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Privy Council Appeal No. 62 of 1996

(1) Detective Inspector Brian Gibbs
(2) The Commissioner of the Royal Cayman Islands Police Force and
(3) The Attorney General of the Cayman Islands *Appellants*

v.

John Mitchell Rea *Respondent*

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 29th January 1998

Present at the hearing:-

Lord Goff of Chieveley
Lord Steyn
Lord Hope of Craighead
Lord Hutton
Mr. Justice Gault

*[Majority Judgment Delivered by **Mr. Justice Gault**]*

From a complex set of facts there have emerged for determination in this appeal two issues. The first is whether there exists a tort of maliciously procuring the issue and execution of a search warrant. There was no dispute between the parties that there is such a tort though there is a lack of high authority on the point. The second issue, which is at the heart of the case, is whether there was sufficient evidence to support a finding that the elements of the tort were established. On this issue Harre C.J. in the Grand Court of the Cayman Islands considered there was not, whereas the Court of Appeal took the contrary view.

The respondent, Mr. Rea, was an experienced banker who in 1985 had been appointed as Managing Director of Pierson, Heldring & Pierson (Cayman) Limited, part of a banking

group with headquarters in Amsterdam. At the time, as required by his terms of employment, he disclosed a private business interest he had in the Cayman Islands and was informed there was no objection to it from his employers.

In September 1991 an internal bank audit disclosed that the business in which Mr. Rea had an interest had grown considerably and that the companies involved conducted transactions through the bank. An external audit was arranged of the financial statements of the companies concerned. The report of the external auditors, made on 24th October 1991, disclosed no irregularities.

On 28th October when in Amsterdam Mr. Rea resigned from the bank on the ground of "conflict of interest" in circumstances that are accepted amounted to constructive dismissal.

When he returned to the Cayman Islands Mr. Rea learned of the execution by the police of search warrants at his home, at the bank, at the offices of one of the companies in which he had an interest and upon two safety deposit boxes held by another bank. A comment made to him while he was in Amsterdam indicated to Mr. Rea that the bank knew of the proposed searches and the Chief Justice so held.

There was no evidence of anything incriminating being found in the course of the searches. On his return to the Cayman Islands Mr. Rea was not interviewed by the police nor arrested upon any charge and eventually the police agreed to return his personal documents.

With the assistance of his solicitors Mr. Rea ascertained that the first three warrants were applied for on 25th October by the first appellant Detective Inspector Gibbs, the officer in charge of the Drug Profit Confiscation Unit of the Royal Cayman Islands Police Force under section 16M of the Misuse of Drugs Law (Second Revision) inserted by section 6 of the Misuse of Drugs (Amendment) Law 1988. The fourth warrant (in respect of the safety deposit boxes) was applied for under the same law on 1st November.

In the case of each warrant the documents in evidence comprise an "Information in Support of Application for Search Warrant" and the form of warrant. These documents were produced by consent and constitute the whole of the

evidence given on behalf of the police. The informations commence:-

> "The information of Brian Gibbs Detective Inspector of the Drug Squad Royal Cayman Islands Police
>
> Who upon oath (affirmation) states:"

The informations then merely state affirmatively that each of the relevant conditions exists for the grant of a warrant without giving any factual basis.

Their Lordships were told that although the document is signed it is not formally sworn to and the practice is for the informant to be sworn before the Judge of the Grand Court and to support the application orally. This would seem to explain the discrepancies between what is stated in the informations and the scope of the warrants issued.

Each of the first three warrants, which are the material ones for present purposes, is expressed to be appropriately issued by reason of section 16M(2)(c). That section and the provisions to which it relates read:-

> "16M.(1) A constable may for the purpose of an investigation into drug trafficking, apply to the Grand Court for a warrant under this section in relation to specified premises.
>
> (2) On such application the court may issue a warrant authorising a constable to enter and search the premises if he is satisfied that -
> ...
>
> (c) the conditions in subsection (4) are fulfilled.
> ...
>
> (4) The conditions referred to in paragraph (c) of subsection (2) are that -
>
> (a) there are reasonable grounds for suspecting that a specific person has carried on or has benefited from drug trafficking;
>
> (b) there are reasonable grounds for suspecting that there is on the premises material relating to the specified person or to drug trafficking

> which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material cannot be at the time of the application ... particularised; and
>
> (c) (i) it is not practicable to communicate with any person entitled to grant entry to the premises;
>
> (ii) entry to the premises will not be granted unless a warrant is produced; or
>
> (iii) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable arriving at the premises could secure immediate entry to them."

In summary for present purposes the Grand Court may issue a warrant if satisfied that there are reasonable grounds for suspecting a specific person, in this case Mr. Rea, has carried on or has benefited from drug trafficking; that there are reasonable grounds for suspecting material of likely value will be found; and that the investigation might be prejudiced unless immediate entry can be secured.

Mr. Rea asked for the material which had been advanced to satisfy the Judge who issued the warrants that there were reasonable grounds for believing he had carried on or benefited from drug trafficking. His solicitors' letter went on to state:-

> "We would respectfully submit that it is normal procedure and appropriate for the subject of an ex parte Order to be given the material which grounded the ex parte application so as to allow him to be able to answer the allegations therein and to afford him the opportunity to present his side of the story."

The request was not complied with and in response it was stated by the Solicitor-General:-

> "If you require access to the material upon which the application was grounded you will be required to obtain it by application to the Court but you should be aware

> that any application, for information which is still regarded as sensitive and confidential to the investigation, will be opposed."

Mr. Rea did not then make application to set aside the warrants, even though executed, which course would have brought out for curial review any claim to withhold information on the ground of public interest immunity. Instead Mr. Rea chose to wait for the investigation to be concluded having been told this should occur "in a matter of weeks rather than months". In light of the Solicitor-General's response such a course was consistent with what was said by Lord Wilberforce in *Reg v. Inland Revenue Commissioners, Ex parte Rossminster Ltd* [1980] A.C. 952, 1000H-1001A as to the lapse of immunity.

The present proceeding was commenced on 29th April 1992 though the police still maintained that the investigation was not complete. That was said by the appellants through their counsel to be still the position at the time of the hearing before their Lordships. Detective Inspector Gibbs was named as first defendant, the Commissioner as second defendant and the Attorney-General as third defendant. The re-amended Statement of Claim alleged that the first defendant, acting as servant and agent of the second and third defendants and of the Government, "wrongfully, falsely and maliciously invoked the process of the Court and procured the grant" of the warrants. It was further alleged that the first defendant had no reasonable or probable cause for suspecting that the plaintiff had carried on or benefited from drug trafficking or that material of value would be found. Loss and damage were alleged by reason of embarrassment, anguish, loss of professional reputation and loss of income and benefits. It was also alleged that the warrants were wrongfully procured and were invalid so that the entry and search amounted to trespass.

The re-amended defence denied the allegations, relied on the warrants as authorising the searches and averred that the first defendant carried out certain investigations prior to and after 25th October 1991 concerning the plaintiff in the discharge of his duties as a police officer. An earlier pleading that the first defendant's belief was based on information from an authoritative and normally reliable source upon which he was entitled to rely was deleted.

There was then nothing in the pleadings on which the case went to trial indicating that the detective inspector's grounds for suspicion rested on information which needed to be maintained as confidential. Nor did discovery by the defendants and further discovery ordered by the Court disclose any documents in existence when the warrant was sought in respect of which privilege was claimed. Indeed it became apparent that there was no police file at all at that date. It was also established that the Grand Court had no note or other record of what took place before the Judge who issued the warrants. This was rightly the subject of critical comment by the Court of Appeal.

Certain interrogatories were administered and answered. These were directed to the issue of any causal link between the procurement of the warrants and Mr. Rea's dismissal from the bank. That they were not focused upon the grounds of the detective inspector's suspicions is understandable in view of the note in para 26/1/13 of The Supreme Court Practice(White Book) which reads:-

> "**Malicious prosecution** - Interrogatories to the defendant asking what grounds he had for prosecuting will, as a rule, be refused (*Maass v. Gas Light and Coke Co.* [1911] 2 K.B. 543, C.A.) ..."

The authority cited for this proposition may call for review in light of the modern approach to disclosure and developments in the law relating to public interest immunity but that is not necessary in this case.

At the trial Mr. Rea gave evidence. He told the Court of his personal circumstances, his background and experience in banking, the events leading up to his dismissal from the bank, the attempts to ascertain the basis for the applications for the warrants and his claimed losses. At the end of his evidence-in-chief the transcript records the following questions and answers:-

> "Q. Have you at any time in your life been concerned with the storing of any controlled drugs where the possession of such drug contravenes the Misuse of Drugs Law?
>
> A. No, I have not.
>
> Q. Have you, at any time of your life, been concerned with the importing or exporting of a controlled drug -

A. No, I have not.

Q. ... where that importation or exportation is prohibited by the provisions of the Misuse of Drugs Law?

A. Not at all.

Q. Can you say whether you have ever done anything which could have caused anyone to suspect you of either carrying on or benefiting from drug trafficking?

A. I can think of nothing whatsoever.

Q. Can you think of anything that you may have done, said or indicated that could cause anyone to suspect that there would either be in your home or at your office any material relating to drug trafficking by you or benefiting from drug trafficking by you?

A. I cannot conceive anything."

The only other witness was the Inspector of Financial Services for the Cayman Islands Government who gave brief evidence as to Mr. Rea's employment prospects in licensed banks in the Cayman Islands.

Apart from producing by consent the warrants and informations the defence called no evidence.

In his judgment delivered on 5th July 1994 the Chief Justice accepted that there is a tort of procuring the issue of a search warrant without reasonable cause and maliciously. He rightly referred to the burden of proof on the plaintiff to prove the negative assertion of absence of reasonable cause. He cited passages referring to a shifting of the burden of proof in the course of trial from *Arbrath v. North Eastern Railway Co.* (1886) 11 App. Cas. 247 and *Cotton v. James* (1830) 1 B. & Ad. 128. He stressed that where the condition for invoking the processes of the Court is mere suspicion much less than prima facie proof or even belief will suffice. He then referred to the formidable task facing the plaintiff of proving entirely by inference the negative allegation of absence of reasonable suspicion.

The Chief Justice relied heavily upon *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd* [1980] A.C. 952. In that case there was invoked what has been termed the presumption of regularity. In the absence of evidence to the contrary it was assumed that the judicial officer who issued the warrants conscientiously carried out his duty, and so it could be assumed he had before him sufficient information to establish the necessary grounds. This point was reiterated by the Privy Council in *Attorney-General of Jamaica v. Williams* [1997] 3 W.L.R. 389.

The judgment of the Chief Justice then contains the following passage:-

> "We are dealing with the inferences, if any which should be drawn from the reluctance of an officer who heads the Drug Profit Confiscation Unit of the Royal Cayman Islands Police to come to this Court to be asked about his work. The phrase 'War against Drugs' may have an element of rhetoric about it. But the enemy is rich, powerful and ruthless and I am reminded of a slogan from my childhood in the Second World War - 'Careless talk costs lives'. It may be that the justification for deep secrecy in relation to particular activities of drug enforcement officers will last for a very long time, not only for the reason which I have mentioned but because an operation may well continue over a long period of complex international investigation."

After reviewing the matters relied upon as casting the inference of lack of reasonable cause the Chief Justice quoted this passage from the speech of Lord Denning in *Glinski v. McIver* [1962] A.C. 726, 762 which he adapted to the case before him:-

> "'But these cases must be carefully watched so as to see that there really is some evidence from his conduct that he knew it was a groundless charge.'
>
> If 'suspicion' is substituted for 'charge' in that passage, we have the present case and, of course, a higher test."

The Chief Justice concluded:-

> "The plaintiff is in the position of having to say that because on his own account he is completely innocent and because no account of the suspicion on which the application under section 16M is based is forthcoming,

> he has sufficiently shown, to the point where an answer is called for, that Detective Inspector Gibbs told the judge a 'fairy tale' which had no basis in reality and which was told to deceive the judge, and that he acted maliciously, that is to say, from some motive other than an honest desire to investigate a person whom he suspected to have offended against the criminal law.
>
> Each case of this description depends on its own facts. The facts of this case do not lead me to that conclusion and the part of the plaintiff's claim which depends on that fails."

After a hearing occupying seven days the Court of Appeal (Zacca P., Kerr and Collett JJ.A.) in separate judgments delivered on 7th December 1995 unanimously allowed the appeal, finding that the tort does exist at law and that there was sufficient evidence from which to infer absence of reasonable cause and malice. The Court went on to deal with matters which it had been unnecessary for the Chief Justice to deal with on his conclusions. They found the wrongful conduct causative of Mr. Rea's dismissal and consequent losses which were quantified as CI$566,281 special damages and CI$50,000 general damages. Those matters were not the subject of argument before their Lordships' Board.

The material conclusion reached by each member of the Court of Appeal was that there was evidence both of absence of reasonable cause and malice sufficient to call on the defence to answer and the defence declined to answer. The reasoning is captured in the following passages from the judgment of Collett J.A.:-

> "At the trial the appellant gave evidence that during the whole of his life and career as a banker he had never indulged in or benefited from drug trafficking or done anything which he considered could give rise to a reasonable suspicion of such an indulgence or benefit. Although at the trial the learned Chief Justice dismissed that evidence as 'self-serving', it is difficult to see what more he could have said given the total absence of any indication from the respondents as to the basis of the suspicion they had entertained.
>
> ...

> We are invited by counsel for the appellant in this circumstance to infer upon a balance of probabilities that the true reason for the first respondent's silence is that he had no evidence which he could give at the trial of grounds which, on an objective test, could be perceived as reasonable, for applying to the Judge for issuance of these warrants. For my own part, I can see no possibility of reaching any other conclusion. This is not a case such as *Rhesa Shipping Co. S.A. v. Edmunds* [1985] 2 All E.R. 712, where the evidence was physically unavailable so that there was no basis upon which the court could say whether or not the burden of proof had been discharged. Here the evidence was available but it was withheld. That is a fact to which a court cannot simply shut its eyes and take refuge in the technicalities of pleading. It is something which goes to the root of the matter. In my judgment at the end of the day the absence of reasonable and probable cause was sufficiently made out and the learned Chief Justice should have so found.
>
> I turn now to the issue of malice. This again is a matter to be proved by the appellant but there is ample authority that in a proper case it may be inferred from want of reasonable and probable cause although the converse is not true: see *Brown v. Hawkes* [1891] 1 Q.B. 718. Malice in this connection does not necessarily connote spite or ill will. It is sufficient if a defendant is shown to have used the machinery of the courts for an improper purpose not in contemplation of the authorising statute, as for example to conduct a fishing expedition against a person against whom no reasonable ground of suspicion is entertained.
>
> ...
>
> My conclusion looking at all the available evidence in this case in its context must be that it is proper to infer malice here on the part of the first respondent in the sense in which that term is understood as an ingredient of the tort of abuse of process."

On the first issue their Lordships agree with the conclusions reached by the courts below and accepted by counsel. That it is an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice has long been recognised though seldom successfully

prosecuted: *Elsee v. Smith* (1822) 2 Chit. 304, *Hope v. Evered* (1886) 17 Q.B.D. 338, 340, *Everett v. Ribbands* [1952] 2 Q.B. 198, 205, *Reynolds v. Commissioner of Police of the Metropolis* [1985] Q.B. 881, 886. Generally any damage will arise from execution rather than issue of a warrant but there may be special circumstances in which it can be shown that the issue of the warrant will itself cause harm. It is the essential element of malice that distinguishes the cause of action from that of trespass where entry is made without authority or on the authority of a warrant invalid on its face. It is akin to malicious prosecution which is a well established tort and to the less common tort of maliciously procuring an arrest: *Roy v. Prior* [1971] A.C. 470. The true foundation of each is intentional abuse of the processes of the court. Malice in this context has the special meaning common to other torts and covers not only spite and ill-will but also improper motive. In the present context the requirement of improper motive would be satisfied by proof of intent to use the process of the court for granting a warrant for a purpose other than to search in the permitted circumstances.

There was little real difference between counsel as to the elements of the tort of maliciously procuring a search warrant though their respective formulations emphasised different aspects. In essence the plaintiff must show:-

1. That the defendant made or caused to be made a successful application for the search warrant.

2. That the defendant did not have "reasonable and probable cause" to make the application. What amounts to reasonable cause depends upon the statutory conditions for grant of the warrant. The statement of Hawkins J. in *Hicks v. Faulkner* (1878) 8 Q.B.D. 167, 171 approved in the House of Lords in *Herniman v. Smith* [1938] A.C. 305, 316 made with reference to malicious prosecution can be adapted for present purposes (although not necessarily for all purposes: *Glinski v. McIver* at page 758 per Lord Denning). It must be shown that the defendant lacked any bona fide belief that he or she was placing before the issuing Judge material sufficient to meet the conditions for issue of the warrant sought. In this case the relevant conditions are (*inter alia*) reasonable suspicion that the specified person has carried on or has benefited from drug trafficking and that material valuable to the investigation might be on the designated premises. That encompasses the subjective belief in good

faith that material grounds for suspicion exist and the objective requirement that the belief is reasonably held.

3. That the defendant acted with malice, and

4. That the damage resulted from the issue or execution of the warrant.

The second and third elements are those on which assessment of the evidence is required. Mr. Rea had the burden of proving not only that the detective inspector lacked an honest belief that he had material satisfying the conditions for issue of the warrants but also that he was actuated by malice. The first required proof of the negative absence of the necessary state of mind. The second required proof of more than absence of "reasonable cause" although that could be evidence of malice: *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. 674, 687, *Brown v. Hawkes* [1891] 2 Q.B. 718, 723, *Meering v. Grahame-White Aviation Co. Ltd* (1919) 122 L.T. 44, 49, *Glinski v. McIver* at 744.

Analysis of the evidence by their Lordships has led to preference for the view taken by the Court of Appeal rather than that of the Chief Justice. There are two respects in which the Chief Justice's approach was unduly favourable to the police. The weight he attached to the *Rossminster Ltd* decision was not warranted in the circumstances of this case. A presumption of regularity in the issuing Judge's consideration of the applications cannot extend to matters which preceded the applications. That the Judge is to be taken as having conscientiously discharged his duty in dealing with the applications means no more than that on the information presented to him he must be regarded as having been reasonably satisfied of the conditions for issue of the warrants. But that does not establish the accuracy of the matters presented to the Judge nor the state of mind of the police officer. While the stance adopted by the defendants initially was simply to rely on the validity of the warrants, Mr. Glasgow Q.C. acknowledged in the course of argument that the warrants by themselves could not provide a complete defence.

The Chief Justice was influenced also by his assumption that the detective inspector was pursuing the war on drug dealing but that was to beg the question and to speculate

when there was no evidence from the defence to that effect. Mr. Glasgow argued that the Chief Justice was entitled to consider any credible explanation for the Detective inspector's conduct. He relied upon *Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co.* [1991] 2 A.C. 283, 300. That was an entirely different case where there was in the evidence some foundation for an inference of confidentiality whereas there is nothing of that kind in the present case. There were neither pleadings nor evidence of any tip-off nor any evidence to support the allegation that investigations had been made prior to the warrant applications. To allow a defence to be maintained simply by unsupported speculation that there might have been good grounds cannot be justified and the authority cited is no support for it.

The other aspects on which some comment on the approach of the Chief Justice is appropriate is that of a shifting burden of proof. Their Lordships find such terminology unhelpful: *Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co.* [1989] S.T.C. 520, 532, *Tan v. Cameron* [1992] 2 A.C. 205, 225E. The preferable approach is to consider the matter in the round and determine whether the evidence as a whole satisfies the standard of proof.

It was of course open to the defendants to elect to give no evidence and simply contend that the case against them was not proved. But that course carried with it the risk that should it transpire there was some evidence tending to establish the plaintiff's case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof: *Cotton v. James* (1830) 1 B. & Ad. 128, 130, 135, *Taylor v. Willans* (1831) 2 B. & Ad. 845, *Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co.* 300F. In the second case just cited Lord Tenterden C.J. said at page 857:-

> "It has been carried further in the argument to-day, for it has been urged that the non-appearance of the prosecutor does not necessarily induce the conclusion of a consciousness at that time, that when the prosecution was originally instituted, he could have given no evidence to support it. That may be so. But the conduct of a party in a late period of a cause is a material circumstance, from which his motives at an earlier period may be inferred. Why might not the

> forbearance of Taylor to appear to give evidence at the trial, under the very peculiar circumstances of this case, raise an inference that his motive was a consciousness, that he had no probable cause for instituting the prosecution? The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is, in some degree, a negative, and the plaintiff can only be called upon to give some, as Mr. J. le Blanc, a most accurate Judge, says, slight evidence of such want. As then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact?"

The burden on Mr. Rea was to prove on the balance of probabilities that the detective inspector did not believe in good faith that there were grounds for suspicion that Mr. Rea had carried on or benefited from drug trafficking. The state of a person's mind can be proved by evidence of what he or she has said or done. It can be proved also by circumstantial evidence.

Mr. Glasgow's approach in argument was to take each matter said to support the inference Mr. Rea contended for and to submit that while it might be consistent with malicious procurement of the warrants it was also consistent with other credible explanations encompassing a belief in reasonable grounds for suspicion. But in the absence of any evidence supporting other explanations their Lordships see no reason to speculate for the benefit of the parties within whose knowledge the true state of affairs rests.

In agreement with the Court of Appeal their Lordships consider that the evidence as a whole takes the matter further than mere equilibrium. Mr. Rea gave evidence of his dismissal from the bank. He was closely cross-examined as to the circumstances leading up to that without there emerging anything that could give rise to suspicions of drug trafficking and none was suggested. He went on to give evidence in which he stated affirmatively that he could not think of anything whatsoever he had done which could have caused anyone to suspect him of either carrying on or benefiting from drug trafficking. He further stated that he could conceive of nothing he may have done, said or indicated that could cause anyone to suspect there would be either in his home or office any material relating to drug trafficking or any benefiting therefrom. He was available for cross-examination

on that evidence. It was left unchallenged. Plainly this was evidence as to the likelihood of there being any ground on which he might be reasonably suspected. By itself it does not prove that the detective inspector did not have reasonable grounds to suspect him. But there is to be taken with it the evidence that his lifestyle was not such as to suggest affluence out of proportion to his income; that nothing was found in the searches; that he was not even interviewed by the police with reference to possible offending; that at the time the warrants were applied for there was no police file whatever; that repeated efforts to identify relevant documentary material by discovery unearthed no documents; that enquiries revealed no note or minute in the records of the Grand Court, and that disclosure of all information has been resisted without explanation right up to the present time.

Their Lordships heard argument that a finding of malice was supported also by the fact that the detective inspector chose to seek search warrants rather than the less intrusive production orders which could have been the subject of applications to set aside before having to be complied with. However, production orders are designed to secure the production of documents which can be specified and would not be appropriate where warrants are sought with a view to searching for documents which cannot be specified. Their Lordships were not persuaded that this aspect of the case carried matters any further.

In the absence of any suggestion of possession by the police of information from any other source, the evidence of the absence of any grounds for suspicion having been provided by Mr. Rea himself must be accorded weight. When all of the factors mentioned are knitted together they form a circumstantial case of the absence of any grounds upon which a person could reasonably suspect him of trafficking in drugs or benefiting therefrom. Having regard to the consideration that when the plaintiff has to prove a negative in relation to matters which were within the knowledge of the defendant, slight evidence will suffice to require an answer from the defendant, Mr. Rea's case called for an answer. Moreover a person alleging invalidity, indeed malicious procuring, of a warrant should be entitled to expect to be informed of the grounds for its issue unless there are good reasons for withholding such information. That the defence did not offer any reason or take any step

to explain the grounds relied on to secure the warrants is the more surprising considering that, had there been concern that disclosure might prejudice drug investigations, the courts would have ensured all necessary protection by allowing public interest immunity. Any challenge to that could have been dealt with in such a way as to protect the information and its sources.

The silence of the defence was maintained when some answer was called for. The absence of any answer supports the inference that there was no satisfactory answer and the detective inspector had no sufficient grounds, even though all that were required were grounds reasonably raising suspicion.

If the detective inspector had no sufficient grounds for suspicion yet satisfied a Judge that he did, in light of his subsequent conduct, it can be inferred that he knew the true position at the time. To procure the warrants in that state of mind was to employ the court process for an improper purpose (such as simply a fishing expedition). The further inference of improper purpose similarly called for answer, yet none was given. The further finding of malice therefore also was open to the Court of Appeal.

As these conclusions are matters of inference from primary facts on which there was no dispute, their Lordships accept that they were no less open to the members of the Court of Appeal merely because, unlike the Chief Justice, they did not hear and see Mr. Rea give evidence.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs before their Lordships' Board.

Dissenting Judgment delivered by
Lord Goff of Chieveley and Lord Hope of Craighead

We regret that we are unable to concur in the majority judgment. We have no difficulty with regard to the first issue in the appeal, because we agree that the malicious procurement and execution of a search warrant is a tort which enables the injured party to recover damages. Our difficulty relates to the second issue, as to the conclusions

which can properly be drawn from the evidence. We also differ in our general approach to this case.

In our opinion the greatest care must always be taken to strike the right balance between the public interest in the investigation of crime and the rights of the individual who is seeking to pursue a private law remedy. On the one hand there are the evils of drug trafficking. The offences which lie within this field vary greatly in their character and gravity throughout the complex and clandestine network which links the consumer to the source of the supply. The gathering of evidence against those who are involved in it is often difficult, and it may also be dangerous both for the informant and for the investigator. The court has a responsibility to ensure that the rights of the individual are respected at all times, but it must be careful also not to hamper the police in their legitimate endeavours to seek out and to identify the criminal. The risk that if things go wrong the police will be exposed to a claim of damages for having acted maliciously is just one of the many hazards which they must face. But we should not like to see too easy a resort to this remedy.

As for the facts of this case, the evidence that the respondent's loss was caused by the obtaining and execution of the search warrants was not all one way. Their Lordships were informed by the appellants' counsel that, in view of the way the case had been argued in the Court of Appeal, no point was to be taken on their behalf before the Board on the questions of causation and damages. In the circumstances counsel was right to decide not to pursue these arguments. But we regret that the Chief Justice, who heard the respondent giving his evidence and said that in one important respect it was so surprising that he did not believe it, chose not to make any findings on these two questions. In the event they were the subject of decision only in the Court of Appeal, which also awarded aggravated damages.

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We confess to a feeling of unease that these matters were not more thoroughly tested in this case. But it is sufficient for us to say that, for the reasons which we shall explain, we consider that the respondent failed to discharge the onus which lay upon him to prove that the warrants were procured and executed maliciously. On the view which we take of the evidence, there was no basis for the inference

that the detective inspector lacked an honest belief that there were grounds for obtaining and executing the search warrants or that he acted maliciously when he took these steps under the procedure which was available to him under the statute.

As an introduction to our analysis of the evidence we should like first to say something about the tort and its ingredients. The action for malicious prosecution is the oldest and most fully developed of the actions for abuse of legal procedure. In *Glinski v. McIver* [1962] A.C. 726, 753 Lord Radcliffe said that it was a well trodden path. The other actions, among which are those for malicious arrest and malicious procurement of a search warrant, are far less common and from time to time doubts have been expressed about their extent and even their existence. We do not doubt their existence, but we think that further examination is needed of their ingredients. A prosecution on the one hand and a search of premises on the other are at opposite ends of the criminal procedure. The factors which may justify the responsible taking of these steps are not the same. The extent to which the existence of reasonable and probable cause may be brought under scrutiny without risk to legitimate police activity is also different. Particular care is required in the application to an action for the malicious procurement of a search warrant of propositions taken from the malicious prosecution cases, especially in regard to the drawing of inferences in the absence of any contrary evidence.

The only reported case of which we are aware in which there was a successful action for the malicious procurement of a search warrant is *Elsee v. Smith* (1822) 2 Chit. 304. The warrant which was issued in that case was not simply one for the search of premises, as it gave authority also for the plaintiff to be arrested and brought before the court. It was contended by the defendant that the action was misconceived as it should have been one for trespass, but that argument was rejected. Abbott C.J. said at page 103 that, as the allegation was that the defendant falsely and maliciously made a charge against the plaintiff and caused a warrant to be issued whereby he was apprehended and unjustly imprisoned, it seemed to him that the action was properly framed and that it ought not to be in trespass. Bayley J. said at page 103 that if a party falsely and maliciously and without any probable cause puts the law in motion, that is properly the subject of an action on the case. The statements of principle which were the basis of that decision can be applied without difficulty to the simple case of a warrant to search premises.

In *Hope v. Evered* (1886) 17 Q.B.D. 338 it was held that the decision of the magistrate that there is reasonable cause for suspicion is a protection to a person who bona fide applies for a search warrant. But Lord Coleridge C.J. said at page 340:-

> "I do not, however, suggest for an instant that this action would not lie against a person who, desiring to use the powers given by this Act for the purposes of oppression, and knowing that he had no reasonable cause for suspicion, in a false and fraudulent manner obtained the issue of a search warrant."

The existence of such a tort was also recognised in *Everett v. Ribbands* [1952] 2 Q.B. 198, 205 by Denning L.J. He said that, if a search warrant is obtained maliciously and without reasonable and probable cause, an action lies. In *Bayliss v. Hill* (unreported) 12th April 1984, Hirst J. said:-

> "Although there is a paucity of concrete cases on the topic, it is well established ... that if a person obtains a search warrant on information given by him maliciously and without reasonable and probable cause, the householder in respect of whose premises the warrant is obtained has a valid, although rarely used, cause of action akin to malicious prosecution."

In *Reynolds v. Commissioner of Police of the Metropolis* [1985] Q.B. 881, 886A Waller L.J. referred to Denning L.J.'s observation in *Everett v. Ribbands* and to *Clerk & Lindsell on Torts*, 15th ed. (1982), para. 18-08, and said that there was no dispute in that case that to procure the issue of a search warrant without reasonable or probable cause and maliciously was an actionable wrong. In *Roy v. Prior* [1971] A.C. 470, 478A Lord Morris of Borth-y-Gest referred to *Elsee v. Smith* as an example of actions brought in respect of abuse of process.

There is a sufficient basis in these authorities for the view that the family of torts in respect of malicious abuse of process includes the tort of maliciously procuring the issuing of a search warrant. It is nevertheless a remarkable fact that there are no reported examples of a successful action on this ground - leaving aside *Elsee v. Smith* where the warrant was also for the plaintiff's arrest. In *Reynolds* the action for the malicious procurement of the search warrant failed, and damages were awarded on the alternative ground of action

for trespass. But the fact that there are no such examples, while remarkable, is not surprising. The primary protection for a person's rights in regard to invasions of his property lies in the requirement that a search of premises needs a warrant from a judicial officer before it can be carried out lawfully. Evidence which has been obtained in an unlawful search is inadmissible, and it cannot be retained by the police. In most cases the warrant to search may be issued by a magistrate, who requires to be satisfied that the applicant has reasonable cause to suspect that incriminating material is within the premises. In the present case there was the additional protection that the application had to be made, in terms of section 16M of the Misuse of Drugs Law, to a judge of the Grand Court, who had himself to be satisfied as to the grounds for it.

We agree with Collett J.A.'s observation in the Court of Appeal that this action differs from the proceedings for judicial review which were brought in *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952 for an order to quash the search warrant. The point of attack here is not the decision of the judge to issue the warrant but the action of the detective inspector which preceded it. The allegation is that it was the detective inspector, not the judge of the Grand Court, who had no reasonable or probable cause and acted maliciously. So the fact that the judge was satisfied that there were reasonable grounds for suspecting does not answer the claim that the detective inspector acted maliciously and without reasonable and probable cause when he applied for the warrants and, having obtained them, executed them at the various premises.

But one should not overlook the importance of the judicial procedure, and of the remedies which are available in public law to ensure that it is carried out properly. If a person in respect of whose property a search warrant is granted believes that it was unjustified, his immediate and most obvious remedy is to seek a review of the decision to grant the search warrant. This may be done either by means of an application for judicial review in the case of a warrant issued by a magistrate or, in the case of a warrant issued by a judge of the Grand Court, by means of an inter partes application to the judge, from whose decision an appeal may then be taken to the Court of Appeal. This procedure was followed in *G. v. S.* [1992-93] C.I.L.R. 203 in order to set aside an order for production which had been made under section 16L of the

Misuse of Drugs Law. It is unlikely that there will be the opportunity for making such an application before a search warrant is executed. But a party who has an interest in having it set aside can come to the court after the event to seek that remedy and, if it is set aside, obtain the benefits of a decision that the application which was made for it ex parte was not justified.

The fact this judicial protection exists, reinforced as it is by the procedures which are available in public law, is important when one comes to consider the ingredients of the tort and the proper approach when analysing the evidence. It would be incorrect to see the tort as having any of the characteristics or functions of a public law remedy. The risk of damage as a result of the unjustified obtaining of a search warrant lies in the wrongful invasion and detention of a person's property, in the use against him in any subsequent criminal proceedings of information which has been obtained in the search and in any damage to his honour and reputation which may flow from it. A prompt application for review of the decision to grant the search warrant, if successful, will in almost every case eliminate these risks. The sole function of the tort is to enable the person to recover damages, and in regard to that private law remedy the guiding principle is that it is for the plaintiff to make out his case. It is for him to prove that the search warrant was obtained maliciously and that there was a want of reasonable and probable cause.

As for the ingredients of the tort, it is obvious and not disputed that the plaintiff must show that the defendant made or caused to be made the application for the search warrant, that he acted maliciously and that the damage of which the plaintiff complains resulted from the fact that the warrant was issued or was executed. These three requirements are self-explanatory, although it should be noted that malice in this context is not used in the narrow sense of an intention to injure but in the broader sense that the defendant was not acting in the discharge of his public duty but from an illegitimate or oblique motive. In *Glinski v. McIver* [1962] A.C. 726, 766 Lord Devlin said that it covered not only spite and ill-will but also any position other than a desire to bring the other party to justice. It is not necessary to prove malice by direct positive evidence. This may be done by reference to the general facts and circumstances of the case. But conjecture or suspicion will not be enough, as it is proof of malice which the law requires.

The fourth requirement is that the plaintiff must also prove that the obtaining and execution of the search warrant was without reasonable and probable cause. The significance of this requirement was described by Lord Eldon L.C. in the Scottish case of *Young v. Leven* (1822) 1 Sh. 179, 210:-

> "... if a man's malice is as foul and black as it can be represented, but yet if he has probable cause for the complaint, he cannot be liable to any action for a malicious prosecution; and, on the one hand, if it has been found that he has no probable cause of complaint, but if his mind is devoid of malice, neither can an action be maintained."

Proof that there was an absence of reasonable and probable cause involves proving a negative. So it is clear that slight evidence to show that there was no reasonable or probable cause will be enough to shift the burden of proving reasonable and probable cause onto the defendant. It is also well settled that proof of the absence of reasonable and probable cause may itself be evidence of malice.

It is necessary to examine these propositions with particular care in the context of an action which is directed against the obtaining and execution of a search warrant. The prerequisites for the obtaining of a search warrant, and the stage in the process of investigation at which such warrants are commonly sought, are different from those which apply when a prosecution is initiated. Where a search of premises has revealed nothing of any value to the investigation it may be easy to conclude, with the benefit of hindsight and in the absence of any contrary evidence, that there were after all no reasonable grounds for suspecting that incriminating material was on the premises. That however is not the same thing as proof of the absence of reasonable and probable cause at the time when the police officer applied for the search warrant. In itself it takes the plaintiff nowhere so far as proof of malice is concerned.

The authorities show that in this context the phrase "reasonable and probable cause" means an honest belief in the grounds for the application in the mind of the police officer at the time when he applied for the search warrant. In *Hicks v. Faulkner* (1878) 8 Q.B.D. 167, 171 Hawkins J. said, in the context of a malicious prosecution case, that he would define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded

upon reasonable grounds which would lead any ordinary prudent and cautious man to the conclusion that the defendant was guilty of the crime charged. This description, which contains within it both objective and subjective elements, was approved by Lord Atkin in *Herniman v. Smith* [1938] A.C. 305, 316.

In our opinion proof of the subjective element, which relates to the state of mind of the prosecutor, is crucial to the proposition that the absence of reasonable and probable cause can itself be evidence of malice. Malice is the word which is used to describe the absence of a proper motive in the mind of the person against whom the claim is brought. In order to justify the drawing of the inference as to the state of the man's mind like must surely be compared with like. In *Brown v. Hawkes* [1891] 2 Q.B. 718, 723 Cave J. said:-

> "Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and *in that case* [emphasis added] want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the circumstances may be."

In the same case A.L. Smith J. at pages 724-725 was of the view that the jury were entitled to find evidence of malice in the light of evidence of want of reasonable and probable cause which showed that the defendant had acted in haste, not caring whether he was right or wrong. Similar observations are to be found in *Meering v. Grahame-White Aviation Co. Ltd.* (1919) 122 L.T. 44, 49 where Warrington L.J. said:-

> "If on those facts the jury came to the conclusion that the prosecutors did not honestly believe in the charge they might further find that the prosecutors were actuated by some indirect motive in pressing the prosecution, and were therefore actuated by malice. That seems to me is exactly what the jury have done in the present case."

In each of these cases the evidence of the want of reasonable and probable cause was a state of facts sufficient to indicate either the absence of an honest belief in the mind of the defendant in the case which he had decided to prosecute or at least a reckless indifference as to whether or not the prosecution was justified. In *Glinski v. McIver* [1962] A.C. 726, 760 Lord Denning said of the want of reasonable and probable cause that it depended on the state of mind of the prosecutor. At pages 761-762 he said of the cases where the inference may be drawn from the conduct of the prosecutor that the question is whether it may reasonably be inferred that he was conscious that he had no reasonable or probable cause for the prosecution. At page 768 Lord Devlin said that the question is a double one: did the prosecutor believe and did he reasonably believe that he had a cause for prosecution.

We would apply the same reasoning to the present case. Where, as here, the plaintiff's case is that malice can be established by inference from the lack of reasonable and probable cause for procuring the search warrant, he must put forward some evidence to show either that the defendant did not honestly believe at the time that he had good grounds for obtaining it, or that his state of mind at the time was such as to amount to a reckless indifference as to whether or not that was so.

It should be remembered that in order to have a reasonable suspicion the police officer need not have evidence amounting to a prima facie case. Information from an informer or a tip-off from a member of the public may be enough to satisfy him that he would be justified in applying for a warrant to search premises. The possibility that such information may have been given to him maliciously cannot be left out of account either by the police officer or by the judge or magistrate whose responsibility it is to decide whether or not he should issue it. But criminal investigations would be seriously hampered if it were to be illegitimate to rely on information of that kind. Time may be short, and further inquiries may alert the suspect to the fact that the premises are to be searched. It is in the nature of such information that it may, on further inquiry when the warrant has been executed, turn out to have been mistaken or inaccurate. Yet it cannot be said that a police officer who obtains a search warrant on the basis of information which has been provided to him in the form of a tip-off was acting maliciously simply because in the event it yields no result. The position is

entirely different at the prosecution stage, when the prosecutor can be expected to have gathered in all the evidence and applied his mind, with the benefit of such legal advice as may be appropriate, to the question whether the prosecution can be justified.

As Lord Devlin explained in *Hussien v. Chong Fook Kam* [1970] A.C. 942, 948B, suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. Suspicion, unlike prima facie proof which consists of admissible evidence, can take into account matters that could not be put in evidence at all and matters which, although admissible, could not form part of a prima facie case. It is also inherent in any process of investigation that circumstances may change as it proceeds. Some avenues of inquiry may prove to be fruitless while others which were previously unobserved may produce results which had not been anticipated. So the question whether there was an absence of reasonable and probable cause for the obtaining of a search warrant must be answered, not with the benefit of hindsight, but with regard only to what was in the mind of the defendant when he applied for it. It will be difficult to identify what was in his mind at the time, unless there are other relevant surrounding circumstances, if there is no record of what he said to the judicial officer and he declines to give evidence. But this difficulty does not relieve the plaintiff who wishes to pursue an action on the ground that the warrant was procured maliciously of the onus of proving that, at the time when he procured it, the defendant did not have an honest belief that there were reasonable grounds for taking this step.

We can now turn to the facts of this case.

The first three warrants were issued on 25th October 1991. This was four days after the respondent had left the Cayman Islands en route for Amsterdam. They were executed three days later at or about the time of his meeting there with his superiors at the Bank. In the answers which he gave when he was examined on interrogatories the detective inspector said that the other appellants had had no conversation with the respondent's superiors at the Bank prior to 28th October 1991 when the first three warrants were executed. He said that he himself had had a telephone conversation on 27th October 1991 with the Bank's general counsel, but that this was strictly for the purpose of

arranging an orderly obedience to the search warrant at the Bank's premises. He then described the steps which he took in the company of officials of the Bank on the morning of 28th October 1991 to enforce the search warrant there. Three days later on 1st November 1991 he applied to the judge for a further search warrant in respect of two safety deposit boxes held by another bank.

The Chief Justice said that he would have found it inconceivable that the respondent's superiors at the Bank were not being kept fully informed about what was going on in the Cayman Islands. A comment indicating that they were aware of these developments was made to the respondent at the meeting with his superiors. But there is no evidence whatever to suggest that the detective inspector or either of the other two appellants were in collusion with the Bank to bring about the respondent's downfall. On the contrary the only direct evidence of contact between the detective inspector and the officials at the Bank suggests that in his dealings with them he was acting throughout strictly in accordance with his duties as a police officer. This is important circumstantial evidence, because if the detective inspector was acting maliciously one would have expected some indication of this in his dealings with the Bank, in view of the effect upon its activities of the carrying out of a search on their premises. Yet there has been no suggestion that the Bank had any cause for complaint about the way in which the matter was handled by the police.

In the appellants' amended defence to the statement of claim it was stated that the detective inspector's belief was based on information from an authoritative and normally reliable source upon which he was entitled to rely. That averment was deleted before trial prior to the date when the detective inspector was examined on interrogatories but after an order for discovery by the appellants had been made. No explanation was given either before or at the trial for the deletion of this averment. There was no evidence at all either in the form of a written note by the judge who issued the warrants or other documentary evidence or of testimony by the detective inspector or anyone else at the trial as to what transpired between him and the judge on 25th October and 1st November 1991. Nevertheless statements in the pleadings and deletions from the pleadings are not evidence. No inference one way or the other can be drawn from them as to the state of mind of the detective inspector when he procured and executed the search warrants.

It was suggested that the appellants' decision not to lead any such evidence was open to criticism because all the detective inspector needed to do in order to protect his sources was to claim public interest immunity when he was in the witness box. The assumption seemed to be that he had only to claim it for the protection to be extended to him, and that this course would be without risk to his inquiries and to those whom he might need to protect. It would not be right to speculate as to the reason why it was decided to conduct the defence in this way. But we would not have found it in the least surprising if the view had been taken that the safer course in the interests of all concerned was to delete the averment and to lead no evidence. It is by no means certain that the protection of public interest immunity would have been made available at the trial. The application for it would have had to have been justified. An explanation would have had to have been given as to why this protection was still necessary so long after the warrants were issued and executed. The respondent would have opposed the application, and the view might well have been taken that in order to meet that opposition effectively things might have to be said which would prejudice the work of the police. The fact that actions of this kind are so rare creates its own difficulty. There is no guidance either in practice or in the authorities as to how the court should handle such an application at the trial. The appellants and their advisers could not, we think, reasonably be criticised if their preference was to remain silent in the light of such uncertainty.

In the Court of Appeal importance was attached to the fact that the discovery by the appellants disclosed no traces of a police file prior to the applications to the Grand Court or of statements from alleged witnesses as to any activity on the respondent's part which might indicate involvement in drug trafficking. Nor was there any indication that the detective inspector sought legal advice from the Attorney-General's office or elsewhere before making the applications. These arguments were renewed before the Board, but we do not think that these features of the case provide any basis for inferring that the detective inspector did not have an honest belief that his applications under section 16M were justified.

As for the absence of a police file, it is necessary to examine precisely the point which was being made. In a

letter before the trial setting out the particulars which were to be relied upon in the light of what had been provided at discovery, it was stated by the respondent's solicitors that their point was that there had not been disclosed to them the existence at the time of the applications to the Grand Court of a signed statement from any person who had made allegations that the respondent was involved in drug trafficking. Of course, if such a statement had been available it would have been important evidence pointing to the existence of reasonable and probable cause. But the absence of such a signed statement, which is the essence of the point about the police file, is as consistent with information having been provided to the police in the form of a tip-off by someone who did not want to put on record his identity as it is with the police having no relevant information at all to suggest that the respondent was involved in drug trafficking. Inquiries by the police into criminal activity of this kind would be seriously hampered if it were to be suggested that a signed statement was a necessary preliminary to the obtaining of a search warrant. We know of no authority which would support such a suggestion.

In *Reynolds v. Commissioner of Police of the Metropolis* [1985] Q.B. 881, 892D-F Slade L.J. said that the fact that the police had obtained advice from the Director of Public Prosecution's office before applying for the search warrant was a relevant factor which tended to negative malice on their part. In the same passage he said, with reference to Upjohn L.J.'s comments in *Abbott v. Refuge Assurance Co. Ltd* [1962] 1 Q.B. 432, 454-455, that the failure to take such advice might have provided some evidence from which the absence of reasonable and probable cause could be inferred. But the action in *Abbott's* case was one for malicious prosecution, the plaintiff and his secretary having been indicted for forgery. Upjohn L.J. was describing the steps which the reasonable man would take before bringing proceedings of that kind. The situation in that case was far removed from that where a police officer is contemplating making an application for a search warrant. Moreover in the present case the detective inspector was the officer in charge of the Drug Profit Confiscation Unit of the Royal Cayman Islands Police Force. There was no evidence to suggest that a man in his position was in need of any legal advice before he applied for a search warrant under section 16M of the Misuse of Drugs Law. The only point on which it was suggested to us that he should have taken advice was as to whether he should have applied

instead for a production order under section 16L. That would have been a less intrusive procedure, but it is a prerequisite for such an order that the particular material or material of a particular description can be identified. There is no basis for saying that the detective inspector was in a position to satisfy that requirement.

The respondent gave evidence that he was a man of good repute. There was no challenge to his testimony that he was completely innocent of any involvement in or with drug trafficking. It is common ground that nothing was found in the course of the searches to indicate otherwise, and that no steps of any kind were taken against him subsequently on the ground that he was being accused of having carried on or benefited from this activity. But we are unable to find in this evidence anything to suggest that the detective inspector acted without an honest belief and maliciously when he applied for the search warrants. The trial judge was right to be careful to exclude from his consideration of this issue conduct after the event which could not be related back to the time when the warrants were applied for. Furthermore there was no evidence that the detective inspector had met or had had any other prior contact with the respondent, or that he was in possession of any other information which would have made a reasonable man in his position hesitate before he made the applications to the Grand Court.

The case might have taken on a quite different aspect if there had been evidence of that kind. There would then have been a background of circumstances which might have provided the basis for the drawing of the necessary inferences. As it is, all we know about the detective inspector's actions is that he made the applications in his capacity as the police officer in charge of the Drug Profit Confiscation Unit and that he had already satisfied the Grand Court that there were grounds for issuing the first three search warrants before he made his first contact with the Bank. In these circumstances we think that the evidence which was given at the trial about the respondent's good character is incapable of supporting the inference that the detective inspector had no reasonable and probable cause for his actions when he applied for the search warrants. It is a factor which points neither one way or the other, in the absence of other surrounding circumstances, as to the state of mind of the detective inspector at the critical time.

The respondent's last argument is that the basis for the drawing of the necessary inferences lies in a combination of the various circumstances. But a circumstantial case can only be built up by the use of relevant evidence. An inference may then be drawn from various circumstances which, when taken individually, are of little significance. But if the circumstances are of no value whatever, no combination of them can give them any greater weight when they are examined collectively. That is the position in which we find ourselves after examining all the evidence. We think that the Court of Appeal were wrong to hold that a lack of reasonable and probable cause was made out by the respondent's evidence and then to draw the further inference that the detective inspector acted maliciously. In our opinion the initial onus on the respondent was not discharged as the evidence on which he relied was not capable of supporting the necessary inferences.

For these reasons we would have humbly advised Her Majesty that this appeal should be allowed and the judgment of the Court of Appeal should be set aside.