

Amended pursuant to leave granted by the hon. Rt Hon Sir Alan Moses on 28 May 2011



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 255 OF 2009

BETWEEN: STUART KERNOHAN

PLAINTIFF

AND: (1) ~~H.E. THE GOVERNOR STUART JACK CVO~~
on behalf of
~~THE GOVERNMENT OF THE CAYMAN ISLANDS~~
(1) MARTIN BRIDGER
(3) ~~THE ACTING COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE~~
(2) THE ATTORNEY-GENERAL OF THE CAYMAN ISLANDS



AMENDED WRIT OF SUMMONS

TO: ~~H.E. THE GOVERNOR STUART JACK CVO~~
on behalf of
~~THE GOVERNMENT OF THE CAYMAN ISLANDS~~
4th Floor, Aall Building
North Church Street
George Town
Grand Cayman
Cayman Islands

AND TO: MARTIN BRIDGER
Central Police Station
George Town
Grand Cayman
Cayman Islands

AND TO: ~~THE (ACTING) COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE~~
~~Central Police Station~~
~~George Town~~
~~Grand Cayman~~
~~Cayman Islands~~

AND TO: THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
Government Administration Building
George Town
Grand Cayman
Cayman Islands
(by virtue of the Crown Proceedings Law (1997 Revision))

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within (14 days) after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495, George Town, Grand Cayman, KY1-1106, the accompanying Acknowledgement of Service stating whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgement within the time stated, or if you return the Acknowledgement without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 25th day of May 2009
Re-issued this 17th day of June 2011

NOTE – This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the court.

IMPORTANT

Directions for Acknowledgement of Service are given with the accompanying form.

AMENDED BY LEAVE OF RT HON. SIR ALAN MOSES SITTING AS AN ACTING
JUDGE OF THE GRAND COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 255 OF 2009

BETWEEN: STUART KERNOHAN PLAINTIFF

AND

~~H.E. THE GOVERNOR STUART JACK
CVO~~

~~On behalf of~~

~~THE GOVERNMENT OF THE CAYMAN
ISLANDS~~

(1) MARTIN BRIDGER

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

(2) THE ATTORNEY-GENERAL OF THE
CAYMAN ISLANDS

DEFENDANTS

AMENDED STATEMENT OF CLAIM

Parties.

1. The First Defendant was a Metropolitan Police Officer, who was seconded to the Royal Cayman Islands Police Service ("RCIPS") in order to lead "Operation Tempura", an investigation into senior officers of the RCIPS and others, for which the First Defendant was sworn in, and acted as, a Special Constable of the RCIPS. The claim against the First Defendant is made against him in his personal capacity and as a Special Constable of the RCIPS. The First Defendant's employment by the Metropolitan Police Service ended in about May 2008, and from about 22nd May 2008 until his departure from the Cayman Islands on a date unknown in 2009, he was employed by the Government of the Cayman Islands under a direct contract of employment ("the First Defendant's Contract") entered into between himself and the Chief Officer of the Portfolio of Internal and External Affairs, on behalf of the Government of the Cayman Islands. Whilst described as a "consultancy agreement" the First Defendant's Contract was in fact and law a contract of employment.
2. The First Defendant was at all material times a servant or agent of the Crown within the meaning of that term in the Crown Proceedings Law (1997 revision). Further or alternatively he was an Officer of the Crown acting in performance or

purported performance of his duties within the meaning of those terms in the Crown Proceedings Law (1997 revision).

3. The Second Defendant is by virtue of the provisions of s11 (2) of the Crown Proceedings Law (1997 revision) the person against whom all proceedings against the Crown are to be instituted and is sued in that capacity in respect of the breaches of contract more fully set out later in this pleading and the claim in tort against the First Defendant.
4. The Governor of the Cayman Islands at all times between August 2007 and the termination of the Plaintiff's employment was Mr Stuart Jack, ("the Governor"). At all times when he acted in relation to the Plaintiff's contract of employment Mr Jack was acting on behalf of the Government of the Cayman Islands.

Contractual terms.

5. 1—By an agreement in writing dated 19th September 2005 ("the Contract of Employment") made between Bruce H. Dinwiddy ~~then (predecessor of the First Defendant in the position of~~ Her Majesty's Governor of the Cayman Islands acting on behalf of the Crown, which was the Plaintiff's employer and the Plaintiff, the Plaintiff was appointed to the position of Commissioner of the RCIPS for a fixed term of 48 months, commencing 15th October 2005 and ending 14th October 2009 ("the Term").
6. 2:By clause 5 of the Contract of Employment, the Plaintiff was entitled to be remunerated as follows:
 - (a) Salary at the rate of Grade D Point 8
 - (b) Special Supplements as follows:
 - (i) Pension 6% employer's contribution, 6 % employee's contribution, both funded by the employer
 - (ii) Housing allowance CI\$2,700 per month (pensionable)
 - (iii) Laundry CI\$75 per month
 - (iv) Transport – a motor vehicle was to be provided.
 - (v) Overtime and time in *lieu* of overtime

The Plaintiff was also entitled to medical benefits for himself, his wife and his daughter.

7. ~~3-~~By clause 6 of the Contract of Employment, the terms and conditions set out in Chapter 8 of the General Orders, as amended from time to time, were incorporated into the Contract of Employment.
8. ~~4-~~ By clause 13 of the Contract of Employment, it was agreed that, except for any provision which applies by virtue of law, all the terms of the Plaintiff's employment were contained in the Contract of Employment.
9. ~~5-~~By clause 14 of the Contract of Employment it was agreed that the Contract of Employment could not be varied or amended unless in writing signed by the employer and the employee and stating the date on which the new provisions were come into operation.

10. There were implied terms of the Contract of Employment:

- (1) That the Government of the Cayman Islands would not, without reasonable cause, do anything calculated or likely to destroy or seriously damage the relationship of trust and confidence that ought to subsist between employer and employee (referred to below as "Implied Term (1)");
- (2) That with respect to disciplinary proceedings against the Plaintiff (including suspension and investigation), the Governor of the Cayman Islands acting on behalf of the Government of the Cayman Islands would not embark upon such process without reasonable cause, would carry out any investigation or disciplinary proceedings with (a) reasonable care and (b) reasonable expedition, would keep himself informed as to the progress of any such investigation or disciplinary proceedings and would not prolong them or any period of suspension in the absence of reasonable cause;
- (3) That in the conduct of any such process the Governor of the Cayman Islands acting on behalf of the Government of the Cayman Islands would observe ordinary principles of natural justice;
- (4) That the Government of the Cayman Islands would take reasonable care for the Plaintiff's physical and mental well-being, which implied term would include the duty to offer him such support and assistance as was reasonably required during any period of suspension.

11. On the 27th August 2007 at about 10.30 am at the office of the Governor a meeting took place between the Plaintiff, the Governor, the Second Defendant and Mr L. Covington, Her Majesty's police representative for the Caribbean and other nearby colonies. Mr Covington attended the meeting by telephone. At that meeting the Plaintiff reported on the current state of an investigation into allegations made by one McKeeva Bush, a member of the legislative assembly, Deputy Commissioner of Police Dixon, a Mr John Evans and a Mr Lyndon Martin, that Deputy Commissioner of Police Ennis had passed confidential information relating to the operations of the Royal Cayman Islands Police to one Seales, the editor of a newspaper.
12. At that meeting it was decided that an independent team of police officers should be brought to the Cayman Islands in order to conduct the investigation. It was also agreed that the Plaintiff would allocate responsibility for the matters under discussion to another senior officer.
13. At that meeting the issue of how it was possible to secure documentary evidence that such information had been passed was a subject of discussion. Two options, apart from doing nothing, were discussed. One was the use of a search warrant but it was felt that the issue of a search warrant was not justified. The other option was the use of Mr Evans as an active informant to obtain copies of the documents said to have been passed. The Governor with the consent and approval of the Second Defendant and Mr Covington authorised and instructed the Plaintiff to utilise the services of the said Evans and the said Martin, both of whom were employees of the newspaper, to obtain copies of the information which was believed to be located in a file in the office occupied by the said Seales specifically approving such a course of action having had all material facts disclosed to them by the Plaintiff.
14. Following that meeting the Second Defendant produced a memorandum setting out the difficulties in obtaining a search warrant to which the Plaintiff responded. A further meeting took place at 6pm on the 28th August 2007 in the office of the Governor between the Plaintiff and the Governor and the Second Defendant. The Plaintiff informed the Governor and the Second Defendant of the progress of the investigation and that he proposed to ask Chief Supt Jones to take charge of the investigation. At that meeting the conclusion reached was that any application for a search warrant was

to be left to the officer in charge of the investigation following the obtaining of documents from the office of Seales by Evans and Martin.

15 A third meeting took place between the Plaintiff and the First and Second Defendant at the office of the Governor on the 29th August 2007. At that meeting a further memorandum from the Second Defendant was discussed. It was agreed that the Plaintiff would stand down from his role as officer with oversight of the operation and that the Governor would take his place. It was agreed that Chief Supt Jones would assume the post of Senior Investigating Officer and report direct to the Governor.

16 Following the conclusion of that meeting the Plaintiff gave the necessary instructions to Chief Supt Jones who thereafter met the Governor and reported directly to him.

17. For the avoidance of doubt it is the Plaintiff's case that the entry into the offices of Cayman Net News which took place on the 3rd September 2007 by Evans and Martin acting as active informants was done on the instructions of and with the approval and knowledge of the Governor and with the approval and knowledge of the Second Defendant.

18 6 By a letter dated 27th March 2008 ("the First Letter"), ~~unlawfully and in breach of the Contract of Employment, which contained no term permitting him to do so the First Defendant~~ the Governor placed the Plaintiff on "required leave" with immediate effect pursuant (as the Plaintiff believes) to the power contained in paragraph 8.8(5) of the General Orders. That paragraph required the Governor to consult with the Head of the Civil Service before placing the Plaintiff on required leave for a period in excess of 30 days and the Governor is put to strict proof that such consultation took place on this occasion and on each occasion that the Plaintiff's required leave was extended.

19 The stated ground for placing the Plaintiff on required leave was "to facilitate the enquiry into the events of the 3 September 2007 and matters related thereto". Those events concerned the alleged unlawful leaking of information from a senior ranking officer of the RCIPS to the press and the alleged unlawful entry into and search of the offices of Cayman Net News. The enquiry, which had been instigated by the Plaintiff himself, was known as 'Operation Tempura'.

20. 7. The First Letter purported to impose conditions on the Plaintiff's conduct during his period of "required leave", including, *inter alia*, a condition that the Plaintiff could not leave the "Island" without the ~~First Defendant's-Governor's~~ permission ("the Condition"), ~~which condition amounted to false imprisonment~~. Such conditions, in particular, the Condition, were unlawful ~~as an unreasonable restraint on the Plaintiff's liberty~~ and, in any event, were in breach of Clause 14 of the Contract of Employment. ~~If, contrary to that case, the Governor had the power to impose the Condition, then such power was circumscribed by and subject to the implied terms set out at paragraph 10 above.~~

21. 8. The First Letter, and its terms and conditions, were a serious breach of the implied term of trust and confidence which is essential to the relationship of employer and employee ("Implied Term 1"). ~~So far as the grounds for suspension ("required leave") were concerned, they related to events in the past as to which there was no, or no realistic, risk of repetition. Even assuming that the events were capable of giving rise to criminal or disciplinary charges against the Plaintiff, there was no, or no adequate, reason to place him on required leave. He remained ready, willing and able to carry out his duties and the investigation was not and would not have been hampered by his continuing to do so. The effect of suspension was to place him and his office under a cloud of suspicion and to make him and his office the focus of intense media and public scrutiny and speculation. Further as the Governor well knew by reason of the facts and matters set out above at paragraphs 11 to 17 above the Plaintiff had at all material times being acting in accordance with the "Governor's instructions and with the approval of the Second Defendant and Mr Covington. Suspension in these circumstances was a breach of the implied terms set out at paragraphs 10(1) and (3).~~

9. ~~Further, on 27th March 2008, the First Defendant held a press conference, attended by the Second Defendant, a special constable of the RCIPS, for whom the Third Defendant is vicariously liable, at which it was stated, falsely and with deliberate effect, that the Plaintiff was not under investigation for any disciplinary or criminal offence.~~

PARTICULARS OF FALSITY

~~(a) The statement made at the press conference to the effect that the Plaintiff was not under investigation for any disciplinary or criminal offence was false because, in fact, as at 27th March 2008, as the First and Second Defendants well knew, the Plaintiff was under investigation in relation to offences under sections 95 and 121 of the Penal Code (2007 Revision) by:~~

~~(i) the Second Defendant who was seconded from the Metropolitan Police Service to the RCIPS and enrolled as a special constable, and for whom the Third Defendant is vicariously liable and~~

~~(ii) the members of his special investigation team (“the Team”), comprised of officers seconded to the RCIPS from the Metropolitan Police Force in London, United Kingdom, and enrolled as special constables of the RCIPS, for whom the Third Defendant is vicariously liable,~~

~~(b) The investigation was and is code-named “Operation Tempura”.~~

22. 9-(e) By applications made to the Chief Justice of the Cayman Islands on 20th February 2008, 13th and 20th March 2008 (“the Applications”), Special Constables Ali and Smith, (both members of the Operation Tempura team) (“the Applicants”), represented by Mr. André MonDésir, Special Counsel to the ~~First Defendant~~ **Governor**, had applied, unsuccessfully, to the Grand Court for search warrants in respect of the Plaintiff and others on the basis that it was alleged there were reasonable grounds for suspecting that the Plaintiff and others had committed the offences described in section 95 and/or 121 of the Penal Code (2007 Revision) as part of an ongoing investigation into suspected criminal activity by the Plaintiff and others.

~~10. The press conference on 27th March 2008 was of such tone and nature as to imply by innuendo serious misconduct and/or criminal activity on the part of the Plaintiff, causing serious damage to his professional and personal reputation, and to the jurisdiction of the Cayman Islands, and amounted to a further serious breach of Implied Term 1 by the First Defendant.~~

11. The innuendo was false.

PARTICULARS OF FALSITY

~~The Plaintiff has not, and could not reasonably have been suspected of having, committed either of the offences under section 95 or 121 of the Penal Code (2007 Revision), nor any other criminal offence. The Plaintiff will rely on the decision of the Chief Justice *In re: Operation Tempura* dated 4th April 2008 (“the Decision”) for its full terms and effects, including the complete exoneration of the Plaintiff at paragraph 122 of the ruling.~~

23. ~~12.~~ At all material times until 1st October 2008, the Plaintiff was unaware of the Applications referred to at paragraph 9 ~~22~~ above or the decision of the Chief Justice ~~re: Operation Tempura dated 4th April 2008 (“the Decision”)~~ in response to the Applications. However, the ~~First Defendant~~ Governor, by his counsel, Mr. MonDésir, and the First Defendant, were or ought to have been aware of the decision of the Chief Justice in relation to the search warrants not later than ~~Second~~ 2nd April 2008, the date on which the Decision was released to the Applicants.
13. ~~The Third Defendant should and would have approved the decision to make the Applications, and was or ought to have been aware of the refusal of the Applications and the contents of the Decision.~~
24. ~~14.~~ Notwithstanding the matters set out in Paragraph 12 ~~22~~ above, and the promise made by the ~~First Defendant~~ Governor in the First Letter to keep the terms of the Plaintiff’s required leave “under review”, the ~~First Defendant~~ Governor failed to reinstate the Plaintiff to his position either shortly after the 4th April 2008 or at all. The Plaintiff says that, following the release of the Decision to the Applicants on 4th April 2008, it was irrational and unreasonable and a breach of the implied terms at paragraphs 10(1) & (2) above for the ~~First Defendant~~ Governor to maintain him on required leave, as it was, or ought to have been clear that there were no grounds for doing so.
25. Further, by placing the Plaintiff on required leave and by failing to reinstate him in the circumstances particularised below the Governor acting on behalf of the Government of the Cayman Islands was acting in breach of the implied trust and confidence term in the Plaintiff’s contract of employment.

PARTICULARS RELIED UPON.

- [i] The Governor adopted the said course and declined the Plaintiff's requests for reinstatement notwithstanding that he knew that he had himself, as had the Second Defendant and Mr Covington, authorised and approved the course of investigation of which he now made complaint and had instructed the Plaintiff to execute that course.
- [ii] In failing to reveal to the First Defendant the facts set out in paragraph 25 [i] above he caused the First Defendant to attempt to obtain a search warrant of the Plaintiff's property, to investigate the Plaintiff for criminal behaviour and to utter numerous statements suggesting that the Plaintiff had acted improperly.
- [iii] ~~15~~ Failure to reinstate the Plaintiff to his position within a reasonable time after 4th April 2008 was a further serious breach of Implied Term 1 ~~and that set out at paragraphs 10 (2) and (3) above.~~
26. ~~16.~~ Further, as there is no provision in the Contract of Employment concerning "required leave" ~~or, alternatively, no adequate grounds for placing the Plaintiff on required leave,~~ and as it is an implied term of the Contract of Employment that the First Defendant should provide the Plaintiff with work ("Implied Term 2"), the failure of the First Defendant to recall the Plaintiff to his position was a serious breach of Implied Term 2.
27. ~~17.~~ Notwithstanding the above, the First Defendant **Governor** maintained the Plaintiff on required leave. ~~During the months of April, May, June, July and August 2008 the Second Defendant continued to make statements to the print and broadcast media concerning the Plaintiff's position, which statements were widely reported, including on the internet, giving rise to yet further innuendo and speculation. Full particulars of the statements referred to in this paragraph are extensive, and will be provided by way of copy documents on discovery. Such innuendo and speculation caused further serious damage to his professional and personal reputation, and to the jurisdiction of the Cayman Islands.~~
18. The innuendo was false (the particulars set out in Paragraph 11 above are repeated), and were malicious, in that the Second Defendant made the statements not caring about the effect on the Plaintiff's reputation or the reputation of the Cayman Islands.

28. ~~19.~~ Further, by letter dated 15th August 2008, the Plaintiff's attorneys drew the ~~First Defendant's~~ **Governor's** attention to the effect that the statements made by the First Defendant were having on the Plaintiff and his family, and stated that the ~~First Defendant~~ Governor had taken no steps to dissociate either himself or the Cayman Islands Government from the innuendo and speculation. Such failure amounted to a further serious breach of Implied Term 1, yet the ~~First Defendant~~ **Governor** did not, and has never, remedied that breach. Such failure on the part of the ~~First Defendant~~ **Governor** was indicative that he did not care about the effect on the Plaintiff's reputation and was a further breach of Implied Term 1, ~~and malicious.~~
29. ~~20.~~ On or about 15th May 2008, the Plaintiff was given notice by the ~~First Defendant~~ **Governor** that he was under investigation as follows:

Name and Address of complainant: DCS Martin Bridger, Police Headquarters, Elizabethan Square, George Town, Grand Cayman
Nature of Offence

1. Misconduct in a public office

Contrary to common law, in that you, Stuart KERNOHAN, between 13th August 2007 and 3rd September 2007, within the jurisdiction of the Cayman Islands, being a person in the public service failed to carry out a proportionate investigation by not undertaking reasonable lines of enquiry in relation to allegations made by Mr. Lyndon MARTIN against Deputy Commissioner of Police Anthony ENNIS and Mr. Desmond Seales the Editor in Chief of Cayman Net News which culminated in an unlawful act, namely the unlawful entry into and search by John EVANS of the office of Mr. Desmond SEALES, located at CAYMAN NET NEWS

OFFICES, 105 ALISSTA TOWERS, 85 NORTH SOUND ROAD, GEORGE TOWN GRAND CAYMAN, prejudicial to the rights of the said Mr. Desmond SEALES.”

30. The Governor acting on behalf of the Government of the Cayman Islands was in breach of the said implied trust and confidence term in that:

[i] ~~21~~ The offence of Misconduct in Public Office, contrary to common law, is a very similar offence to that previously alleged against the Plaintiff under section 95 of the Penal Code (2007 Revision) such that to all practical intents and purposes the Notice of Investigation merely re-labelled the offence originally alleged (and which the Chief Justice had, in his ruling of 4 April 2008, rejected).

[ii] ~~22~~: The Notice of Investigation set out in Paragraph 29 above (“the Notice of Investigation”) does not disclose matters sufficient to amount to an allegation of Misconduct in Public Office at common law. Further:

- (a) The actions of the Plaintiff in relation to the matters complained of were reasonable and proportionate lines of inquiry, as was implicit from the Decision.
- (b) As the ~~First~~ Governor and the First Defendants well knew, the Chief Justice had held that the actions of Mr. John Evans did not amount to an unlawful act (paragraph 122 (ii)) and
- (c) In any event, the Plaintiff was acting with lawful excuse and justification, namely the lawful investigation of a serious criminal allegation which had been made by apparently credible witnesses.

31. ~~23~~ The ~~First~~ Governor and the First Defendants were, or ought to have been, aware of the matters set out in Paragraph ~~30~~ ~~21~~[i] above. They ought also to have been aware that the allegations made in the Notice of Investigation were substantially the same, and based on the same facts, as the allegations put before the Chief Justice during the Applications and that, accordingly, they had no realistically possible chance of successfully prosecuting the Plaintiff on the basis of that material.

32. 24 By a letter dated 30th April 2009, the Plaintiff was informed that the investigation into his conduct had been closed and that he would not be charged with any criminal offence arising out of the investigation.
33. 25. — ~~The Third Defendant should and would have approved the decision to give the Notice of Investigation, and the Third and First Defendants~~ **The Governor** should or ought to have been aware of the matters set out in Paragraphs 20 to 24 29-32 above.
34. 26. In or about early July 2008, the Plaintiff's salary was paid into his bank account in the Cayman Islands, and then withdrawn, apparently at the request of the Government of the Cayman Islands. Such conduct amounted to:
- (a) A repudiatory breach of the Contract of Employment on the part of the ~~First Defendant~~ **Governor acting on behalf of the Government of the Cayman Islands** and
 - (b) A further serious breach of Implied Term 1 by the **Governor acting on behalf of the Government of the Cayman Islands** ~~First Defendant~~.
35. 27—The Plaintiff's salary was repaid to him following written complaint by his attorneys, but this did not remedy the breach of Implied Term 1 set out in Paragraph 26 34(b) above.
36. 28—By letter dated 10th September 2008, the Plaintiff's English solicitors, Russell Jones & Walker ("the RJW Letter"), wrote to the First Defendant correctly stating that the Notice of Investigation did not disclose a criminal offence.
37. 29—Notwithstanding the matters set out above, and the promise made by the ~~First Defendant~~ **Governor** in the First Letter to keep the terms of the Plaintiff's required leave "under review", the ~~First Defendant~~ **Governor** failed to recall the Plaintiff to his position either shortly after 10th September 2008 or at all. The Plaintiff says that, in addition to the matters set out in Paragraph 14 24 above, following receipt of the RJW Letter it was irrational and unreasonable for the ~~First Defendant~~ **Governor**:
- (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively

- (b) not to take competent Cayman Islands' legal advice on Cayman Islands' law concerning the contents of the RJW Letter (i.e. the statement that the Notice of Investigation disclosed no criminal offence); if he had done so, he would have been properly advised that the Notice of Investigation did not disclose a criminal offence, in which case he should have reinstated the Plaintiff in his position.
38. ~~30~~ Failure to reinstate the Plaintiff to his position within a reasonable time after 10th September 2008 was a further serious breach of the Implied Term 1 and that set out at paragraph 10(2) and (3) above by the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~.
- 39–31. Further, the failure of the ~~First Defendant~~ Governor to recall the Plaintiff to his position within a reasonable period after 10th September 2008 was a serious breach of Implied Term 2 by the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~.
- 40–32. The Plaintiff became aware of the Decision on 1st October 2008.
- 41 33. By letter dated 9th October 2008 to the ~~First Defendant~~ Governor, the Plaintiff, by his attorneys, demanded that, *inter alia*, in the light of the Decision the ~~First Defendant~~ Governor should reinstate the Plaintiff within 7 days. This letter was obviously important and required, as a matter of proper public administration, ~~and as part of the obligation under Implied Term 2~~, an urgent response.
42. ~~34 Wrongfully, and in breach of Implied Term 2~~, Neither the Plaintiff nor his attorneys received any response to that letter.
43. 35 The decision of Cresswell J. in Cause no. 464 of 2008 (**R v. Ebanks ex p. Henderson**) was delivered in open court on 29th October 2008 (“Cresswell J.’s Ruling”). The decision authoritatively described the offence of misconduct in public office contrary to common law, as it pertains in the Cayman Islands.
44. 36. The Governor acting on behalf of the Government of the Cayman Islands ~~First to Third Defendants~~ should have, as a matter of urgency, reviewed the Notice of Investigation in the light of Cresswell J.’s Ruling. If ~~they~~ he had done so, they would have realised that the Notice of Investigation did not disclose a criminal offence. It is

to be inferred that they did not. If they had done, the ~~First Defendant~~ Governor would have been obliged to review Plaintiff's position, and conclude that he should be reinstated.

45. ~~37.~~ Notwithstanding the matters set out above, and the promise made by the ~~First Defendant~~ Governor in the First Letter to keep the terms of the Plaintiff's required leave "under review", the ~~First Defendant~~ Governor failed to recall the Plaintiff to his position either shortly after the 29th October 2008 or at all. The Plaintiff says that, in addition to the matters set out in Paragraph ~~36~~ 44 above, following delivery of Cresswell J's Ruling it was irrational and unreasonable for the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~:

- (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively
- (b) not to take competent Cayman Islands' legal advice on Cayman Islands' law concerning the contents of Cresswell J.'s Ruling (i.e the elements of the offence of misconduct in public office contrary to common law, as it pertains in the Cayman Islands) and the state of the evidence against the Plaintiff; if he had done so, he would have been properly advised that the Notice of Investigation did not disclose a criminal offence, in which case he should have reinstated the Plaintiff in his position without delay.

46. ~~38.~~ Failure to reinstate the Plaintiff to his position within a short time after 29th October 2008 was a further serious breach of the Implied Term 1 and that set out at paragraphs 10(2) and (3) above by the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~.

47. ~~39.~~ Further, the failure of the ~~First Defendant~~ Governor to recall the Plaintiff to his position within a short time after 29th October 2008 was a serious breach of Implied Term 2 by the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~.

48. ~~40.~~ Further, in his ruling, Cresswell J. held that the ~~Second~~ First Defendant had been guilty of the "gravest abuse of the process" in his conduct of the matters complained of in Cause 464 of 2008. That finding, which has not been appealed,

together with the criticisms made of the ~~Second~~ **First** Defendant in the Decision should have prompted the ~~First and Third Defendants~~ **Governor** and Second Defendant to consider whether the ~~Second~~ **First** Defendant's "investigation" into the Plaintiff's conduct might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation.

49. 41 The Plaintiff will say that, following delivery of Cresswell J's Ruling it was irrational and unreasonable **and a breach of the implied terms at paragraphs 10(1), (2) & (3) above** for the ~~First and Third Defendant~~ **Governor**:

- (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively
- (b) not to take competent legal advice on Cayman Islands' law concerning the conduct of the First Defendant, in particular whether the First Defendant's "investigation" into the Plaintiff's conduct was or might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation.

50. 42. If the ~~First and Third Defendants~~ **Governor** had taken competent Cayman Islands' legal advice, as described in Paragraph ~~41(b)~~ **49(b)** above, they would have been properly advised that the conduct of the First Defendant, in particular whether the First Defendant's "investigation" into the Plaintiff's conduct was or might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation, in which case the ~~First Defendant~~ **Governor** should have reinstated the Plaintiff in his position without delay.

51. 43 In the light of matters which have occurred since 29th October 2008, it is to be reasonably inferred that they did not take competent Cayman Islands' legal advice, as described in Paragraph ~~41(b)~~ **49(b)** above.

52. 44. For these further reasons ~~(a)~~ the failure to reinstate the Plaintiff to his position within a short time after 29th October 2008 or at all was a further serious breach of the Implied Term 1 **and that set out at paragraph 10 (2) and (3) above** by the ~~First Defendant~~ **Governor** and

~~(b) the failure of the First Defendant to recall the Plaintiff to his position within a short time after 29th October 2008 or at all was a serious breach of Implied Term 2 by the First Defendant.~~

53 In support or further support of the allegations at paragraphs 24, 37-38 and 49-52 above the Plaintiff will rely upon the facts that between about January 2008 and 18th November 2008, the First Defendant and his officers did not produce any further material relevant to their investigation into the Plaintiff's conduct. In the circumstances, it is to be inferred that no real effort was being applied to the investigation into the Plaintiff's conduct and/or that there was, in truth, no or no proper or no *bona fide* investigation. The Plaintiff will rely on the "Disclosure Bundle" provided to his attorneys by the Operation Tempura Team on or about 23rd January 2009, in preparation for an interview in connection with the alleged offence. That bundle contained no material dated between 8th January 2008 and 25th November 2008 and no material which would not have been available to the Operation Tempura Team between about August 2007 and January 2008.

54 45. By a letter dated 18th November 2008 ("the Second Letter"), unlawfully, and in breach of the Contract of Employment, the ~~First Defendant~~ Governor summarily dismissed the Plaintiff from his position as Commissioner of the RCIPS.

55 46. The Second Letter discloses no reasonable grounds for the dismissal, summary or otherwise, of the Plaintiff. In particular, its reliance on the lawfulness of the Condition is misconceived and contrary to law for the reasons set out in Paragraph 7 20 above.

56. Further, if and to the extent that the dismissal letter placed reliance upon the Plaintiff's failure, despite requests, to return to the Cayman Islands, the Plaintiff will say that his failure (if such it be) was induced by the Governor's many repudiatory breaches of the Contract of Employment. As at 18 November 2008, and as hereinbefore pleaded, the Governor had committed the following such breaches:

(i) He had placed the Plaintiff on required leave in circumstances where doing so was a breach of the implied terms at paragraphs 10(1), (2) & (3) above and where such action was only within his legal powers after consultation with the Head of the Civil Service (as to which the Governor is put to strict proof).

- (ii) He had attached a condition to the required leave which, in the circumstances set out below breached or threatened to breach the implied terms at paragraphs 10(1), (2) & (3) above;
- (iii) In breach of the implied terms at paragraphs 10(1), (2) & (3) above, he had continued the Plaintiff's required leave when, from 4 April 2008 at the latest (the date of the Chief Justice's ruling in **In The Matter Of Operation Tempura**) he knew or ought to have known that "there was no reasonable basis for concluding that the Plaintiff had committed *any* criminal offence" [emphasis added]; (see paragraph 122 of ruling) and no reason to believe that the Plaintiff had acted in any way improperly.
- (iv) Despite its plain relevance to the matters in issue and despite there being no legal impediment to disclosing to the Plaintiff the Chief Justice's ruling, in breach of the implied terms at paragraphs 10(1), (2) & (3) above, he had failed to do so.
- (v) In breach of the implied terms at paragraphs 10(1), (2) & (3) above he had instead, on 15 May 2008, placed the Plaintiff under formal investigation for the offence of "misconduct in a public office". It is to be inferred that the offence of misconduct in a public office was chosen in preference to the practically identical offence of "abuse of public office" contained in section 95 of the Penal Code (2007 Revision) in order to distinguish, or try to distinguish, the Chief Justice's ruling.
- (vi) He had continued the period of required leave and the investigation notwithstanding the letter dated 10 September 2008 from Russell Jones and Walker, the letter dated 9 October 2008 from Campbells and the ruling of Cresswell J in *Ex Parte* Henderson dated 29 October 2008.
- (vii) In breach of the implied terms at paragraphs 10(1), (2), (3) & (4) above he had failed to support the Plaintiff or to disassociate himself from the rumours concerning him.
- (viii) In breach of the implied terms at paragraphs 10(1), (2) & (3) above he had failed to carry out the investigation with reasonable care and expedition, such that it persisted from 27 March 2008 until the date of dismissal (and, so far as the purely criminal aspect of it was concerned, until 20 April 2009).

- (ix) In breach of the implied terms at paragraphs 10(1), (2) & (3) above he had continued and prolonged the investigation without reasonable cause alternatively, he either knew or ought to have known that, in fact, no or no reasonable or proper investigation was in fact taking place.
- (x) In breach of the implied terms at paragraphs 10(1), (2), (3) & (4) above he had failed to address the Plaintiff's concerns about his return to the Island expressed particularly in letters dated 22 July, 1 August and 15 August, 16 September and 9 October 2008 in which the Plaintiff repeatedly referred to the reputational damage of his continued suspension and the rumour and innuendo surrounding it and that in consequence any return would be "likely to be both humiliating and, possibly, dangerous" (letter 16 September 2008).
- (xi) Further, the Plaintiff had a real and justifiable apprehension that he would be unlawfully arrested by the First Defendant or officers acting under his supervision, which apprehension was only heightened by the Governor's insistence that he returned to the jurisdiction. That such fear was justified was borne out by the unlawful arrest of Justice Henderson by officers acting under the supervision of the First Defendant on 24th September 2008.
- (xii) Without addressing those concerns, in breach of the implied term at paragraphs 10(4) above he had by letter dated 10 September 2008 instigated a (further) disciplinary procedure against the Plaintiff in respect of the Plaintiff's alleged disobedience to the Governor's orders to return to the Cayman Islands. But that procedure was manifestly unfair to the Plaintiff in that the Governor had neither appointed, nor given any notice to the Plaintiff of his intention to appoint, an independent tribunal to consider the disciplinary allegations against him. On the contrary, it appeared that the Governor intended to act as sole arbiter despite the taint of his previous involvement and the extremely strained relations between him and the Plaintiff.
- 57 Further to the above, the Plaintiff had in his letter dated 15 May 2008 and at all material times thereafter made it clear to the Governor that he was prepared to return to the Cayman Islands to resume his post. From at latest 4 April 2008 the Governor had no or no adequate reason not to allow the Plaintiff to return to post. But at no

time up to and including the letter dated 18 November 2008 dismissing the Plaintiff did the Governor seek the Plaintiff's return for the purpose of taking up his duties.

58. Given the breaches set out above and given that the Governor's requests to the Plaintiff to return to the Island were not stated to be for the purpose of restoring him to his duties and did not address the Plaintiff's legitimate and genuinely held concerns as to the likely personal consequence for him if he did return, the Plaintiff was not in breach (still less repudiatory breach) of contract in failing to do so.

59. Given the Governor's numerous aforesaid breaches of contract the Plaintiff was under no obligation to obey an instruction from him.

60. ~~47.~~ Further, it is an obvious inference that sending the Second Letter and the summary dismissal of the Plaintiff were the result of an irrational and unreasonable reaction by the ~~First Defendant~~ Governor to the publication of the letter dated 9th October 2008 referred to in Paragraph ~~33~~ 41 above, which letter had been published as a direct result of the ~~First Defendant~~ Governor own failure to respond to urgent correspondence.

61. ~~48.~~ The Plaintiff says that each of the individual breaches of the Contract of Employment outlined above was sufficient in itself to give rise to an immediate right on his part to terminate the Contract of Employment by accepting the ~~First Defendant~~ Governor repudiatory breach and that taken cumulatively, they collectively amount to a repudiatory breach of the Contract of Employment, which ~~if, notwithstanding the Governor unlawful termination, the contract subsists,~~ the Plaintiff hereby accepts.

62. ~~49.~~ By reason of the Plaintiff's wrongful and unlawful dismissal by the Governor acting on behalf of the Government of the Cayman Islands ~~First Defendant~~, in breach of the Contract of Employment, he has suffered loss and damage:

- (a) Salary and benefits until the end of the term.
- (b) Repatriation expenses.

PARTICULARS

These are set out in a schedule. They are subject to revision once discovery has taken place.

63. ~~50~~ Further, the ~~First Defendant's~~ Governor's breaches of the Contract of Employment have caused the Plaintiff to suffer foreseeable damage to his professional and personal reputation, for which he is entitled to be compensated, ~~both by way of general damages, and~~ for future loss of earnings, as he will or may be unable to obtain a replacement position of similar professional standing as a result of the wrongful stigma attaching to him by reason of the ~~First Defendant's~~ Governor's conduct.

PARTICULARS

These are set out in a schedule. They are subject to revision once discovery has taken place.

64. ~~51~~ Further, the matters set out above amount to misfeasance in public office on the part of ~~First defendant either personally or for whom the 5th defendant as his successor is liable~~ and the First Defendant whereby the Plaintiff has suffered loss and damage as set out above.

PARTICULARS IN RESPECT OF THE FIRST DEFENDANT

- (a) Following the ruling of the Chief Justice dated 4 April 2008, there was no, or no reasonable basis upon which the First Defendant could have continued an investigation into the conduct of the Plaintiff. It was abundantly plain from the ruling that the Plaintiff could not be considered to have committed any criminal offence. The conduct of First Defendant in extending the investigation was either malicious in the sense that it was intended to injure the Plaintiff or was recklessly indifferent as to its legality and to the probability of injuring him.
- (b) Furthermore, as pleaded in Paragraph 53 above, there was not in fact any investigation or any reasonable and proper investigation being conducted by the First Defendant or his officers between about January 2008 and 25th November 2008. The reason for the First Defendant to advise the Governor that the Plaintiff should be removed from his office in March 2008 were therefore non-existent and the First Defendant's conduct in so advising was, at the very least, so knowingly and recklessly indifferent to the Plaintiff's position as to amount to bad faith.

~~52. Further, the matters set out above amount to defamation of character, both slanderous and, in relation to printed material, libellous, on the part of the First and Second Defendants, whereby the Plaintiff has suffered loss and damage as set out above.~~

~~52. The Third Defendant is vicariously liable for the Second Defendant.~~

65. ~~53.~~ Further the Plaintiff seeks and is entitled to interest pursuant to section 34(1) of the Judicature Law (2007 Revision) at such rate from such date and on such amount as the Court thinks fit.

AND THE PLAINTIFF CLAIMS:

- (1) A declaration that the Contract of Employment has been unlawfully terminated by the ~~First Defendant~~ **Government of the Cayman Islands**
- (2) Damages, including against the ~~First and~~ First Defendant, and/or those who are vicariously liable for them ~~him~~ aggravated and/or exemplary damages.
- (3) Interest pursuant to section 34(1) of the Judicature Law (2007 Revision) to be assessed.
- (4) Such further or other relief as this honourable Court thinks fit.
- (5) Costs.

Dated 25th May 2009

RE-DATED this ^{17th}.....day of June 2011

ANDREW HOGARTH QC

RICHARD DAVISON



CAMPBELLS, Attorneys at law

THIS AMENDED WRIT AND STATEMENT OF CLAIM is filed by Campbells Attorneys-at-Law for the Plaintiff whose address for service is 4th Floor Scotia Centre, PO Box 884, George Town, Grand Cayman, KY1-1103 (STM/gh/re/13318-15303)