



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: S11 OF 2008

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3
4 IN THE MATTER OF THE GRAND COURT RULES, ORDER 53

5
6
7 AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY
8 THE PLAINTIFFS

9
10 BETWEEN:

11
12 CARLOS POWELL AND ADRIAN ROWE

13
14 Plaintiffs

15 AND:

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17 ATTORNEY GENERAL OF THE CAYMAN ISLANDS
18 (FOR AND ON BEHALF OF THE PUBLIC WORKS
19 DEPARTMENT AND THE ROYAL CAYMAN ISLANDS POLICE
20 DEPARTMENT)

21 Defendant

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23 **Coram:** The Hon. Mr. Justice Foster (Actg)

24
25 **Appearances:** Mrs. Margeta Facey-Clarke of Facey Clarke & Company
26 for the Plaintiffs
27 Mrs. Vicki Ellis of the Legal Department for the Attorney General

28
29 **Heard on 3rd December 2008**

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32 **REASONS FOR ORDER MADE ON 3RD DECEMBER 2008**

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35 1. This matter concerns the procedure on an application by a Plaintiff for leave to
36 apply for judicial review and in particular whether on such an application, which
37 the Grand Court Rules (“GCR”) require to be made *ex parte*, the Judge has a
38 discretion to hear submissions by the putative defendant to the proposed
39 application for judicial review and, if so, in what circumstances such discretion
40 should be exercised.



1 **Background**

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3 2. On 30th October 2008 an application was filed on behalf of the Plaintiffs for leave
4 to apply for judicial review. The decision in respect of which the Plaintiffs sought
5 judicial review was a decision of the Director of the Cayman Islands Government
6 Public Works Department (“PWD”) not to reinstate the Plaintiffs, who were
7 employees of the PWD, as evidenced by letters from the Director dated 15th July
8 2008. The Plaintiffs also sought review of the decision of the Director not to
9 provide the Plaintiff with a written decision and/or transcript of the hearing
10 between the Plaintiffs and the Defendant (*sic*) (presumably meaning the Director)
11 on 4th September 2008. That meeting related to the Plaintiffs’ employment status.
12 The Plaintiffs also sought relief in respect of the decision of the Director of the
13 PWD not to provide the Plaintiffs with copies of the affidavits provided to the
14 Police in support of the obtaining of search warrants by the Police to search the
15 Plaintiffs’ homes on 21st September 2007 in connection with a police
16 investigation into certain activities of the Plaintiffs in the course of their
17 employment by the PWD. The Plaintiffs’ application for leave named the
18 Attorney General (“on behalf of the Public Works Department and the Royal
19 Cayman Islands Police Department”) as the defendant and therefore as putative
20 defendant to the proposed application for judicial review.

21

22 3. The Plaintiffs’ application for leave to apply for judicial review was listed for
23 hearing before me on Wednesday 3rd December 2008 as an *ex parte* application.

1 Having reviewed the Plaintiffs' application and their supporting affidavits over
2 the preceding weekend, at my request my secretary wrote on Tuesday 2nd
3 December 2008 to counsel for the Plaintiffs as follows:

4
5 *Mrs. Facey Clarke*

6
7 *The Judge received your bundle but asked me to email you the following*

8
9 *"There is an obvious issue whether the Director of PWD was exercising a public*
10 *or a private function in relation to the applicants' contracts of employment. Only*
11 *if it was a public function is judicial review appropriate. The court will need to*
12 *be satisfied on that issue by reference to relevant authority. See for example*
13 *O'Reilly v Mackman [1982] All ER 1124".*
14

- 15 4. Later the same day (2nd December 2008), the Clerk of Court, apparently at the
16 request of counsel for the Attorney General, brought to my attention a letter dated
17 1st December 2008 which counsel for the Attorney General had written to counsel
18 for the Plaintiffs in the following terms:

19
20 *"Dear Madame,*

21
22 ***Re: Cause 511 of 2008 – Carlos Powell et al. v The Attorney General of the***
23 ***Cayman Islands***

24
25 *We write with reference to the above captioned matter which we have noted is set*
26 *down on Wednesday 3rd December 2008 for the hearing of an Application for*
27 *Judicial Review before Hon. Mr. Justice Foster.*

28
29 *We are instructed that you had undertaken to serve the Appointing Officer, Public*
30 *Works Department with your proposed application. We have been advised that*
31 *this has not been done.*

32
33 *We are of the view that it is proper and reasonable that this matter be heard on*
34 *an inter partes basis for the following reasons:*

- 35
36 a. *Your expressed undertaking to serve the application on the Appointing*
37 *Officer.*

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- b. *You are fully aware that the disciplinary proceedings in respect of your clients were adjourned twice at your request and on the premise that you intended to raise a legal challenge to these proceedings before the Grand Court.*
- c. *Further, we have fundamental objections (both procedural and substantive) to the Application and we are of the view that the Court would only benefit if these are set out at an early stage.*
- d. *A significant period of time has elapsed since the initiation of disciplinary proceedings in respect to your clients. This delay is directly and solely attributable to your clients. We are of the view that an inter partes would assist in averting further delays.*

In the circumstances we would ask that you serve the Attorney General through the Government Legal Department with a copy of the Application which was filed with the Courts Office and agree to have the leave application heard "on notice".

As the matter is listed for Wednesday of this week we would be grateful if you would respond urgently via email to all the parties copied herein at your earliest convenience. Please note that if we fail to hear from you, we will in any event respectfully ask the Court's permission to appear and make representations on behalf of the Attorney General.

*Yours faithfully,
Deputy Solicitor General for the Attorney General"*

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5. When the Plaintiffs' application for leave came on for hearing in chambers before me at 9:30am on Wednesday 3rd December 2008 counsel for the Attorney General also appeared. She referred me to her letter to counsel for the Plaintiffs dated 1st December 2008 as set out above and confirmed that she had noted from the Court List that the application had been set down for hearing that morning before me. Counsel for the Plaintiffs objected to counsel for the Attorney General being heard or present on her *ex parte* application for leave. Counsel for the Attorney General accordingly requested that she be allowed to make submissions as to why

1 she should be heard on the Plaintiffs' application. She asserted that there were
2 significant problems, both procedural and substantive, with the Plaintiffs'
3 application, for example that it was manifestly wrong in the circumstances that
4 the Attorney General should be named as the proposed Defendant to the
5 application for judicial review. She wished to bring these to the attention of the
6 Court at this stage to avoid the wasted time and cost of a further *inter partes*
7 hearing. She stated that there was local precedent for the Attorney General as a
8 putative defendant in judicial review proceedings being heard at the initial *ex*
9 *parte* stage of the application for leave and that there were relevant authorities on
10 the point, although she did not have them with her at that time.

11

12 6. Counsel for the Plaintiffs strongly objected to counsel for the Attorney General
13 being heard on the Plaintiffs' *ex parte* application for leave and argued that any
14 submissions which the Attorney General wished to make with regard to the
15 Plaintiffs' application for judicial review should be made at the proper stage,
16 namely at the *inter partes* hearing of the Plaintiffs' application for judicial review,
17 assuming the Court granted leave to proceed with the application. She
18 emphasized that the Grand Court Rules ("GCR") required an application for leave
19 to be made *ex parte* and that there was a clear procedure provided for by the
20 GCR, which should be followed.

21

22 7. Since I considered that it would of assistance to hear full argument on the point
23 and to see the relevant authorities, as well as allowing counsel for the Plaintiffs

1 more time to prepare her submissions in opposition to the request of counsel for
2 the Attorney General to be heard on the application for leave, I adjourned the
3 matter for hearing of that issue to 2:30pm later that day.

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5 **The Issue**

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7 8. GCR O.53, r.3 provides:

- 8 (1) *No application for judicial review shall be made unless the leave of the*
9 *Court has been obtained in accordance with this rule.*
- 10 (2) *An application for leave must be made ex parte to a Judge by filing –*
11
12 (a) *a notice in Form No. 53 of Appendix 1 containing a statement of:-*
13
14 (i) *the name and description of the applicant;*
15 (ii) *the relief sought and the grounds upon which it is sought;*
16 (iii) *the name and address of the applicant's attorney (if any);*
17 *and*
18 (iv) *the applicant's address for service;*
19
20 (b) *An affidavit which verifies the facts relied on.*
- 21 (3) *The judge may determine the application without a hearing, unless a*
22 *hearing is requested in the notice of application, and need not sit in open*
23 *Court; in any case the Clerk of the Court shall serve a copy of the judge's*
24 *order on the applicant.*
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28 9. The rule goes on to provide that if the application for leave is refused by the
29 Judge, the applicant may renew it by applying to a single Judge sitting in open
30 Court. Rule 5 provides that where leave to apply for judicial review has been
31 granted the application is to be made by originating motion to a Judge in open
32 Court (unless the Court directs that it should be made to a Judge in Chambers)

1 and that within 7 days of the notice of motion, supporting affidavits are required
2 to be served on the defendant and all other persons directly affected.

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4 10. As already explained, the Plaintiffs' application for leave to apply for judicial
5 review came before me in Chambers as an *ex parte* application. The sole issue at
6 the hearing before me on the afternoon of Wednesday 3rd December 2008 was
7 whether Counsel for the Attorney General, who is named as the Defendant in the
8 Plaintiffs' application, should be allowed to make submissions in relation to the
9 Plaintiffs' *ex parte* application for leave to apply for judicial review.

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11 **The Arguments:**

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13 11. Counsel for the Plaintiffs argued strongly that the Plaintiffs' application for leave
14 to apply for judicial review was required, pursuant to GCR O.53, r.3, to be made
15 *ex parte*. She submitted that this was clearly mandatory in light of the wording of
16 the rule "must (my emphasis) be made *ex parte*". She contended that this means
17 what it says. I note also that r.3 (3) provides that the Judge may determine an
18 application for leave without a hearing and if that were done there would be no
19 opportunity for the putative defendant to make representations in relation to the
20 application. This is because it would not appear on the Court List and the putative
21 defendant would be unaware that the application had been made. It was clearly
22 fortuitous that counsel for the Attorney General noticed the listing of the
23 Plaintiffs' application on the Court List, which prompted her to write the letter of

1 1st December and to seek leave to be heard on the application. Counsel for the
2 Plaintiffs further argued that the GCR clearly provide a comprehensive procedure
3 whereby there is an initial requirement to obtain leave, designed to prevent
4 frivolous or inappropriate attempts to challenge administrative actions and to
5 enable the Court to be satisfied that the Plaintiff has an arguable case without
6 going into the matter in depth. It is only at the second stage, if leave is granted,
7 that the Defendant in the judicial review application has the opportunity to make
8 his submissions on the merits of the Plaintiff's claim on an *inter partes* basis.

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10 12. Counsel for the Attorney General accepted that the putative defendant in an *ex*
11 *parte* application for leave to apply for judicial review has no right or entitlement
12 to be heard at that stage but submitted that the Court has a discretion to hear an
13 interested party even at that initial stage. She referred to the case of R v Secretary
14 of State ex p Rukchanda Begum [1990] C.O.D. 84-148 at 107 (The Times 3 April
15 1989) in which Lord Donaldson M.R. in the English Court of Appeal said at page
16 108:

17 “...a judge who is confronted with an application for leave to apply for judicial
18 review should grant it if he is clear that there is a point fit for further
19 investigation on a full *inter partes* basis with all such evidence as is necessary on
20 the facts and all such argument as is necessary on the law. If he is satisfied that
21 there is no arguable case he should dismiss it. But there is an intermediate
22 category of cases in which the judge, on looking at the papers which support the
23 application, can very reasonably come to the conclusion that he really does not
24 know whether there is or is not an arguable case, either because the facts are not
25 clear or because he has not received sufficient assistance with the law to enable
26 him to be satisfied as to precisely what the relevant law is. That is not necessarily
27 a criticism of counsel supporting the application: it may well be inherent in the
28 problem.

29 *In those circumstances, where he is in doubt, the right course, in my view, is*
30 *always to invite the putative respondent to attend and to make representation as*

1 to whether leave should or should not be granted. This is not to say that the
2 subsequent inter partes hearing should become anything remotely like the hearing
3 which would ensue if leave were granted. It is analogous to the approach which
4 was considered by Lord Diplock in Antaios Compania Naviera S.A. v Salen
5 Rederierna A.B. [1985] A.C. 191 at 207 in a quite different context, that of
6 arbitration; if taking account of a brief argument on either side, the judge is
7 satisfied that there is a case fit for further consideration, then he should give
8 leave. Adjournment for an inter partes hearing will at least enable the judge to
9 have a bird's eye view of the contentions on both sides and any doubts or
10 difficulties are likely to be resolved one way or the other: that is to say either in
11 favour of granting leave or in favour of refusing leave, or resolved in the sense
12 that it is obviously very difficult and needs further thought, which of course
13 amounts to a requirement for leave to be granted".
14

15 13. Counsel for the Attorney General also directed my attention to R v Secretary of
16 State ex p. Davendraanath Doorga [1990] COD 84-148 at 108 in the English
17 Court of Appeal where Lord Donaldson M.R., having stated that Judges dealing
18 with applications [for leave to apply for judicial review] at first instance should
19 bear in mind that there are three categories of case, said:

20 *"The first is the case where there are, prima facie, reasons for granting judicial*
21 *review. In such a case leave shall duly be granted. There are other cases in*
22 *which the applications for judicial review is wholly unarguable, in which case,*
23 *quite clearly, leave should be refused. However, there is an intermediate*
24 *category - not perhaps very frequent but it does occur - in which the judge may*
25 *say, 'Well, there is no prima facie case on the applicant's evidence but,*
26 *nevertheless, the applicant's evidence leaves me with an uneasy feeling, and I*
27 *should like to know rather more about this'. Alternatively, he may say, 'The*
28 *applicant's case looks strong but I nevertheless have an uneasy feeling that there*
29 *may be some very quick and easy explanation for this'. In either case it would be*
30 *quite proper and, indeed, reasonable for him to adjourn the application for leave*
31 *in order that it may be further heard inter partes. At such a hearing it is not for*
32 *the respondent to deploy his full case, but he simply has to put forward, if he can,*
33 *some totally knock-out point which makes it clear that there is no basis for the*
34 *application at all".*
35

36 14. Counsel for the Attorney General contended that the comments of Lord
37 Donaldson M.R. in these cases in the Court of Appeal in England in 1989 clearly

1 showed that there were circumstances in which the Court could and would invite
2 the putative defendant to be heard and make representations on whether leave to
3 apply for judicial review should be granted. She pointed out that GCR O.53 is in
4 precisely the same terms as O.53, r.3 of the English RSC 1999 and that note
5 53/14/155 of the Supreme Court Practice 1999 quotes the passage from Lord
6 Donaldson's judgment in the Begum case (*ibid*). She also referred me to the
7 report in Kruger v Governor 1997 CILR 73 and the comments of Smellie J. (as he
8 then was) at page 89 when he said:

9
10 *There is a point of procedure which later occurred to me and which I should*
11 *mention. Although intended by the Grand Court Rules, O.53 to be made ex parte,*
12 *this application for leave was made inter partes at the initiative of the applicant*
13 *who had invited the other parties in and consented to the taking of submissions*
14 *from them. A general disapproval of inter partes arguments on an ex parte*
15 *application for leave was expressed by the Court of Appeal in Smith v*
16 *Commissioner of Police (1980-83 CILR 126). As this case involved the liberty of*
17 *the subject who consented, I took the view that the applicant could not ultimately*
18 *be prejudiced by the Court's having the benefit of the submission of all counsel, at*
19 *this early stage. I was assured that the procedure adopted is likely in the end to*
20 *result in the saving of considerable time and expense.*

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23 15. In Smith v Commissioner of Police (*ibid*) Carberry J.A., in giving the judgment,
24 of the Court of Appeal, said (page 134):

25 *The Cayman rules in effect provide for two stages in the making of such an*
26 *application [for judicial review]: an application for leave to make the application*
27 *and, if leave is given, the actual application before the Grand Court. The first*
28 *stage is ex parte and is conducted before the judge in chambers. At this stage all*
29 *that is necessary to show is that there is some arguable case or claim which is not*
30 *obviously untenable, vexatious or frivolous. The original application is supported*
31 *by a short statement setting out the bare grounds on which the relief is sought,*
32 *with an affidavit verifying the facts relied on. [References are then made to the*
33 *pre-1979 White Books].*

34
35 *It ought normally to be rare for the application to be refused at this stage, unless*
36 *it is obviously untenable. Any defence or answer to the application is to be made*

1 *at the second stage, when leave having been granted, the applicant proceeds to*
2 *file a notice of motion and to serve the parties against whom he seeks relief, with*
3 *copies of the notice of motion (or summons), the statement, and any affidavits*
4 *accompanying the original application for leave, together with any additional*
5 *material. The respondent in return may file affidavits in reply.*
6

7 *We share the astonishment of the applicant's counsel, Mr. Alberga, at the*
8 *discovery from the notes of evidence made by the Learned Judge in chambers,*
9 *that the respondent – the Commissioner of Police – was present [at the hearing of*
10 *the application for leave] in the person of Mr. R. Donaldson, then Acting Attorney*
11 *General, and that, without any recorded objection from the applicant's junior*
12 *counsel, Mr. McField, he proceeded to canvass the merits of the applications for*
13 *certiorari and prohibition and to address the Learned Judge on these substantive*
14 *applications as if this were the motion which should have been heard in open*
15 *court.*
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18 Carberry J.A. then made reference to the case of Bazies v Attorney General
19 (Trinidad & Tobago) [1991] 18 WIR 113 where the Attorney General appeared at
20 the application for leave and vigorously contested it, and said: [The Court of
21 Appeal of Trinidad & Tobago] *had little difficulty in finding that at this stage the*
22 *application was an ex parte one, and that the Attorney General had no right to be*
23 *there; he should have waited for the second stage, the actual application in court,*
24 *to make his intervention".*
25

26 and continued:

27 *In our view, Mr. Donaldson [the acting Attorney General] had no right of*
28 *audience at this stage of the application. It was ex parte and unlike Bazies case*
29 *we have no idea how he came to be there.*
30
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32 16. I was informed by counsel for the Attorney General that it is not unusual in this
33 jurisdiction nowadays for the Attorney General, in cases where he is the putative
34 defendant, to be heard on applications for leave to apply for judicial review and

1 that she herself, as Crown Counsel, had experience of doing so. I also note that at
2 paragraph 15-016 on page 664 of de Smith, Woolf & Jowell on Judicial Review
3 of Administrative Action (5th Edn.) it is stated that “in some circumstances a
4 practice has developed for respondents to be represented at hearings [of *ex parte*
5 applications for leave]. Counsel submitted that in the present case there were
6 determinative arguments (she described them as “knock out points”) for the
7 Attorney General, particularly an argument that he had clearly been wrongly
8 named as proposed defendant to the proposed judicial review proceedings. She
9 also submitted that there were serious issues as to whether the questions raised by
10 the Plaintiffs relating to their position as employees amounted to the exercise by
11 the Director of the PWD of a public or private function and were or were not
12 questions appropriate for judicial review at all. She submitted that in the
13 circumstances it would save time and costs and expedite matters if she was
14 allowed to make submissions on whether the Plaintiffs should be granted leave
15 and she contended that there was no prejudice to the Plaintiffs in adopting that
16 course. I was also concerned myself at the lack of promptness on the part of the
17 Plaintiffs in filing their application for leave on 30th October 2008 when the
18 principal decision which they sought to have reviewed, namely the decision of the
19 Director of the PWD not to reinstate them, was intimated to them by his letters of
20 15th July 2008, over 3 months previously.

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1 Conclusions

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3 17. Although GCR O.53, r.3 does provide that an application for leave to apply for
4 judicial review must be made *ex parte* I am conscious that the preamble to the
5 GCR provides that their overriding objective is to enable the Court to deal with
6 every cause or matter in a just, expeditious and economical way. The preamble
7 also provides that the rules shall be liberally construed to give effect to the
8 overriding objective and, in particular, to secure the just, most expeditious and
9 least expensive determination of every cause or matter on its merits. While, of
10 course, I do not consider that these objectives entitle me to interpret a rule
11 contrary to its clear meaning, it does seem to me that in appropriate
12 circumstances, consistent with the comments of Lord Donaldson M.R. in the
13 Begum and Drooga cases (*ibid*) the Court has a discretion to hear from the
14 proposed defendant to the proposed judicial review at the stage of the application
15 for leave. In the Kruger v Governor case the plaintiff applied for leave *inter*
16 *partes* and was not criticized for doing so in the circumstances. Although I do not
17 consider that the proposed defendant in judicial review proceedings has any right
18 to be heard at the stage of the application for leave, and in my opinion that is all
19 the Court of Appeal were saying in Smith v Commissioner of Police (*ibid*), it does
20 seem to me that, in circumstances like the present, where the proposed defendant
21 has informed the Court that he wishes to submit that he has been wrongly named
22 as the defendant and that there are other serious and substantial defects in the
23 proposed application for judicial review, it would be contrary to the overriding

1 objectives to which I have referred for the Court not to hear those submissions at
2 the earliest stage. The clear intent of the procedure provided by the GCR in
3 relation to applications for judicial review is to enable the judge to whom the
4 application for leave is made to be satisfied that there is a case against the
5 proposed defendant fit for investigation at a full *inter partes* hearing of the
6 substantive application for judicial review (see 1999 RSC 53/14/55). If the Judge
7 is informed by counsel for the Attorney General that she wishes to submit that the
8 Attorney General has clearly been wrongly named as putative defendant it seems
9 to me that these are circumstances in which the Court may properly exercise a
10 discretion to hear submissions on the point on the application for leave. I do not
11 suggest that there should be a prolonged and detailed *inter partes* hearing at that
12 stage but if there are clear determinative points which the proposed defendant's
13 counsel informs the Court she considers exist, I consider that the Court should
14 exercise its discretion to hear them. In my view there is no prejudice to the
15 Plaintiff in doing so and it will assist the Court in determining whether leave to
16 proceed with a substantive application for judicial review should be granted.

17
18 18. In the circumstances I made the following order:



- 19 1. *Leave given to the putative defendant, the Attorney General, to make*
20 *representations on the hearing of the Plaintiffs' application for leave*
21 *to apply for judicial review dated 30th October 2008.*
22
- 23 2. *The hearing of the Plaintiffs' said application is adjourned for hearing*
24 *no later than Friday 12th December 2008, with a time allowance of 2*
25 *hours.*
26
- 27 3. *The Applicants' attorney to serve the application on the Legal*
28 *Department by 3pm on Thursday 4th December 2008.*

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19. However, on 12th December 2008 Counsel for the Plaintiffs applied for leave to appeal against my order of 3rd December. Counsel for the Attorney General then intimated that rather than incur the time and costs of an appeal she would withdraw her application on behalf of the Attorney General to make representations on the hearing of the Plaintiffs' application for leave. Notwithstanding this, counsel for the Plaintiff persisted with her application for leave to appeal and in the circumstances, particularly having regard to the judgment of the Court of Appeal in Smith v Commissioner of Police (*ibid*), I granted leave to appeal.

20. I should perhaps explain why these reasons for the order made on 3rd December 2008 have only been produced at this stage. I understand from the Registrar of the Court of Appeal that until very recently it was not at all clear, in light of the intimation given on behalf of the Attorney General that rather than incur the time and cost of an appeal, the application to make representations on the hearing of the Plaintiffs' application for leave would be withdrawn, whether the Plaintiffs were in fact intending to proceed such an appeal. In light of that uncertainty I was only recently requested by the Registrar to provide these reasons.

Dated 5th June 2009



The Hon. Mr. Justice Angus Foster
Judge of the Grand Court (Acting)