and (2) the letters. He says that, in each case, he intended to make copies of the documents and (by inference) leave the originals in place. He intended to take away the information contained in the documents but not the pieces of paper upon which that information was written.

Information, confidential or otherwise, is not "property" and cannot be stolen: Penal Code, s. 238(1); Oxford v. Moss (1979) 68 Cr. App. R. 183, DC. In Oxford, the court held that the definition of property in s. 4(1) of the Theft Act 1968, which is identical to the current definition in s.

238(1) of the Penal Code, does not include confidential information. Mere information cannot be stolen. For essentially the same reason, there cannot have been any intention to "appropriate" something "belonging to another".

This legal principle should have been brought to the respondent's attention.

Instead of disclosing the entirety of Mr. Evans' statements (as was required), the investigators chose to include extracts from them in the Information. In doing so, they misled the respondent. They included (para. 3(h) a statement by Mr. Evans on November 1 2007 that if he had found the letters they "would have been handed to the police". This was the evidence of intent to steal that was given to the respondent i.e. that Mr. Evans intended to take the original documents away. However, the respondent was not told that in his earlier Statement of Oct. 8, 2007 Mr. Evans had also said he intended only to make copies of the original letters. This was a deliberate decision by the investigators to disclose the evidence supporting their theory and conceal the equally compelling evidence against it.

Mr. Evans is the only witness of significance. His credibility, at least in the limited sense of the accuracy of some of his recollections, is in issue. In these circumstances, everything said by Evans about his conversations

with the applicant should have been disclosed so that the respondent could assess for himself what it is that Evans is actually saying.

The Information makes reference to a "right to a personal life" (sic) enjoyed by Mr. Seales and by the letter-writers. It is assumed this is a reference to the right to respect for "private and family life" guaranteed by s. 8(1) of the *Convention*. The *Convention* is not applicable in the Cayman Islands (although it is of persuasive value when construing local legislation). The respondent should have been told this.

As to journalistic material the Information alleges that the applicant, in making his request, had "no, or insufficient, regard to the risk that journalistic material might be obtained". The concept of journalistic material appears to come from UK statutory provisions which have no counterpart in the Cayman Islands. The phrase is unknown to the law in the Cayman Islands. Whatever is meant (in Cayman law) by "journalistic material" (if anything), cannot extend to the identity of the author of a letter already published in a newspaper. Properly understood, "journalistic material", to the extent that it has any legal significance in the Cayman Islands, consists of the product of research and investigations carried out by a journalist for the purpose of writing a story for publication. In no way can a letter to the editor, or the identity of its author, fall within this category. The respondent should have been told

that there is no legislation concerning "journalistic material" in this jurisdiction and that the concept has no legal significance here.

As to independent legal counsel, at the outset of their investigation, the investigators were provided with the services of Mr. A. Mon Désir, a barrister entitled to practice in the Cayman Islands. He appeared on the two applications made to the Chief Justice and is described in one as the "Special Counsel to His Excellency the Governor". The Attorney General appears to have played no part in these applications.

In August, 2008 Mr. Mon Désir was appointed to the Supreme Court of Trinidad & Tobago and left the Cayman Islands. No new "Special Counsel" was assigned, for reasons which are unclear.

Mr. Martin Polaine, a non-practising barrister in the UK, appears to have joined the investigation team. He is not called to the Bar of the Cayman Islands or admitted as a Solicitor here. He has no right of audience in this jurisdiction. Mr. Polaine appeared before the respondent at the hearing with the investigators and made a submission (see para. 9 of the respondent's Note). The respondent understood that Mr. Polaine was a "lawyer" (para. 3, 4 & 6).

The Investigators did not disclose to the respondent that Mr. Polaine is not called to the Bar in the Cayman Islands and is not qualified to practice

as a solicitor in the Cayman Islands. The result of this non-disclosure is that the respondent may have assumed, erroneously, that the request for the warrants had been vetted and approved by a prosecutor entitled to act as such in the Cayman Islands. As a layman, the respondent may have placed considerable weight on this "fact." Mr. Polaine's true status should have been disclosed.

On about May 21 2008 the applicant provided a one-page signed statement to the investigators. This statement and the recollections of Mr. Evans constitute the only direct evidence of what was said between the two men. The statement contains important evidence and should have been disclosed to the respondent.

On several occasions, the Investigators requested an oral "interview" with the applicant. The Chief Justice, the Solicitor General and the Special Counsel, Mr. Andre Mon Désir considered the question of how the applicant should respond to this request. Each of them agreed that it was inappropriate for the applicant to submit to an oral cross-examination; they agreed that answering written questions was the appropriate way forward. Their agreement to this was provided well after Mr. Evans gave his statements of October 8 and November 1. The applicant advised the investigators (in writing) that he would answer questions posed to him in writing. The investigators never accepted this position.

Mr. Alberga's submission in this connection is set out below.

There was a failure on the part of the applicants for the search warrants to make full and frank disclosure to the respondent of material principles of law and/or relevant and material facts, then the effect of that is that it is not possible to determine what decision the respondent would have arrived at had the proper disclosure been made to him at the time of the application. Consequently, his decision to grant the search warrants should be set aside and the warrants quashed with all consequential ancillary relief.

Mr. Alberga submitted that the answers to Issues 1 and 2 were in the affirmative.

I refer to some of Mr. Alberga's further submissions below.

12) SUBMISSIONS ON BEHALF OF RCIPS

Mr. Nicholas Purnell QC for RCIPS submitted as follows:

The proper approach is for the court to ask itself:

(i) whether the earlier decisions of the Chief Justice were material to the respondent's consideration (whether or not they were adverse to the application before him). If they were not material, the point is resolved against the applicant.

(ii) if they were material, did the non-disclosure arise out of a deliberate decision not to disclose the decisions to the respondent? The word 'malice' was utilised in this context by Laws LJ in Jennings v CPS (supra) at para 8. In R(Cruickshank Ltd) v Chief Constable of Kent [2001] EWHC Admin 123, the phrase 'bad faith' was used. Only exceptional circumstances would justify not quashing the warrant if the non-disclosure was effected through malicious or bad faith.

(iii) if the non-disclosure did not arise through deliberate intent, whether the warrant should, in its discretion, be quashed. In making this assessment, the court should have regard to:

(a) the degree of oversight or error of judgment;

(b) the reasons for the failure to disclose;

(c) the degree to which the applicant's case might have been hindered by the non-disclosure.

Mr. Purnell submitted that:

(i) the decisions of the Chief Justice were not material to the issues before the respondent;

(ii) even if the decisions could properly be characterised as material, the failure to disclose did not arise out of bad faith;

(iii) this Court should not quash the warrants on this ground, on account of the reasons for non-disclosure, the lack of culpability and the fact that even had disclosure been made, the result would have been the same.

It is SIO Bridger's evidence that the decisions of the Chief Justice were not referred to as his principal reason was that he believed them to be irrelevant to the investigation into the applicant.

The decisions of 22 February and 4 April show that the Chief Justice was concerned with applications for search warrants in connection with different suspects. Further, the decisions were based on different legal and factual issues than those the respondent was addressing, namely

whether there were reasonable grounds for suspecting the applicant of the commission of the common law offence of misconduct in public office.

That the decision of 22 February was not material is apparent from the following features of the judgment:

(i) the application related to applications for search warrant in relation to Commissioner Kernohan, Deputy Commissioner Dixon and Chief Superintendent Jones, and in relation to offences under sections 95 and 121 of the Penal Code.

(ii) in paragraphs 2 -4, the Chief Justice addressed the issue whether, by virtue of the allegations against the applicant, he should recuse himself on account of actual or apparent bias. By implication, he regarded the issue of the applicant as external to the issues before him.

(iii) the Chief Justice acknowledged at paragraph 4 that his decision was not a final one.

(iv) In paragraph 5, the Chief Justice concluded that he had not discerned a clear basis upon which it could reasonably be said that any offence had been committed. However, at paragraph 5(i), he made it clear that this was in relation to the enlistment of Mr. Martin and Mr. Evans by 'the subjects of the investigation', ie Com. Pol. Kernohan, DCP Dixon and Ch. Supt. Jones.

(v) The basis upon which he reached this decision, namely that Mr. Evans and Mr. Martin were directed to commit an arbitrary act which could have been prejudicial to the rights of another, addressed an element exclusively within section 95, and one which

did not arise in relation to the common law offence of misconduct in public office.

(vi) The ratio of his decision was that Mr. Evans and Mr. Martin were earnestly seeking the recovery of sensitive documents which the police would have been entitled to obtain through search warrant on the basis that they belonged to the police, and had been improperly obtained and then dishonestly disclosed. That analysis is wholly irrelevant to the case against the applicant.

(vii) He formed the view that Mr. Martin and Mr. Evans were not acting in breach of the law but were instead acting out of genuine concern to protect the public interest against the abuse of very sensitive official information. That analysis has no application to the present case.

The judgment of 4 April was similarly irrelevant for the following reasons:

(i) it is plain from paragraph 12 that the Chief Justice was, again, addressing the issue of whether the police officers had been acting in bona fide execution of their duties, by seeking the return of the documentation. That is not a defence upon which the applicant could rely.

(ii) The factual issues that he addressed in paragraphs 14 to 62 were exclusively concerned with the events surrounding Com. Pol. Kernohan, Mr. Seales, Ch. Supt. Jones, DCP Dixon and Mr. Martin, and the recovery of the box file apparently containing

copies of e-mails between Mr. Seales and DCP Ennis, and the Gold Command minutes. Indeed, in the course of summarising Mr. Evans' statement of 8 October 2007, the Chief Justice specifically omitted in paragraph 54-56 any reference to the tasking alleged to have been given by the applicant.

(iii) The legal principles annunciated in paragraphs 70 to 70, and 96 to 120, were concerned only with sections 95 and 121. The principles relating to search and seizure and entry are of general application, and of no particular significance in so far as the allegations against the applicant are concerned.

(iv) The analysis at paragraph 122(i) addressed the states of mind of Com. Pol. Kernohan and Ch. Supt. Jones, and their apparent 'genuine and urgent belief' that documents to prove the commission of serious crimes would be recovered. That potential defence, does not arise on the facts of the present case. The analysis in paragraph 122(ii) was concerned only with the statutory tests in sections 95 and 121.

An allegation of bad faith is one that should not lightly be made, and the suggestions made by the applicant's counsel that there had been impropriety were not properly founded. It is plain from his affidavit evidence that SIO Bridger was acting professionally and carefully in the discharge of his duties and it is impossible to characterise his conclusion that the decisions of the Chief Justice were irrelevant as having been made in bad faith.

Even if the rulings of the Chief Justice are considered to have been material, the Court is invited not to quash the warrants on that ground alone.

First, the reasons provided by SIO Bridger for not bringing the judgments to the attention of the respondent were reasonable and within the range of rational decision-making, even if the Court disagrees with them. The degree of oversight or error of judgment is therefore slight.

Secondly, SIO Bridger has provided good reasons in his affidavit to suppose that, even if the judgments had been disclosed, along with the suspicions held by the investigating team as to the propriety of the Chief Justice's conduct, the degree to which the case might have been hindered by the disclosure would have been very slight indeed. Had the respondent been made fully aware of all the concerns held by the investigating team, it is likely that that he would have been reinforced in his opinion that there were proper grounds upon which warrants could be issued.

Mr. Purnell submitted that there was no material non-disclosure in the other respects contended for by Mr. Alberga, save to the extent of the concessions he made as set out below.

Mr. Purnell submitted that the answers to Issues 1 and 2 were in the

negative.

I refer to some of Mr. Purnell's further submissions below.

(13) ANALYSIS – SOME INTRODUCTORY MATTERS

It is convenient at the outset of my analysis to refer to the following matters.

Equality before the law

All citizens are subject to the law and entitled to the protection of the law.

The separation of powers and the judiciary's power and duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it.

The rule of law and the separation of powers are central to democracy in the Cayman Islands.

In the decision of the Privy Council in Ahnee v Director of Public Prosecutions [1999] 2 AC 294 Lord Steyn said at page 303:-

"Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts

which are calculated to undermine it. A similar point was well expressed by the majority of the Canadian Supreme Court in MacMillan Bloedel Ltd. v. Simpson [1995] 4 S.C.R. 725 . The context was the constitutionality of the power to punish for contempt. Speaking for the majority Lamer C.J. observed, at p. 754:

"The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The in facie contempt power is not more vital to the court's authority than the ex facie contempt power."

Their Lordships would respectfully adopt these obsevations. The principle of the separation of powers and the constitutional role of the judiciary rule out the technical and semantic arguments on which the contemnors rely. All this is apparent on the face of the Constitution. But there is also strong support for this reasoning in decisions of high authority. The strength of the doctrine of separation of powers is shown by the decision of the Privy Council in Liyanage v. The Queen [1967] 1 A.C. 259."

Lord Steyn referred at page 304 to

"the essential role of the judiciary in protecting the due administration of justice."

At page 305 Lord Steyn continued:

" the offence of scandalising the court exists in principle to protect the administration of justice. That leaves the question whether the offence is

reasonably justifiable in a democratic society. In England such proceedings are rare and none has been successfully brought for more than 60 years. But it is permissible to **306* take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman, Civil Liberties & Human Rights in England and Wales (1993), pp. 746-747; *Barendt, Freedom of Speech* (1985), pp. 218-219. Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of criticising, in good faith, in private or public, the public act done in the seat of justice:" see Reg. v. Gray [1900] 2 Q.B. 36 , 40; Ambard v. Attorney-General for Trinidad and Tobago [1936] A.C. 322 , 335 and Badry v. Director of Public Prosecutions [1983] 2 A.C. 297 The classic illustration of such an offence is the imputation of improper motives to a judge...

Given the narrow scope of the offence of scandalising the court, their Lordships are satisfied that the constitutional criterion that it must be necessary in a democratic society is in principle made out."

Scandalising the Court

I refer to what is set out in Arlidge, Eady & Smith on Contempt 3rd edition 2005 paragraphs 5-204 to 5-274. At paragraphs 5-260 to 5-274

modern examples of "scandalising" in other common law jurisdictions are referred to under the headings Canada, Australia, New Zealand, Singapore, Mauritius and Hong Kong.

Acts insulting to or scandalising the Court

Section 27 of the Grand Court Law (2008 Revision) provides

"27(1) Without prejudice to any powers conferred upon the Court under section 11(1), the Court shall have jurisdiction to order the arrest of and to try summarily any person guilty of any contempt of the Court or any act insulting to or scandalising the Court or disturbing the proceedings thereof, and any person convicted under this section is liable to imprisonment for six months and to a fine of five hundred dollars.

(2) For the purposes of this section, contempt of court shall include any action or inaction amounting to interference with or obstruction of, or having a tendency to interfere with or to obstruct, the due administration of justice".

Misconduct in public office

The ingredients of the offence of misconduct in public office contrary to common law were summarised by Pill LJ in Attorney General's Reference (No 3 of 2003) [2005] QB 73 at para. 61 as follows:

(1) A public officer acting as such
(2) wilfully neglects to perform his duty and/or wilfully misconducts himself
(3) to such a degree as to amount to an abuse of the public's trust in the office holder

(4) without reasonable excuse or justification.

In his judgment, Pill LJ elaborated upon these elements.

I have paid full regard to the whole of the analysis in Pill LJ's judgment of these four elements including the references he made at paragraph 61 to earlier paragraphs. It is unnecessary to set out this analysis in full. I refer to it for its full terms and effect.

(14) ANALYSIS AND CONCLUSIONS ISSUE 3

It is convenient to consider Issue 3 before the remaining Issues. Issue 3 is:-

> 3(a) Was there a failure on the part of the officers applying for the search warrants to put all requisite information, materials, submissions and guidance before the respondent

and/or was there a misrepresentation of any material matters?

(b) If so, was that failure in bad faith, deliberate or inadvertent?

(c) In any event, should the search warrants be set aside?

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

The purpose of the requirement that a search warrant be issued by a court or a justice of the peace is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a police officer to enter upon a person's premises, search his belongings and seize his goods, the function of the court or justice is to satisfy itself/himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing a police officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met. (Lord Hoffmann in Attorney-General of Jamaica and Williams [1998] AC 351 at page 358).

The prescribed circumstances

It is for the court or justice to identify the prescribed circumstances and to satisfy itself/himself that the prescribed circumstance exist.

It is elementary that the identification of the prescribed circumstances will turn on the true construction of the particular statutory provision in question.

In the present case it is necessary to identify the prescribed circumstances on a true construction of section 26 of the Criminal Procedure Code (2006 Revision).

Reference to decisions in relation to statutory provisions in other jurisdictions in differing terms is of limited assistance in construing section 26. Nonetheless it is illustratrative to refer to Attorney-General of Jamaica and Williams where the statutory provision in question was section 203 of the Customs Act of Jamaica which provided:-

"If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the island, and it shall be made to appear by information on oath before any resident magistrate or justice in the island, it shall be lawful for such resident magistrate or justice by special warrant under his hand to authorise such officer to enter and search such house or other place, by day or by night, and to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and it shall be lawful for such officer, in case of resistance, to break open any door, and force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid."

As to section 203 at page 358 Lord Hoffman said:-

"Section 203 is clear as to the matters upon which the justice must be satisfied. It must appear to him from information on oath that the officer has reasonable cause to suspect one or more of the matters there specified. It is not sufficient that the justice is satisfied by the officer's oath that he suspects; it must appear to the justice that his cause for suspicion is reasonable. The test is an objective one. The matter was considered by the House of Lords in *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952, which also concerned a search by officers of the Revenue on a warrant issued by a judge. Although the statutory provision in that case, section 20C of the *Taxes Management Act* 1970, as amended, provided that it was for the appropriate judicial officer to be satisfied on information on oath given by an officer of the Board that there was reasonable ground for suspicion that an offence had been committed, the practical effect of the requirement was the same as that laid down by section 203 of the *Customs Act.* Lord Wilberforce said, at p. 998:

'If the judge does his duty... he must carefully consider for himself the grounds put forward by the revenue officer and judicially satisfy himself, in relation to each of the premises concerned, that these amount to reasonable grounds for suspecting, etc. It would be quite wrong to suppose that he acts simply as a rubber stamp on the revenue's application.'

"Viscount Dilhorne said, at p. 1004: 'It cannot in my view be emphasised too strongly that the section requires that the appropriate judicial authority should himself be satisfied of these matters and that it does not suffice for the person laying the information to say that he is.' Lord Salmon said, at p. 1018:

'if officers of the board require search warrants, they must give evidence on oath laying before a circuit judge the grounds for their suspicion and ... the duty of the judge must then be to consider the evidence and decide whether he (the judge) is satisfied that it establishes reasonable ground for the board's suspicion.'

"Lord Scarman said, at p. 1022: 'The judge must himself be satisfied. It is not enough that the officer should state on oath that he is satisfied... The issue of the warrant is a judicial act, and must be preceded by a judicial inquiry which satisfies the judge that the requirements for its issue have been met.' In the present case, the matter was correctly stated by Forte J.A. in the following passage:

'Although it is clear in the statute that it is the customs officer who has to have 'reasonable cause to suspect' it is equally clear in my view that he (the customs officer) has to make it appear to the justice that he (the customs officer) has 'reasonable cause' to suspect. If it does not appear to the justice of the peace that the officer has 'reasonable cause' then he ought not to issue the warrant. In coming to that conclusion, it is inescapable that the justice would also have to apply his mind to the matters upon which the officer's

cause for suspicion is based and/or the credibility of the officer....

The application is made ex parte and the officer must disclose to the justice all that the latter needs to know in order to discharge his duty. There may be some knowledge, for example the identity of informers, with which the justice will find it unnecessary to be burdened. But sufficient information to establish the grounds for suspicion to his satisfaction must be stated on oath. The statute does not require the information to be provided in writing. An oral statement on oath is sufficient.

"Their Lordships do not underestimate the difficulty and delicacy of the task which is upon justices and other judicial officers to whom application is made for search warrants. The applicant is generally a police or other law enforcement officer who knows far more than the justice about the investigation. The application is made ex parte; there is naturally a predisposition upon the part of the justice to be helpful to the officer who is present and assures him that a search is necessary. The officer may be known to the justice, who may have learnt to trust his judgment and veracity. Their Lordships do not suggest that this is something which should be ignored. On the other hand, the citizen whose rights the justice is constitutionally required to protect is absent and seldom depicted in the most favourable light. Nevertheless, if the constitutional safeguards are to have any meaning, it is essential for the justice conscientiously to ask himself whether on the information given to him upon oath (in the case of section 203, either orally or in writing) he is satisfied that the officer's suspicion is based upon reasonable cause."

Section 26 of the Criminal Procedure Code (2006 Revision)

Section 26 of the Criminal Procedure Code (2006 Revision) is in the following terms.

26. "Where a court or a Justice of the Peace is satisfied by information on oath that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, ship, vehicle, box, receptacle or place, such court or Justice of the Peace may, by warrant (called a search warrant), authorise a police officer or other person therein named to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in the warrant) for any such thing and, if anything searched for is found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law".

Mr. Purnell submitted that part of the Chief Justice's analysis of section 26 in his Reasons of 4 April was wrong.

His submissions were as follows.

The only question is whether the officer has a reasonable suspicion of an offence. It is neither appropriate nor the correct process for the issuer of a warrant to conduct an analysis as to whether or not certain criteria are satisfied, because to do so would impose the court's or the justice's decision about the quality of the evidence

for the real test, which is the police officer's suspicion of the commission of an offence. The court or justice has to be satisfied that when the police officer says that (on the basis of the information provided) he suspects that a criminal offence has been committed, that (objectively) is a reasonable view for the officer to take. Mr. Purnell submitted that the hurdle is low.

The Grand Court normally follows previous decisions as a matter of judicial comity. In the matter of Bank of Credit and Commerce International (Overseas) Ltd (in Liquidation) 1994-95 CILR 56 Harre CJ said:

"Mr. Moses asks me to take the view that this and other observations of my learned predecessor to which I shall refer later were in part *obiter*, in part distinguishable and should not in any event be followed. I would not lightly adopt the last of these alternatives, although it is open to me to do so. The principle is to be found in the following passage from the judgment of Lord Goddard, C.J. in Huddersfield Police Auth. V Watson (2) ([1947] K.B. at 848):

> "...I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction"."

See further Halsburys Laws of England volume 37 paragraph 1244 and Amanuel v Alexandros Shipping Co [1986] 1 QB 464 at 469 Webster J ("No authority has been cited to me which suggests that a decision made ex parte is not a decision to which the ordinary rules of precedent in principle apply").

The Chief Justice's Reasons for Decision of 4 April constituted a fully reasoned decision as to the requirements of section 26 which I follow in relation to section 26.

I do not consider that the Chief Justice was wrong in his analysis of the conditions precedent to the grant of a warrant.

I put the matter in my own language as follows.

In the present case the respondent had to be satisfied by information on oath

1. that according to reasonable suspicion the applicant had committed the offence of misconduct in public office and
2. that according to reasonable suspicion material which was necessary to the conduct of the investigation into the offence of misconduct in public office was in the Home/Kirk House.

As to (1) the ingredients of the offence are

(a) the applicant acting as a public officer (not in his

private capacity)

(b) wilfully misconducted himself;

(c) to such a degree as to amount to an abuse of the public's trust in the applicant;

(d) without reasonable excuse or justification.

Further the respondent had to be satisfied that it was appropriate and proportionate in all the circumstances (including questions of privilege, confidential information etc) to authorise the search warrants in the terms sought.

Section 26 includes the words "that in fact or according to reasonable suspicion ... an offence has been committed." It does not say "according to reasonable suspicion of the person who swears the information".

The duty to make full disclosure

As to applications for injunctions or freezing orders there is a duty upon an *ex parte* applicant for an injunction or freezing order to make full disclosure.

In R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac [1917] 1 KB 486, Warrington LJ said at p 509:-

"It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an

obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

In Bank Mellat v Nikpour [1985] FSR 87, Donaldson J said at p 90:-

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

He then quoted the passage of Warrington LJ above and stated at pp 91-92:-

"the court will be astute to ensure that a plaintiff who obtained an injunction without full disclosure - or any ex parte order without full disclosure - is deprived of any advantage he may have derived by that breach of duty ... The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Pillar order, one of the law's two "Nuclear" weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked."

As to ex parte applications for search warrants, Feldman in the Law relating to Entry, Search & Seizure 1986 at paragraph 4.53 states (in my opinion correctly) that

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

In Rea v Gibbs 1994-95 CILR 553 Collett JA referred to the need to ensure that the facts are placed before the judge asked to grant a search warrant "fully and fairly". In doing so he employed the language of Lord Coleridge CJ in Hope v Evered 17 QBD at 340.

In Attorney-General of Jamaica and Williams Lord Hoffmann referred to the duty of the officer to disclose to the justice "all that the latter needs to know in order to discharge his duty".

In R v. Bow Street Magistrates' Court [2005] 4 All ER 285 Kennedy LJ said: "It is the duty of the applicant to give full assistance to the district judge, and that includes drawing to his or her attention anything that militates against the issue of a warrant"

The experience of the tribunal to which the application is made and the circumstances in which the application is made are in my opinion relevant to the extent of the duty to give full assistance. It may be necessary to disclose to a justice of the peace a material matter that would be expected to be known to a justice of the Grand Court.

The consequences of a failure to disclose material facts

I will consider first some of the authorities as to the consequences of a failure to disclose material facts on an application for an injunction or freezing order.

In Brink's Mat Ltd v Elcombe and others [1988] 1 WLR 1350 in the context of an application to discharge a freezing order Ralph Gibson LJ said at page 1357:

> "...If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v Nikpour,* at p.91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 KB 486, 509.
>
> Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in

the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": *per* Lord Denning M.R. in *Bank Mellat v Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms."

In Memory Corporation Plc v Sidhu [2001] 1 WLR 1443 the question arose whether a freezing order should be discharged on the grounds of non-disclosure. At page 1455, Robert Walker LJ said:

"The correct view ... is that the advocate's individual duty to the court, and the collective duty to the court, on a without notice application, of the plaintiff and his team of legal advisers are duties which often overlap. Where they do overlap it will usually be unnecessary, and unprofitable, to insist on one categorisation to the exclusion of the other. It will however always be necessary for the court, in deciding what should be the consequences of any breach of duty, to take account of all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant (which will include the question whether the

consequences of the breach are remediable and have been remedied). Above all the court must bear in mind the overriding objective and the need for proportionality. As Balcombe L.J. said in Brink's Mat Ltd. v. Elcombe [1988] 1 W.L. 1350, 1358, this judge-made rule cannot itself be allowed to become an instrument of injustice. The relative degrees of culpability of the client and of his lawyers are not irrelevant but will seldom if ever be determinative".

As to factors which might point towards a different approach being taken in relation to without notice applications for restraint orders, in comparison to applications in ordinary litigation for freezing orders, in Jennings v CPS [2006] 1 WLR 182 the first ground of appeal was that the alleged failure of the Crown Prosecution Service to make proper disclosure on an *ex parte* application for a restraint order under section 77 of the Criminal Justice Act 1988 should be visited by an order discharging the restraint order.

At paragraphs 56 and 57 Laws L.J. said:

"It seems to me that there are two factors which might point towards a different approach being taken to without notice applications for restraint orders in comparison to applications in ordinary litigation for freezing orders; but they pull in opposite directions. First, the application is necessarily brought (assuming of course that it is brought in good faith) in the public interest. The public interest in question is the efficacy of s71 of the 1988 Act. Here is the first factor: the court should be more concerned to fulfil this public interest, if that is what on the facts the restraint order would do, than to discipline the applicant-the Crown-for

delay or failure of disclosure. But secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure. The court needs to have both these considerations in mind. But they do not, I think, promote some distinct and separate test for the exercise of the s77 jurisdiction. They are relevant factors which in his good sense the judge will consider and weigh as they arise case by case".

See further Longmore L.J. at paragraphs 62 to 64.

(The present case is of course concerned with applications for search warrants, not an application for a restraint order under section 77 of the 1988 Act).

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

The procedure to be followed on applications for search warrants

In Rea v Gibbs 1994-95 CILR 553 Collett JA at the end of his judgment at page 610 made the following general comments on the procedure to be followed where search warrants are applied for in the Cayman Islands. He said

"I cannot part with this case without commenting upon the procedure which was apparently followed in this case in applying for these warrants. The learned Chief Justice himself in his judgment commented adversely upon the absence of any note of the proceedings by the judge who issued them. These comments I fully endorse: whatever may be the usual procedure followed in the United Kingdom when search warrants are issued by justices of the peace [on] an information laid by [a] police officer, such a procedure is entirely inappropriate to an application in this jurisdiction before a Judge of the Grand Court under s.16M of the Misuse of Drugs Law (Second Revision). There may be no statutory rules laid down to govern the procedure in a criminal as contrasted with a civil cause before the court; nevertheless it has been universal practice in such applications, as for instance for bail or for extension of time in which to appeal a Summary Court conviction, for an *ex parte* notice of motion or summons as a minimum to issue. That is usually accompanied by an affidavit. If security considerations preclude the filing of an affidavit in the usual way, oral evidence can be given of the circumstances by an officer or officers of the police, but in such cases it should, as in all other cases, be noted in narrative form by the judge, and so constitute an official record.

One further observation. There is not reason why a legitimate application by a police officer under s.16M should be presented by him in person, since the assistance of a legally qualified officer of the Attorney General's chambers can always be made available. This course would have the twin advantages of filtering such applications before the judge is approached so as to ensure that they fall within the ambit of the statute and of ensuring that the facts are placed before the judge "fully and fairly", to employ once more the language of Lord Coleridge, C.J. Such a practice would to a great extent ensure that the circumstances which

have unhappily prevailed in the present case are not repeated and I commend it to all those charged with responsibility for such applications in this jurisdiction in the future".

The Judicial Studies Board (of England and Wales) Adult Court Bench Book contains guidelines to Magistrates in England and Wales who are asked to deal with applications outside court hours under the heading 'The Magistrate at Home'. I refer to these guidelines because I consider that Mr. Bridger's account in his third affidavit of his experience of applications for approximately one thousand warrants (largely I assume in England and Wales) should be balanced against this independent material. The guidelines include the following.

"3. The Magistrate at Home.

You may be asked to deal with applications outside court hours. The purpose of these notes is to provide a handy reference guide to assist in dealing with these requests.

The guidelines are not exhaustive. You must be very careful before signing any documents at home. In the case of unusual requests and in all cases, if you are unsure or have any doubts, you should contact a member of the legal team either at the court office or their home. If you are unable to contact any of these do not sign the document but ask the applicant to attend at their local courthouse during normal working hours...

All Applications

- You should not deal with any warrant applications without obtaining legal advice from a member of the legal team...

Search Warrants.

...For all search warrant applications:

- You should have been contacted by a member of court staff who will have made the necessary arrangements for the applicant to visit your home or place of work. If this is not the case and you have been approached directly by the applicant you must contact a legal adviser before hearing the application and signing the forms presented, to ensure that you have jurisdiction and that the necessary legal and administrative requirements have been complied with.

- When the applicant attends, request formal identification from them.

- Where the applicant is a police officer, check that the application has been authorised by an inspector or senior officer on duty.

- The applicant should bring with them an information setting out the grounds for the application, together with sufficient copies of the search warrant... Ask the applicant to sign the information. This must be done in your presence. If the documents have already been signed, ask the applicant to sign them again...

- Your legal adviser will already have explained what the applicant must identify if you are to issue the warrant. Question the applicant to satisfy yourself of the grounds. In particular ensure that the premises are precisely identified in the documents and that all relevant details have been completed...

- If you are satisfied that the necessary grounds exist, put the date and time on the information, warrant and copy warrants and sign them.
- Giving Reasons. The general rule is that reasons for granting or refusing a warrant do not have to be recorded because the information should contain all the necessary details. Where additional pertinent information is elicited from an applicant by way of questioning, it is desirable for a note to be kept in the event of a challenge being mounted against the issue of a warrant. Practice may vary, but these notes should be made on the information or on a form provided for this purpose locally. Please refer to local guidance documents to confirm the practice in your area.

- Retain the original information document and hand the warrant to the applicant. The retained information should be handed to the court office at the earliest opportunity".

No equivalent of the JSB Adult Court Bench Book is provided to justices of the peace in the Cayman Islands. I was provided with a document

entitled "Training Manual for Justices of the Peace" which (I was told) is only provided to justices of the peace who attend training courses.

The provisions of the Police and Criminal Evidence Act 1984 do not apply in the Cayman Islands. The circumstances and practices in the Cayman Islands differ from those in England and Wales in a number of respects. The general practice here (it would seem) is for the police to approach a justice of the peace directly.

The guidelines in the Adult Court Bench Book underline three fundamental principles which are in my opinion applicable in the Cayman Islands:-

1. Those performing judicial functions should act and be seen to act independently.
2. The need for the availability of independent legal advice to a justice of the peace who is asked to issue a search warrant, particularly in the case of unusual requests or requests where unusual offences are alleged.
3. The desirability of a note being kept where additional pertinent information is provided orally to the justice of the peace.

As to 2., Collett JA said supra

"the assistance of a legally qualified officer of the Attorney General's chambers can always be made available. This course would have the twin advantages of filtering such applications before the judge is

approached so as to ensure that they fall within the ambit of the statute and of ensuring that the facts are placed before the judge "fully and fairly".

As I understand the position it is always open to a justice of the peace to contact the Court and ask one of the legally qualified members of the Court staff to provide advice. In case of doubt or in the case of any unusual application, the application should be referred to a magistrate or the Grand Court.

As to 3., this is what Collect JA said in terms should happen.

I am concerned about paragraph 25 of Mr. Bridger's first affidavit. He says "I did not have sufficient confidence in the judiciary of the Grand Court. I spoke to the Oversight Group about this and Donnie Ebanks, the Deputy Chief Secretary, suggested a list of three justices of the peace who would be suitable". (emphasis added). There are (I am informed) about 168 justices of the peace in the Cayman Islands.

In my opinion these extraordinary applications for search warrants should have been made to the Grand Court and not to a justice of peace. Mr Bridger knew that the complexity of the issues in the earlier applications for warrants in respect of three other persons had required

several hearings and led to Reasons extending to 51 pages. How could a justice of the peace be expected to deal with similarly exceptional and complex applications on police premises in a short space of time? The Chief Justice's approach on 22 February demonstrates that had he been asked to appoint a judge (if necessary a visiting judge) to hear the applications he would have done so. If Mr. Bridger's affidavit is to be read as suggesting that the Chief Justice would not have acted professionally had he been approached to allocate a judge to hear the matter, such a suggestion is in my opinion wholly unwarranted.

Even, if contrary to my view, it was appropriate to make the applications for the search warrants to a justice of the peace, the applications to the respondent were contrary to good practice for the following reasons.

The respondent says that Mr. Donovan Ebanks asked him to attend the offices of "the Metropolitan Police" or "the Inquiry Team" on 24 September. In my opinion the respondent should not have been asked to attend police premises. The request served to undermine the independence that a justice of the peace should maintain at all times. If it was necessary to apply outside court hours, the applications should have been made at the respondent's home or office.

I am troubled by the fact that Mr. Donovan Ebanks "advised [the respondent] that it was a matter of which the Governor was aware". The Governor appoints justices of the peace pursuant to the Summary

Jurisdiction Law (2004 Revision). What effect was such a statement likely to have on the respondent's approach to the application? In my view the statement should not have been made.

It would have been obvious to any fair-minded police officer that the respondent was out of his depth. The respondent did not have independent legal advice available to him. The respondent could not be expected to have any knowledge of the ingredients of the offence of misconduct in public office contrary to common law or the law of contempt.

I am troubled by the selection of a particular justice of the peace as "suitable".

Admitted or partly admitted failures to put material facts and matters before the respondent and/or admitted misrepresentations of material facts and matters and/or admitted errors

1. Paragraph 2 of the Information alleged that the applicant

> between 30th June 2007 and 4th September 2007, being a holder of a public office, did wilfully, and without reasonable excuse or justification, misconduct himself, in that he did a series of acts and made a series of omissions calculated to injure the public interest, namely:

- informing John EVANS that he was considering whether letters published by Cayman Net News (CNN) amounted to contempt of court when he knew, or had reason to believe, that the content of such letters was not capable of so amounting and that, even if they did, the alleged contempt was not in the face of the court and would require investigation by the police at the request of the Attorney General;

Mr. Purnell conceded (for the purposes of the judicial review hearing only) that the whole of the bullet point was incorrect because of section 27 of the Grand Court Law (2008 Revision) which provides

"27(1) Without prejudice to any powers conferred upon the Court under section 11(1), the Court shall have jurisdiction to order the arrest of and to try summarily any person guilty of any contempt of the Court or any act insulting to or scandalising the Court or disturbing the proceedings thereof, and any person convicted under this section is liable to imprisonment for six months and to a fine of five hundred dollars.

(2) For the purposes of this section, contempt of court shall include any action or inaction amounting to interference with or obstruction of, or having a tendency to interfere with or to obstruct, the due administration of justice".

(For completeness I record that Mr. Purnell was apparently unfamiliar with the section 27 of the Grand Court Law until the last morning of the hearing when it was drawn to his attention by Mr. Alberga. This is not a criticism of Mr. Purnell, but those instructing him should have been familiar with the section).

I refer to the judgment of Lord Steyn in Ahnee supra and to Arlidge, Eady and Smith at paragraphs 5-260 to 5-274 where modern examples of "scandalising" in other common law jurisdictions are referred to under the headings Canada, Australia, New Zealand, Singapore, Mauritius and Hong Kong.

The allegation that the applicant

"knew, or had reason to believe, that the content of such letters was not capable of … amounting [to contempt] …".

was part of the foundation of what followed in the Information.

The allegation was unfounded and misleading.

2. Paragraph 3 of the Information set out the material circumstances of the allegations. At sub-paragraph (l) it was stated:

   - HENDERSON informed EVANS that the letters possibly constitute a criminal offence of contempt. However, the letters have been examined by independent legal council (sic) and 'do not relate to any 'live' proceedings and therefore, are not capable of amounting to contempt, no matter how offensive they may appear.

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

Mr. Purnell accepted that sub-paragraph (l) as a proposition of law was inaccurate "because of the questionable existence of the form of contempt known as scandalising the Court".

I add the following. If such advice as alleged was given it failed to have any regard to among other matters

(a) section 27(1) of Grand Court Law (2008 Revision).

(b) the decision of the Privy Council in Ahnee v Director of Public Prosecutions [1999] 2 AC 294 supra.

and

(c) what is set out in Arlidge, Eady & Smith on Contempt 3rd edition 2005 paragraphs 5-204 to 5-274.

Further paragraph 3 (n) of the Information stated

> "(n) Justice HENDERSON remarks that the publication of the letters amounts to contempt. It is not clear on what basis he asserts that publishing letters criticising the judiciary would amount to contempt.

This sub-paragraph was again seriously misleading. It would seem that the applicants for the search warrants and those who provided legal advice to them were unfamiliar with section 27 of the Grand Court Law and the form of contempt known as scandalising the court.

3. Sub-paragraph (q) of paragraph 3 of the Information states

- In order to ascertain the involvement of Justice HENDERSON, and to obtain his account, he was invited to avail himself for a witness interview by the independent enquiry team on five occasions, but declined each time.

Mr. Purnell conceded that the statement made by the applicant to the investigators and the correspondence between the applicant and the investigators, including his repeated offers to answer questions in writing should have been disclosed to the respondent.

In my opinion sub-paragraph (q) presented an incomplete and misleading picture. Material facts were not disclosed so as to provide a balanced picture.

The following should have been disclosed:-

i. The applicant's letter to the Governor dated 24 June 2008;

ii. Mr. Bridger's letter to the Chief Justice dated 26 June (received 24 July) which included the sentence "if a judge is properly a witness to matters which are subject to investigation, he or she must be treated accordingly, with any difficulties that arise as a consequence being managed appropriately" (emphasis added).

iii. The Chief Justice's letter dated 3 September enclosing the applicant's response. The applicant's response comprised his statement of 21 May and his letter of 2 September.

I refer to the contents of applicant's statement and letter.

I accept Mr. Alberga's submission as follows:

"The Information (at para. 3(q)) asserts that the applicant refused to submit to a "witness interview" on 5 occasions. The inference left (intentionally) is that the applicant simply refused to divulge information. The Information does not disclose that on each such occasion the applicant suggested an alternative course which already had the approval of the Chief Justice, the Solicitor General and the Investigators' own Special Counsel Mr. Mon Desir - written questions and answers. In the circumstances, disclosure of the applicant's offer would have negatived the adverse inference which the investigators were contending for and should have been made.

This is particularly important in the light of the respondent's recollection "from what S10 Bridger told me I understood that [the applicant] had interfered in the investigation by refusing the search". If so, this was a deliberate misrepresentation of the facts and a reasonable inference is that Mr. Bridger intended to influence the respondent by suggesting culpable conduct on the part of the applicant. Nothing could be further from the truth; the applicant was entitled to refuse to consent to the search of his home and his judicial offices and was entitled to insist on due process. To characterise the lawful refusal of consent as "interference" was mischievous and wrong."

Further failures to put material facts and matters before the respondent and further misrepresentations of material facts and matters.

I have referred to 3 admitted or partly admitted failures. I will continue the numbering.

4. In my opinion if the matter was to be put fully and fairly to the respondent it was necessary to identify (accurately) the ingredients of the offence of misconduct in public office.

Section 95 of the Penal Code (2007 Revision) creates the offence of abuse of office. Section 95 provides:

95. (1) Whoever being employed in the public service does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of an offence and liable to imprisonment for three years.

(2) If the act is done or directed to be done for purposes of gain such person is guilty of an offence and liable to imprisonment for four years.

(3) A prosecution for an offence under this section, section... shall not be instituted except by or with the sanction of the Attorney-General.

Section 95 was considered by the Chief Justice in his Reasons for Decision of 4 April. Mr. Alberga conceded that despite the existence of the offence of abuse of office contrary to section 95, the common law offence of misconduct in public office remains an offence in the Cayman Islands. None of the legal representatives of the parties could, however, remember a single case in the past in the Cayman Islands involving an allegation of misconduct in public office contrary to common law.

The application for the search warrants was made on police premises when there was no independent lawyer available to advise the respondent. Mr. Purnell submitted that the respondent had to know enough about the offence of misconduct in public office contrary to common law to

understand that it was capable of falling within the calendar of criminal offences. It was (according to Mr. Purnell) sufficient if the respondent knew that misconduct in public office contrary to common law was an offence contrary to the law of the Cayman Islands. I reject those submissions. How can (to borrow Lord Hoffmann's words) the protection of a judicial decision be interposed on an application for a search warrant, if the tribunal which is supposed to provide that protection does not know what the ingredients of the offence in question are?

I asked Mr. Purnell where the formulation in paragraph 2 of the Information ("It is alleged that, contrary Common Law, Justice Alexander Henderson, between 30th June 2007 and 4th September 2007, being a holder of a public office, did wilfully, and without reasonable excuse or justification, misconduct himself, in that he did a series of acts and made a series of omissions calculated to injure the public interest, namely:") came from. Mr. Purnell could not say where it was drawn from but described it as "a very useful commonsense approach that did not purport to contain the ingredients of the offence". I disagree.

I fail to see how the respondent in the circumstances that prevailed on 24 September could have discharged his function to satisfy himself that the prescribed circumstances existed unless he was informed of the

ingredients of the offence of misconduct in public office contrary to common law.

The ingredients of the offence were accurately stated by Pill LJ in Attorney General's Reference (No 3 of 2003) supra. (It is unnecessary for present purposes to express an opinion as to Mr. Purnell's submission that Pill LJ's formulation at paragraph 61 (1) should have read "a public officer acting as such or in relation to his public office").

Paragraph 2 of the Information failed to identify the ingredients of the offence accurately.

Further, other passages in the Information were at best misleading. At paragraph 3 sub-paragraph (s) it is submitted that "The evidence presently available... tends to show that Justice Henderson was in breach of his duties of impartiality, propriety and integrity in the following ways...." At sub-paragraph (t) it is contended that "the breach of duty is capable of amounting, as a matter of fact, to a breach of such seriousness as to warrant criminal sanction".

If these passages from the Information were intended to be read as referring back to the inaccurate summary of the offence in paragraph 2, they do nothing to correct the inaccurate summary. Further the Information could be read as suggesting that the offence of misconduct in public office would be established if (a) the applicant was "in breach of

his duties of impartiality, propriety and integrity" (paragraph (s)) and/or (b) if there was "a breach of duty... of such seriousness as to warrant criminal sanction (paragraph (t)). There is no mention in this part of the Information of the ingredient/defence - without reasonable excuse or justification.

5. In my opinion the Rulings and Reasons for Decision of the Chief Justice given on 22 February and 4 April 2008 in relation to applications for search warrants relating to three persons subject to part of the same investigation should have been provided to the respondent. Those three persons were all mentioned in the Information.

By way of example only paragraphs 63-68 and 69 of the Reasons for Decision of 4 April 2008 provided a statement of the legal principles as to

(a) the role of the tribunal to whom an application for a search warrant is made and
(b) the conditions precedent to the grant of a warrant.

Paragraphs 142-146 (under the heading 'What Evidence?) drew a distinction in the context of Operation Tempura between "material which was necessary to the conduct of the investigation into the offence of misconduct in public office" and an "oppressive 'fishing expedition' ".

There is considerable force in Mr. Alberga's other submissions set out above as to the relevance of the Rulings and Reasons for Decision.

If the respondent had been shown the Rulings and Reasons (or even been told about them) the overwhelming probability is that he would have said – "Why are you not making the application to the Grand Court?" There was no good answer to such a question.

Had the respondent been shown the Rulings and Reasons (or even been told about them) the overwhelming probability is that he would have directed that the applications should be heard by the Grand Court or adjourned the applications so that he could obtain independent legal advice.

If contrary to my opinion it was not necessary for the applicants for the search warrant to provide to the respondent copies of the Rulings and Reasons for Decision of 22 February and 4 April, in alternative the material parts of the same should have been fairly summarised to the respondent. Had this been done the overwhelming probability is that the respondent's reaction would have been the same as that set out above.

In his first affidavit Mr. Bridger said

"There was no mention in the Information of the decisions by the Chief Justice in February and March 2008. My principal reason for concluding that it was not necessary to disclose … was that they were irrelevant to

the issues before the [respondent] which he had to decide. ... In addition I had concerns about certain aspects of the Chief Justice's rulings".

The fact that a police officer (or any other person) disagrees with a decision of a judge is not a reason for not drawing that decision (if material) to the attention of a court or a justice of the peace.

I add that "the suspicions held by the investigating team as to the propriety of the Chief Justice's conduct" (see paragraph 26 of Mr. Purnell's skeleton argument) are on the material before me wholly without foundation.

6. It was the duty of the applicants for the search warrants to draw to the respondent's attention anything that militated against the issue of a warrant. If Mr. Evans' two witness statements of 13 October and 28 October 2007 were not to be shown to the respondent (and in my opinion in the particular circumstances of the application in question good practice required that they should have been) at the very least the Information should have included all extracts which militated against the suggestion that the applicant had committed the offence of misconduct in public office. By way of, example the following passage in Mr. Evans'... first statement should have been disclosed.

   "If having searched Seales office, and if I had found the letters, I would have copied them and given them to Mr. Jones. I was aware

that there is some sort of public complaint that the police are dealing with"

This passage was material because Mr. Evans was making it clear that there was no question of passing anything to the applicant.

There were further passages in Mr. Evans' statements material to the overall context (see 7 below) which should have been disclosed.

7. In my opinion Mr. Alberga is correct in his submission that the overall context in which the applicant spoke to Mr. Evans should have been more fully set out in the Information, including in particular the fact that in at least one instance a letter was not in fact written by the person whose name appeared at the foot of the letter. The alleged offence of misconduct in public office had to be considered against a full and fair account of the extraordinary background.

In my opinion the following passage from Mr. Evans' second statement was material in the overall context and should have been disclosed or summarised:-

"The first letter was allegedly signed by Teresa Turpin, she is related to Barry Randall through a previous marriage. Barry Randall controls the Cayman Net News publication in Miami. Teresa Turpin has always denied any involvement in the letter writing.

Barry Randall must have read a copy of the letter prior to printing, what he found disturbing was that the identity of Mrs. Turpin had been established within 20 minutes of the publication appearing and being made public."

At the same time in my opinion the letter published by Cayman Net News on 3 July 2007 purporting to have been written by Thelma Turpin and the letter from Thelma Myrie-Turpin published by Cayman Net News on 6 July 2007 stating that she was not the author of the letter of 3 July 2007 and had no knowledge of it whatsoever, should have been disclosed or referred to.

The letter published on 6 July 2007 read:-

"Letter: It wasn't me

Dear Sir,

A letter entitled "There's room for legal aid abuse" which appeared in the Tuesday , 3 July edition of Cayman Net News is attributed to my name.

Whilst I agree with some of the points raised. I would like to make it perfectly clear that I, Thelma Turpin, of Cotton Tree Bay, Cayman Brac was not the author of the said letter and had no knowledge of it whatsoever.

Thelma Myrie-Turpin"

There is a distinction between on the one hand letters criticising the judiciary (Information paragraph 3 (k)), and on the other hand a letter

criticising the judiciary which purported to be written by a person who did not in fact write it. The respondent should have been told that there was one letter in the latter category. That letter was fabricated in the sense that it was not written by the person it purported to be written by. On any view such fabrication would be regarded by any right thinking person as extremely serious.

In view of the catalogue of failures and misrepresentations set out above it is unnecessary to consider Mr. Alberga's remaining submissions as to examples of alleged material non-disclosure and misrepresentation. This decision is founded on the seven failures/misrepresentations listed above.

The consequences of the failures to put material facts and matters before the respondent and of misrepresentation of material facts and matters.

I ask myself the question – given the failures identified in paragraphs 1 to 7 above, is it just that the search warrants should stand? My answer is no.

The respondent was asked to go to police premises when he should not have been. His independence was compromised. Material facts and matters were not set out fully and fairly in the Information or the oral

statements. The respondent was not told all that he needed to know to discharge his duty. He was not given full assistance. Matters that militated against the issue of a warrant were not drawn to his attention. The jurisdiction was (to borrow the words of Laws LJ) "conscripted to the service of arbitrary and unfair action" by the police officers concerned.

The failures and misrepresentations individually and collectively evidenced and reflected the gravest abuse of the process.

I have no hesitation in granting the relief sought in paragraphs 1, 2 and 3 of the application. The relief in paragraph 3 will extend to copies of all items seized in any form whatsoever. I also order an inquiry as to damages.

For completeness I turn to consider the remaining Issues.

(15) ANALYSIS AND CONCLUSIONS ISSUE 1

Issue 1 is as follows:

> Was it Wednesbury unreasonable for the respondent on the evidence and argument placed before him to be satisfied that in fact or according to reasonable suspicion the applicant had committed the common law offence of misconduct in public office as particularised in the Information on Oath?

For the purposes of addressing Issue 1 the respondent must be assumed to have had an accurate understanding of the relevant law of the Cayman Islands. (In fact the relevant legal principles were not placed before the respondent and he could not have been expected to know them).

On the assumption that the respondent had an accurate understanding of the relevant law of the Cayman Islands, I answer the question in the affirmative.

The relevant law as to contempt and the ingredients of the offence of misconduct in public office contrary to common law are set out above.

It is important to examine carefully the account of Mr. Evans as set out in the Information:

- [Justice Henderson] had asked me to look for some letters that had been published by Net News attacking the judiciary, specifically the Chief Justice. Judge Henderson had asked me to identify the source of the letters and their authenticity. Judge Henderson was not aware of the circumstance of me trying to obtain those letters.

I am a good friend socially of Judge Alex Henderson, one of the Grand Court Judges.

- Judge Henderson asked me to talk to someone in the office, and ask if they could be a little more careful about the letters. More letters were published and Mr Henderson phoned me and asked if [I could speak] to someone to ask them to back off a bit. I decided that if I could find the box file in Desmond's office I may be able to establish where the letters had originated.

- Mr Henderson told me he was considering if the letters were contempt, and if there were sufficient grounds to take legal action against the newspaper.

- Judge Henderson contacted me shortly afterwards and said you, meaning Cayman Net News, have to be careful because it is heading towards areas of contempt. Judge Henderson contacted me again by phone [in] the office around the 25th July 2007after two more letters appeared on the 20th July 2007 ...[produces letters as exhibit][1]. He just pointed out two more letters had been published and asked if we could be careful about the sources of the letters. He politely asked me to talk to the newspaper and also requested if I could find out where the letters had come from...

- ...sure at some stage Judge Henderson mentioned the Chief Justice was looking at whether the newspaper had exceeded 'fair comment' and was heading towards contempt.

- If I had have identified the source by searching Mr. Seales office by finding the box file, this would not have been revealed to Judge Henderson or the Chief Justice. The documents as I have previously stated would have been handed to the police.

- I have not seen Judge Alex Henderson for several weeks, and I am now aware that there is a separate police investigation. One of my roles now at Cayman Net News is to keep an eye out to see if any more letters materialise, although I think the judiciary may have already identified the source. I have a hunch that the letter writer has been identified.

- I did not have any concerns that I was asked to make enquiries on behalf of Judge Henderson unofficially

Quite apart from the question whether (according to reasonable suspicion) any of ingredients (1) to (3) of the offence of misconduct in public office were present, it could not reasonably be said that according to reasonable suspicion the applicant acted "without excuse or justification".

It is important to note that

(a) in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the

administration of justice against contempts which are calculated to undermine it. (per Lord Steyn in Ahnee supra).

(b) there was no material in the Information to suggest that the applicant had asked Mr. Evans to act unlawfully.

(c) the letters in question included at least one letter that had been fabricated in the sense referred to above.

In my opinion the answer to Issue 1 is in the affirmative.

(16) ANALYSIS AND CONCLUSIONS ISSUE 2

Issue 2 is as follows:

> Was it Wednesbury unreasonable for the respondent on the evidence and argument placed before the respondent to be satisfied that in fact or according to reasonable suspicion that recovery of the objects described in the search warrants was necessary to the conduct of the investigation then taking place?

I refer to what the Chief Justice said in his Reasons for Decision under the heading - What Evidence?

I raised with Mr. Alberga the question whether in relation to section 26 there is any difference in principle between the correct approach to an application for a search warrant made before arrest, and to an application

for a search warrant made after arrest. (Compare the position under the Police and Criminal Evidence Act 1984 – Stone The Law of Entry, Search and Seizure 4th ed. paras. 3.74 to 3.83). Mr. Alberga said there was no difference in the correct approach under section 26 pre and post arrest, and I have proceeded on this basis.

Mr. Purnell very properly drew my attention to the following. The word "necessary" appears in section 26 in the phrase "necessary to the conduct of an investigation" (emphasis added). Section 28(1) provides that "Every search warrant shall be in the form set out in the second schedule..." The form of search warrant in the second schedule includes the words:-

"I/the court am/is satisfied by information on oath that there is reasonable suspicion of the commission of the offence of _____ and it has been made to appear to this court/me that the production of the following article(s) is/are essential to the inquiry into the said offence" (emphasis added).

Mr. Purnell submitted that there was no duty on the applicants for the warrant to draw to the attention of the respondent the fact that a warrant in the terms sought would extend to highly confidential material, which could not possibly be relevant to the investigation. I reject this submission.

It was in my opinion incumbent on the applicants for the search warrants to provide to the respondent sufficient particulars to explain why (according to reasonable suspicion) recovery of the articles described in the search warrants was necessary to the conduct of the investigation. In my opinion the Information did not contain sufficient particulars.

Further the respondent's attention should have been drawn to the fact that the "computers provided for or by [the applicant's] employment" in Kirk House would almost certainly contain highly confidential information which could not possibly be necessary to the conduct of the investigation. Such highly confidential information would be likely to include drafts of judgments already delivered or to be delivered in the future, notes in relation to past and current cases, emails from and to the legal representatives in past and current cases etc.

I refer to the first affidavit of Detective Sergeant Timothy Thorne. It refers to matters that took place after the search warrants were granted and includes the following passage.

"I previewed the contents of the hard disk and identified a folder called [x]. I opened this folder, which appeared to be irrelevant to our investigation, and Mr. Alberga ... asked that it be treated with the utmost sensitivity. I made a copy of the file onto a thumb drive supplied by Mr. Doussept and passed it back to him. I explained that the file would be reviewed once by a member of the investigative team to make sure that it

was irrelevant to the investigation, but only to the extent necessary to determine this.

I imaged the computer the next day.

John Kemp reviewed the folder which had been identified and confirmed that it was irrelevant to investigation. This is the only time that the folder has been reviewed".

The approach adopted by the police in the present case was back to front and wrong. Not only did the applicants for the search warrants fail to provide to the respondent sufficient particulars to explain why (according to reasonable suspicion) recovery of the "computers provided for or by [the applicant's] employment" was necessary to the conduct of the investigation, but they failed to draw the respondent's attention to the fact that such computers would be bound to contain highly confidential information which on any view the police should not have been permitted to access.

What happened was back to front because the proper ambit of a search warrant should be decided (before it is granted) by the tribunal concerned, not afterwards by the police.

In my opinion not only (in absence of sufficient particulars as above) was this a fishing expedition, but it was in part a fishing expedition in certain waters (of which folder x is an example) that the police should on any view never have been allowed to enter.

I answer Issue 2 in the affirmative.

(17) ANALYSIS AND CONCLUSIONS ISSUE 4

Issue 4 is as follows.

In any event, should the warrants be set aside because

(a) They are not in the form prescribed by section 28(1) of the Criminal Procedure Code and the second schedule thereto?

(b) They purport to have been issued by a court rather than by a justice of the peace

(c) They do not bear the seal of the Court referred to?

It is to be noted that

1. The search warrants were not given under the seal of the Court.
2. The articles were not "produce[d] … forthwith before a court".
3. The warrants were not returned to a court (or the respondent) with an endorsement certifying the manner of execution.
4. The Information referred to Grand Court Hero's Square and yet one search warrant was in respect of Kirk House.
5. The warrant contained the words "and if necessary any persons therein" which do not appear in the second schedule to the Criminal Procedure Code.

In view of my conclusions set out above in relation to Issues 3, 1 and 2, it is unnecessary to consider these points.

Acting Judge of the Grand Court

Peter Gestwell

Dated the 29th October 2008.